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FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. OP–1589]

Federal Reserve Policy on Payment System Risk; U.S. Branches and Agencies of Foreign Banking Organizations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notification of delay.

SUMMARY: The Board of Governors of the Federal Reserve System (''Board'') is delaying the implementation date of changes to part II of the Federal Reserve Policy on Payment System Risk (''PSR policy'') related to procedures for determining the net debit cap and maximum daylight overdraft capacity of a U.S. branch or agency of a foreign banking organization (''FBO'').

DATES: The implementation date of the amendments to the PSR policy published on April 1, 2019 (84 FR 12049), has been delayed from April 1, 2020 to October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Jeffrey Walker, Deputy Associate Director (202–721–4559), Jason Hinkle, Assistant Director (202–912–7805); or Brajan Kola, Senior Financial Institution and Policy Analyst (202–736–5683), Division of Reserve Bank Operations and Payment Systems; or Evan Winerman, Senior Counsel (202–872–7578), Legal Division, Board of Governors of the Federal Reserve System. For users of Telecommunications Device for the Deaf (TDD) only, please call 202–263–4869.

SUPPLEMENTARY INFORMATION: On April 1, 2019, the Board approved amendments to part II of the PSR policy, which establishes the maximum levels of daylight overdrafts that depository institutions may incur in their Federal Reserve accounts.[10] These amendments will remove references to the Strength of Support Assessment (''SOSA'') ranking; remove references to FBOs' financial holding company (''FHC'') status; and adopt alternative methods for determining an FBO's eligibility for a positive net debit cap, the size of its net debit cap, and its eligibility to request a streamlined procedure to obtain maximum daylight overdraft capacity. The Board selected April 1, 2020, as the implementation date for these amendments in response to a comment requesting that the Board delay implementation for at least 12 months. The Board stated ''that a transition period would help FBOs adjust to these changes.'' [11]

The availability of intraday credit from the Federal Reserve Banks supports the smooth functioning of payment systems and the settlement and clearing of transactions across a range of credit markets. The coronavirus outbreak has disrupted economic activity and financial markets in the United States. In light of these ongoing disruptions, the Board believes that, out of an abundance of caution, it should extend the transition period to October 1, 2020. This additional time will allow FBOs and the Reserve Banks to focus on other heightened priorities rather than establishing new arrangements for accessing intraday credit.

Accordingly, the Board is delaying the implementation date of the amendments to the PSR policy from April 1, 2020, to October 1, 2020.

By order of the Board of Governors of the Federal Reserve System, March 24, 2020.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2020–06482 Filed 4–3–20; 8:45 am]

BILLING CODE 6210–01–P

[10] 84 FR 12049 (April 1, 2019).

[11] *Id.* at 12056.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0019; Product Identifier 2017–SW–074–AD; Amendment 39–19881; AD 2020–06–12]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Airbus Helicopters Model AS332L2 and EC225LP helicopters. This AD requires determining the accumulated hours time-in-service (TIS) of certain part-numbered main gearbox (MGB) suspension bar attachment bolts and fittings, applying a life limit add-on factor, and inspecting the torque of certain MGB suspension bar attachment nuts. This AD was prompted by a report of torque loss on an MGB suspension bar bolt. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective May 11, 2020.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of May 11, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view this referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0019.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* in Docket No. FAA–2018–0019; or in person at Docket Operations between 9 a.m. and 5 p.m.,

Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (previously European Aviation Safety Agency) (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street 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: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On December 9, 2019, at 84 FR 67248, the **Federal Register** published the FAA's notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to Airbus Helicopters Model AS332L2 and EC225LP helicopters, with an MGB suspension bar front attachment bolt (bolt) part number (P/N) 332A22–1613–21 or 332A22–1613–20, MGB suspension bar rear bolt P/N 332A22–1614–20, MGB suspension bar front attachment fitting (fitting) P/N 332A22–1623–01, MGB suspension bar rear left hand fitting P/N 332A22–1624–02 or 332A22–1624–04, or MGB suspension bar rear right hand fitting P/N 332A22–1624–03 or 332A22–1624–05 installed.

For Airbus Helicopters Model AS332L2 and EC225LP helicopters, the NPRM proposed to require, within 30 hours time-in-service (TIS), re-calculating the life limit accumulated by each front and rear bolt by applying an add-on factor listed in the applicable service information. For each bolt that meets or exceeds its life limit, also known as service life limit (SLL), the NPRM proposed to require removing each bolt from service before further flight. For each bolt that has not exceeded its life limit, the NPRM proposed to require continuing to calculate and record the life limit of each bolt on its component history card or equivalent record and removing the bolt from service before reaching its life limit.

For Model AS332L2 helicopters, the NPRM proposed to require, within 30 hours TIS, re-calculating the life limit accumulated by the front, rear left hand, and rear right hand fittings by applying an add-on factor listed in the applicable service information. For each fitting that meets or exceeds its life limit, the NPRM proposed to require removing the fitting from service before further flight. For each fitting that has not exceeded its life limit, the NPRM proposed to require continuing to calculate and record the life limit of each fitting on its component history card or equivalent record and removing the fitting from service before reaching its life limit.

For Model AS332L2 helicopters, the NPRM proposed to require, within 150 hours TIS (without applying an add on-factor), inspecting the torque of each MGB suspension bar fitting front and rear nut. If the torque on any nut is higher than the maximum allowable limit, the NPRM proposed to require removing the nut and its bolt from service before further flight. If the torque on any nut is lower than the minimum allowable limit, the NPRM proposed to require tightening the nut before further flight and removing the nut and its bolt from service within 150 hours TIS.

The proposed requirements were intended prevent the MGB suspension bar bolts and fittings remaining in service beyond their fatigue life, which could result in structural failure of the MGB suspension bar and loss of helicopter control.

The NPRM was prompted by EASA AD No. 2017–0189, dated September 22, 2017, issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters (formerly Eurocopter, Eurocopter France, Aerospatiale) Model AS 332 L2 and EC 225 LP helicopters. EASA advises that the installation of the MGB upper deck fittings of the three MGB suspension bars could lead to tightening torque loss on the fittings' attachment pins (bolts). Due to design similarities, Model AS 332 L2 helicopters could also be affected by the same installation condition. An investigation determined that the life limits in the Airworthiness Limitations Sections for the pins and fittings are valid if an ''add-on penalty factor'' is applied.

EASA states that this condition, if not corrected, could lead to structural failure of the MGB suspension bar attachment pins or fittings. Accordingly, the EASA AD requires applying the add-on penalty factor to the flight hours to re-calculate the life limits and replacing an affected part before exceeding its life limit. EASA further advises that Airbus Helicopters' initial service information contained an error that may have resulted in the installation of pins or fittings using an incorrect torque value. As a result, the EASA AD also requires replacing pins if an incorrect torque value was applied and reporting the information to Airbus Helicopters.

Comments

The FAA gave the public the opportunity to participate in developing this AD, but the FAA did not receive any comments on the NPRM.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the EASA AD

The EASA AD allows an optional 150 hours TIS extension to the life limit of an affected fitting for Model AS 332 L2 helicopters by performing dye-penetrant inspections. This AD does not allow this option. For Model AS 332 L2 helicopters, the EASA AD requires replacing pins (bolts) that are replacement pins installed before the AD's effective date with an incorrect torque value applied. This AD requires inspecting the torque for each nut for Model AS 332 L2 helicopters instead and depending on the outcome, removing the nut and its bolt from service. The EASA AD requires reporting certain information to Airbus Helicopters, while this AD does not.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 01.00.86 for Model AS332 helicopters and Airbus Helicopters EASB No. 04A013 for Model EC225LP helicopters, both Revision 1 and dated August 25, 2017. This service information specifies applying an add-on factor to the flying hours logged by the pins and fittings and replacing them if the SLL is exceeded. If an incorrect tightening torque value was applied to the pins, the service information specifies replacing the pins and contacting Airbus Helicopters.

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

Determining the adjusted life limit for the bolts and fittings takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $989 for the U.S. fleet.

Replacing a bolt takes about 4 work-hours and parts cost about $89 for an estimated cost of $429 per bolt.

There are no costs of compliance for replacing a fitting and inspecting, and if necessary tightening, the torque for Model AS332L2 helicopters by this AD because there are no Model AS332L2 helicopters on the U.S. Registry.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

2. Will not affect intrastate aviation in Alaska, and

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

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):

2020–06–12 Airbus Helicopters: Amendment 39–19881; Docket No. FAA–2018–0019; Product Identifier 2017–SW–074–AD.

(a) Applicability

This AD applies to Airbus Helicopters Model AS332L2 and EC225LP helicopters, certificated in any category, with a main gearbox (MGB) suspension bar front attachment bolt (bolt) part number (P/N) 332A22–1613–21 or 332A22–1613–20, MGB suspension bar rear bolt P/N 332A22–1614–20, MGB suspension bar front attachment fitting (fitting) P/N 332A22–1623–01, MGB suspension bar rear left hand fitting P/N 332A22–1624–02 or 332A22–1624–04, or MGB suspension bar rear right hand fitting P/N 332A22–1624–03 or 332A22–1624–05 installed.

(b) Unsafe Condition

This AD defines the unsafe condition as MGB suspension bar bolts and fittings remaining in service beyond their fatigue life and loose MGB suspension bar bolts or fittings, which could result in structural failure of the MGB suspension bar and loss of helicopter control.

(c) Effective Date

This AD becomes effective May 11, 2020.

(d) Compliance

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

(e) Required Actions

(1) Within 30 hours time-in-service (TIS), review records to determine the total hours TIS of each MGB suspension bar bolt.

(i) Determine the life limit of each bolt by applying the hours TIS by the add-on factor listed in Table No. 1 of Airbus Helicopters Emergency Alert Service Bulletin No. 01.00.86, Revision 1, dated August 25, 2017 (EASB 01.00.86), or Airbus Helicopters Emergency Alert Service Bulletin No. 04A013, Revision 1, dated August 25, 2017, as applicable to your model helicopter.

Note 1 to paragraph (e)(1)(i) of this AD: Airbus Helicopters refers to bolts as ''pins.''

(A) Before further flight, remove from service any bolt that has reached or exceeded its life limit.

(B) For each bolt that has not exceeded its life limit, continue to calculate and record the life limit on its component history card or equivalent record by applying the add-on factor each time the helicopter accumulates hours TIS, and remove from service any bolt before reaching its life limit.

(ii) Thereafter following paragraph (e)(1)(i) of this AD, continue to calculate and record the life limit of each bolt on its component history card or equivalent record by applying the add-on factor each time the helicopter accumulates hours TIS and remove from service any bolt before reaching its life limit.

(2) For Model AS332L2 helicopters, within 30 hours TIS, review records to determine the total hours TIS of each MGB suspension bar fitting.

(i) Determine the life limit of each fitting by applying the hours TIS by the add-on factor listed in Table No. 1 of EASB 01.00.86.

(A) Before further flight, remove from service any fitting that has reached or exceeded its life limit.

(B) For each fitting that has not exceeded its life limit, continue to calculate and record the life limit on its component history card or equivalent record by applying the add-on factor each time the helicopter accumulates hours TIS, and remove from service any fitting before reaching its life limit.

(ii) Thereafter following paragraph (e)(2)(i) of this AD, continue to calculate and record the life limit of each fitting on its component history card or equivalent record by applying the add-on factor each time the helicopter accumulates hours TIS and remove from service any fitting before reaching its life limit.

(3) For Model AS332L2 helicopters, within 150 hours TIS (without the add-on factor), inspect the torque of each MGB suspension bar attachment front and rear nut. The allowable torque for each front nut is 602–663 lbf. in (6.8–7.5 daN.m) and the allowable torque for each rear nut is 337–398 lbf. in (3.8–4.5 daN.m).

(i) If the torque on any nut is higher than the maximum allowable torque stated in paragraph (e)(3) of this AD, before further flight, remove from service the bolt and nut.

(ii) If the torque on any nut is lower than the minimum allowable torque value stated in paragraph (e)(3) of this AD, before further flight, tighten the nut to the allowable torque stated in paragraph (e)(3) of this AD. Within 150 hours TIS (without the add-on factor), remove from service any bolt and nut that were tightened as required by this paragraph.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Section, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101

Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

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

(g) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (previously European Aviation Safety Agency) (EASA) AD No. 2017–0189, dated September 22, 2017. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2018–0019.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6320, Main Rotor Gearbox.

(i) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 01.00.86, Revision 1, dated August 25, 2017.

(ii) Airbus Helicopters EASB No. 04A013, Revision 1, dated August 25, 2017.

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.*

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

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

Issued on March 25, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–07140 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–1015; Product Identifier 2018–SW–104–AD; Amendment 39–19882; AD 2020–06–13]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters. This AD requires determining the accumulated hours time-in-service (TIS) of certain part-numbered main gearbox (MGB) suspension bar attachment fittings (fittings) and bolts, and establishes new life limits. This AD was prompted by the outcome of tests and analyses performed by Airbus Helicopters. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective May 11, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* in Docket No. FAA–2019–1015; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (previously European Aviation Safety Agency) (EASA) AD, any comments received, and other information. The street 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: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On December 9, 2019, at 84 FR 67246, the **Federal Register** published the FAA's notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters, with an MGB suspension bar right-hand side (RH) rear fitting part number (P/N) 330A22–2702–07 and bolt P/N 330A22–0135–20, MGB suspension bar left-hand side (LH) rear fitting P/N 330A22–2702–06 and bolt P/N 330A22–0135–20, or MGB suspension bar front bolt P/N 330A22–0134–20 installed. The NPRM proposed to require within 50 hours TIS, reviewing the helicopter records to determine the total hours TIS of the MGB suspension bar RH and LH rear fittings. The NPRM also proposed to require removing from service the RH rear fitting and its bolts and the LH rear fitting and its bolts based on the accumulated total hours TIS of the fittings and other conditions. Thereafter, the NPRM proposed to require removing from service the RH rear fitting and its bolts at intervals not to exceed 1,470 hours TIS, removing from service the LH rear fitting at intervals not to exceed 13,600 hours TIS, and removing from service the LH rear bolts during each Major Inspection ''G.'' Finally, the NPRM proposed to require removing from service the front bolts during each Major Inspection ''G.''

The proposed requirements were intended to prevent structural failure of the MGB suspension bar fittings and bolts, possibly resulting in detachment of the MGB suspension bars.

The NPRM was prompted by EASA AD No. 2018–0260, dated December 3, 2018, issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters (formerly Eurocopter, Eurocopter France, Aerospatiale) Model AS 332 C, AS 332 C1, AS 332 L, and AS 332 L1 helicopters. From review of reported Model EC 225 LP data, EASA advises that the installation of the MGB upper deck fittings of the three MGB suspension bars could lead to tightening torque loss on the fittings' attachment screws (bolts). Due to design similarities, Model AS 332 C, AS 332 C1, AS 332 L, and AS 332 L1 helicopters could also be affected by the same installation condition.

Investigations determined that a life limit reduction of the MGB suspension bar fittings and screws was necessary for these model helicopters.

EASA states that this condition, if not corrected, could lead to structural failure of the MGB suspension bar fittings and screws, possibly resulting in detachment of the MGB suspension bars. Accordingly, the EASA AD requires determining the accumulated service life of the affected parts and introduced new life limits.

Comments

The FAA gave the public the opportunity to participate in developing this AD, but the FAA did not receive any comments on the NPRM.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Interim Action

The FAA considers this AD to be an interim action. The design approval holder is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, the FAA might consider additional rulemaking.

Differences Between This AD and the EASA AD

The EASA AD allows an option for the first MGB RH rear fitting replacement to inspect torque and specifies different replacement compliance times based on the torque inspection results, whereas this AD does not.

Related Service Information

The FAA reviewed Airbus Helicopters Alert Service Bulletin No. AS332–01.00.90, Revision 0, dated November 21, 2018. This service information specifies determining the accumulated hours TIS of certain part-numbered rear MGB suspension bar fittings and screws. This service information further specifies criteria to determine the initial replacement compliance time of those parts and a new life limit for those parts thereafter. This service information also establishes a life limit for the front MGB attachment screws.

Costs of Compliance

The FAA estimates that this AD affects 14 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor costs are estimated at $85 per work-hour.

Determining the total hours TIS of the rear MGB fittings takes about 0.5 work-hour for an estimated cost of $43 per helicopter and $602 for the U.S. fleet.

Replacing a rear MGB fitting and its set of four bolts takes about 8 work-hours and parts cost about $12,937, for an estimated cost of $13,617 per replacement cycle.

Replacing a set of four MGB attachment bolts takes about 4 work-hours and parts cost about $224, for an estimated cost of $564 per replacement cycle.

Replacing a LH rear MGB fitting takes about 8 work-hours and parts cost about $12,713, for an estimated cost of $13,393 per replacement cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

2. Will not affect intrastate aviation in Alaska, and

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

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):

2020–06–13 Airbus Helicopters: Amendment 39–19882; Docket No. FAA–2019–1015; Product Identifier 2018–SW–104–AD.

(a) Applicability

This AD applies to Airbus Helicopters Model AS332C, AS332C1, AS332L, and AS332L1 helicopters, certificated in any category, with a main gearbox (MGB) suspension bar right-hand side (RH) rear attachment fitting (fitting) part number (P/N) 330A22–2702–07 and bolt P/N 330A22–0135–20, MGB suspension bar left-hand side (LH) rear fitting P/N 330A22–2702–06 and bolt P/N 330A22–0135–20, or MGB suspension bar front bolt P/N 330A22–0134–20 installed.

(b) Unsafe Condition

This AD defines the unsafe condition as MGB suspension bar fittings and bolts remaining in service beyond their fatigue life. This condition could result in failure of an MGB attachment assembly, detachment of an MGB suspension bar, and subsequent loss of helicopter control.

(c) Effective Date

This AD becomes effective May 11, 2020.

(d) Compliance

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

(e) Required Actions

(1) Within 50 hours time-in-service (TIS), review records to determine the total hours TIS of each MGB suspension bar RH and LH rear fitting.

(i) For any RH rear fitting that has accumulated 1,470 or more total hours TIS,

before further flight, remove from service the RH rear fitting and its bolts.

(ii) For any RH rear fitting that has accumulated less than 1,470 total hours TIS, remove from service the RH rear fitting and its bolts before the fitting accumulates 1,470 total hours TIS.

(iii) For any LH rear fitting that has accumulated 13,600 or more total hours TIS, before further flight, remove from service the LH rear fitting and its bolts.

(iv) For any LH rear fitting that has accumulated less than 13,600 total hours TIS:

(A) If a Major Inspection ''G'' has not been completed since the LH rear fitting has been installed, remove from service the LH rear bolts during the next Major Inspection ''G'' inspection; or

Note 1 to paragraph (e)(1)(iv)(A) of this AD: Major Inspection ''G'' (7,500 hours TIS between overhauls) is defined in Maintenance Manual MET 05–29–00–601.

(B) If a Major Inspection ''G'' has been completed since the LH rear fitting has been installed, before further flight, remove from service the LH rear bolts; and

(C) Remove from service the LH rear fitting before the fitting accumulates 13,600 total hours TIS.

(2) Thereafter following paragraph (e)(1) of this AD, remove from service any RH rear fitting and its bolts at intervals not to exceed 1,470 hours TIS, remove from service any LH rear fitting at intervals not to exceed 13,600 hours TIS, and remove from service any LH rear bolts during each Major Inspection ''G.''

(3) During the next Major Inspection ''G,'' remove from service the MGB suspension bar front bolts. Thereafter, remove from service the front bolts during each Major Inspection ''G.''

(f) Alternative Methods of Compliance (AMOCs)

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

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

(g) Additional Information

(1) Airbus Helicopters Alert Service Bulletin No. AS332–01.00.90, Revision 0, dated November 21, 2018, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Union Aviation Safety Agency (previously European Aviation Safety Agency) (EASA) AD No. 2018–0260, dated December 3, 2018. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2019–1015.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6320 Main Rotor Gearbox.

Issued on March 27, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–07138 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9889]

RIN 1545–BO4

Investing in Qualified Opportunity Funds; Correcting Amendments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to Treasury Decision 9889, which was published in the **Federal Register** on Monday, January 13, 2020. Treasury Decision 9889 contained final regulations under the Internal Revenue Code (the ''Code) that govern the extent to which taxpayers may elect the Federal income tax benefits with respect to certain equity interests in a qualified opportunity fund (QOF).

DATES: These corrections are effective on April 1, 2020, and applicable as of January 13, 2020.

FOR FURTHER INFORMATION CONTACT: Concerning section 1400Z–2 and these regulations generally, Alfred H. Bae, (202) 317–7006, or Kyle C. Griffin, (202) 317–4718, of the Office of Associate Chief Counsel (Income Tax and Accounting); concerning issues related to C corporations and consolidated groups, Jeremy Aron-Dine, (202) 317–6848, or Sarah Hoyt, (202) 317–5024, of the Office of Associate Chief Counsel (Corporate); concerning issues related to gains from financial contracts, REITs, or RICs, Andrea Hoffenson or Pamela Lew, (202) 317–7053, of the Office of Associate Chief Counsel (Financial Institutions and Products); concerning issues related to investments by foreign persons, Eric Florenz, (202) 317–6941, or Milton Cahn (202) 317–6937, of the Office of Associate Chief Counsel (International); concerning issues related to partnerships, S corporations or trusts, Marla Borkson, Sonia Kothari, or Vishal Amin, at (202) 317–6850, and concerning issues related to estates and gifts, Leslie Finlow or Lorraine Gardner, at (202) 317–6859, of the Office of Associate Chief Counsel (Passthroughs and Special Industries). These numbers are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9889) that are the subject of this correction are under section 1400Z–2 of the Code.

Need for Correction

As published on January 13, 2020 (85 FR 1866) contained errors that may prove to be misleading and need to be corrected.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation continues to read in part as follows:

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

■ **Par. 2.** Section1.1400Z2–0 is amended:

■ a. By revising the entry for § 1.1400Z2(a)–1(d)(2);

■ b. In the entry for § 1.1400Z2(b)–1(h) introductory text, by removing the language ''S corporations''; and

■ c. By revising the entry for § 1.1400Z2(d)–1(a)(4).

The revisions read as follows:

§ 1.1400Z2–0 Table of Contents.

* * * * *

§ 1.1400Z2(a)–1 Deferring tax on capital gains by investing in opportunity zones.

* * * * *

(d) * * *

(2) Annual reporting of qualifying investments.

* * * * *

§ 1.1400Z2(d)–1 Qualified opportunity funds and qualified opportunity zone businesses.

(a) * * *

(4) [Reserved]

* * * * *

■ **Par. 3.** Section 1.1400Z2(a)–1 is amended:

■ a. In paragraph (b)(3) by adding the language ''described in § 1.1400Z2(d)–2(d)(4)(ii) that is'' after the words ''means the test'';

■ b. In the last sentence of paragraph (b)(11)(ix)(A)(*2*), by removing the language ''publications'' and adding in its place ''instructions'';

■ c. In paragraph (b)(32), by removing the word ''business'';

■ d. In the last sentence of paragraph (c)(1)(iii)(A), by removing the word ''only'' before ''apply''; and

■ e. By revising paragraphs (d)(2), (g)(2) introductory text, and (g)(2)(i).

The revisions read as follows:

§ 1.1400Z2(a)–1 Deferring tax on capital gains by investing in opportunity zones.

* * * * *

(d) * * *

(2) *Annual reporting of qualifying investments.* An eligible taxpayer must report any qualifying investment held at any point during the taxable year in accordance with guidance published in the Internal Revenue Bulletin or in forms and instructions (see §§ 601.601(d)(2) and 601.602 of this chapter). A failure to make this report for any given taxable year will result in a rebuttable presumption that the taxpayer has had an inclusion event described in § 1.1400Z2(b)–1(c) during that year. The presumption described in the previous sentence may be rebutted by the taxpayer making the report described in the first sentence of this paragraph (d)(2) or by the taxpayer establishing to the satisfaction of the Commissioner that an inclusion event described in § 1.1400Z2(b)–1(c) did not occur during that taxable year.

* * * * *

(g) * * *

(2) *Prior periods.* With respect to eligible gains that would be recognized (absent the making of a deferral election) during the portion of a taxpayer's first taxable year ending after December 21, 2017, and during taxable years beginning after December 21, 2017, and on or before March 13, 2020, a taxpayer may choose either—

(i) To apply the section 1400Z–2 regulations, if applied in a consistent manner for all such taxable years (reliance by a taxpayer under paragraph (g)(2)(ii) of this section, § 1.1400Z2(b)–1(j)(2)(ii), § 1.1400Z2(d)–1(e)(2)(ii), § 1.1400Z2(d)–2(e)(2)(ii), or § 1.1400Z2(f)–1(d)(2)(ii), is disregarded solely for purposes of the consistency requirement under this paragraph (g)(2)(i)); or

* * * * *

■ **Par. 4.** Section 1.1400Z2(b)–1 is amended:

■ a. In the last sentence of paragraph (c)(6)(ii)(B), by removing ''§ 1400Z2(c)–1(b)(1)(ii)'' and adding in its place ''§ 1.1400Z2(c)–1(b)(1)(ii)''; and

■ b. By revising paragraphs (j)(2) introductory text and (j)(2)(i).

The revisions read as follows:

§ 1.1400Z2(b)–1 Inclusion of gains that have been deferred under section 1400Z–2(a)

* * * * *

(j) * * *

(2) *Prior periods.* With respect to the portion of a taxpayer's first taxable year ending after December 21, 2017, and for taxable years beginning after December 21, 2017, and on or before March 13, 2020, a taxpayer may choose either—

To apply the section 1400Z–2 regulations, if applied in a consistent manner for all such taxable years (reliance by a taxpayer on paragraph (j)(2)(ii) of this section, § 1.1400Z2(a)–1(g)(2)(ii), § 1.1400Z2(d)–1(e)(2)(ii), § 1.1400Z2(d)–2(e)(2)(ii), or § 1.1400Z2(f)–1(d)(2)(ii), is disregarded solely for purposes of the consistency requirement under this paragraph (j)(2)(i)); or

* * * * *

§ 1.1400Z2(c)–1 [Amended]

■ **Par. 5.** Section 1.1400Z2(c)–1 is amended:

■ a. In the first sentence of paragraph (b)(2)(ii)(A), by removing the language ''one of more partnerships'' and adding in its place ''one or more partnerships''; and

■ b. In the third sentence of paragraph (b)(2)(ii)(B)(*1*), by removing ''§ 1400Z2(b)–1(c)(6)(iv)(B)'' and adding in its place ''§ 1.1400Z2(b)–1(c)(6)(iv)(B)''.

■ **Par. 6.** Section 1.1400Z2(d)–1 is amended:

■ a. In the first sentence of paragraph (b)(2)(i)(C)(*2*)(*ii*), by removing the language ''not later than'' and adding in its place ''not earlier than'';

■ b. By revising paragraph (b)(4)(ii);

■ c. In the first sentence of paragraph (c)(2)(i)(C)(*2*), by removing the language ''is made by'' and adding in its place ''may be made by'';

■ d. In paragraph (d)(3)(v)(D), by removing the language ''receive up to'' and adding in its place ''receive not more than'';

■ e. By removing paragraphs (d)(3)(v)(F) and (G);

■ f. By revising paragraphs (d)(3)(vi) and (vii);

■ g. By redesignating paragraphs (d)(3)(ix) and (x) as (d)(3)(viii) and (ix), respectively; and

■ h. By revising paragraphs (d)(6)(i) and (iii), (e)(2) introductory text, and (e)(2)(i).

The revisions read as follows:

§ 1.1400Z2(d)–1 Qualified opportunity funds and qualified opportunity zone businesses.

* * * * *

(b) * * *

(4) * * *

(ii) *Property owned by an eligible entity*—(A) *Property purchased or constructed.* The value of each property owned by an eligible entity that is acquired by purchase for fair market value or constructed for fair market value is the eligible entity's unadjusted cost basis of the asset under section 1012 or section 1013. Solely for purposes of this paragraph (b)(4)(ii)(A), the acquisition by a QOF of qualified opportunity zone stock or a qualified opportunity zone partnership interest is treated as a purchase of such interest by the QOF.

* * * * *

(d) * * *

(3) * * *

(vi) *Safe harbor for section 1397C requirements other than ''sin business'' prohibition*—(A) *Maximum 62-month safe harbor for start-up businesses.* Property described in paragraphs (d)(3)(vi)(B), (C), and (D) of this section may benefit from one or more 31-month periods, for a total of 62 months, in the form of multiple overlapping or a sequential application of the working capital safe harbor if—

(*1*) Each application independently satisfies all of the requirements in paragraphs (d)(3)(v)(A) through (C) of this section;

(*2*) The working capital assets from an expiring 31-month period were expended in accordance with the requirements in paragraphs (d)(3)(v)(A) through (C) of this section;

(*3*) The subsequent infusions of working capital assets form an integral part of the plan covered by the initial working capital safe harbor period; and

(*4*) Each overlapping or sequential application of the working capital safe harbor includes a substantial amount of working capital assets (which may include debt instruments described in section 1221(a)(4)).

(B) *Safe harbor for gross income derived from the active conduct of business.* Solely for purposes of applying the 50-percent test in section 1397C(b)(2) to the definition of a qualified opportunity zone business in section 1400Z–2(d)(3), if any gross income is derived from property that paragraph (d)(3)(v) of this section treats as a reasonable amount of working

capital, then that gross income is counted toward satisfaction of the 50-percent test.

(C) *Safe harbor for use of intangible property.* Solely for purposes of applying the use requirement in section 1397C(b)(4) to the definition of a qualified opportunity zone business under section 1400Z–2(d)(3), intangible property purchased or licensed by the trade or business, pursuant to the reasonable written plan with a written schedule for the expenditure of the working capital, satisfies the use requirement during any period in which the business is proceeding in a manner that is substantially consistent with paragraphs (d)(3)(v)(A) through (C) of this section.

(D) *Safe harbor for working capital and property on which working capital is being expended*—(*1*) *Working capital.* If paragraph (d)(3)(v) of this section treats property of an entity that would otherwise be nonqualified financial property as being a reasonable amount of working capital because of compliance with the three requirements of paragraphs (d)(3)(v)(A) through (C) of this section, the entity satisfies the requirements of section 1400Z–2(d)(2)(D)(i) only during the working capital safe harbor period(s) for which the requirements of paragraphs (d)(3)(v)(A) through (C) of this section are satisfied; however such property is not qualified opportunity zone business property for any purpose.

(*2*) *Tangible property acquired with covered working capital.* If tangible property referred to in paragraph (d)(3)(v)(A) of this section is expected to satisfy the requirements of section 1400Z–2(d)(2)(D)(i) as a result of the planned expenditure of working capital described in paragraph (d)(3)(v)(A), and is purchased, leased, or improved by the trade or business, pursuant to the written plan for the expenditure of the working capital, then the tangible property is treated as qualified opportunity zone business property satisfying the requirements of section 1400Z–2(d)(2)(D)(i), during that and subsequent working capital periods the property is subject to, for purposes of the 70-percent tangible property standard in section 1400Z–2(d)(3).

(vii) *Examples.* The following examples illustrate the rules of paragraphs (d)(3)(v) and (vi) of this section.

(A) *Example 1. General application of working capital safe harbor*—(*1*) *Facts.* QOF F creates a domestic C corporation E to open a fast-food restaurant and acquires almost all of the equity of E in exchange for cash. E has a written plan and a 20-month schedule for the use of this cash to establish the restaurant. Among the planned uses for the cash are identification of favorable locations in the qualified opportunity zone, leasing a building suitable for such a restaurant, outfitting the building with appropriate equipment and furniture (both owned and leased), necessary security deposits, obtaining a franchise and local permits, and the hiring and training of kitchen and wait staff. Not-yet-disbursed amounts were held in assets described in section 1397C(e)(1), and these assets were eventually expended in a manner consistent with the plan and schedule.

(*2*) *Analysis.* E's use of the cash qualifies for the working capital safe harbor described in paragraph (d)(3)(v) of this section.

(B) *Example 2. Multiple applications of working capital safe harbor*—(*1*) *Facts.* QOF G creates a domestic C corporation H to start a new technology company and acquires equity of H in exchange for cash on Date 1. In addition to H's rapid deployment of capital received from other equity investors, H writes a plan with a 30-month schedule for the use of the Date 1 cash. The plan describes use of the cash to research and develop a new technology (Technology), including paying salaries for engineers and other scientists to conduct the research, purchasing, and leasing equipment to be used in research and furnishing office and laboratory space. Approximately 18 months after Date 1, on Date 2, G acquires additional equity in H for cash, and H writes a second plan. This new plan has a 25-month schedule for the development of a new application of existing software (Application), to be marketed to government agencies. Among the planned uses for the cash received on Date 2 are paying development costs, including salaries for software engineers, other employees, and third-party consultants to assist in developing and marketing the new application to the anticipated customers. Not-yet-disbursed amounts that were scheduled for development of the Technology and the Application were held in assets described in section 1397C(e)(1), and these assets were eventually expended in a manner substantially consistent with the plans and schedules for both the Technology and the Application.

(*2*) *Analysis.* H's use of both the cash received on Date 1 and the cash received on Date 2 qualifies for the working capital safe harbor described in paragraph (d)(3)(v) of this section.

(C) *Example 3. General application of working capital safe harbor*—(*1*) *Facts.* In 2019, Taxpayer H realized $w million of capital gains and within the 180-day period invested $w million in QOF T, a qualified opportunity fund. QOF T immediately acquired from partnership P a partnership interest in P, solely in exchange for $w million of cash. P immediately placed the $w million in working capital assets, which remained in working capital assets until used. P had written plans to acquire land in a qualified opportunity zone on which it planned to construct a commercial building. Of the $w million, $x million was dedicated to the land purchase, $y million to the construction of the building, and $z million to ancillary but necessary expenditures for the project. The written plans provided for purchase of the land within a month of receipt of the cash from QOF T and for the remaining $y and $z million to be spent within the next 30 months on construction of the building and on the ancillary expenditures. All expenditures were made on schedule, consuming the $w million. During the taxable years that overlap with the first 31-month period, P had no gross income other than that derived from the amounts held in those working capital assets. Prior to completion of the building, P's only assets were the land it purchased, the unspent amounts in the working capital assets, and P's work in process as the building was constructed.

(*2*) *Analysis*—P met the three requirements of the safe harbor provided in paragraphs (d)(3)(v)(A) through (C) of this section. P had a written plan to spend the $w received from QOF T for the acquisition, construction, and/or substantial improvement of tangible property in a qualified opportunity zone, as defined in section 1400Z–1(a). P had a written schedule consistent with the ordinary start-up for a business for the expenditure of the working capital assets. And, finally, P's working capital assets were actually used in a manner that was substantially consistent with its written plan and the ordinary start-up of a business. First, the $x million, the $y million, and the $z million are treated as reasonable in amount for purposes of sections 1397C(b)(2) and 1400Z–2(d)(3)(A)(ii). Second, because P had no other gross income during the 31 months at issue, 100 percent of P's gross income during that time is treated as derived from an active trade or business in the qualified opportunity zone for purposes of satisfying the 50-percent test of section 1397C(b)(2). Third, for purposes of satisfying the requirement of section 1397C(b)(4), during the period of land acquisition and building construction a substantial portion of P's intangible property is treated as being used in the active conduct of a trade or

business in the qualified opportunity zone. Fourth, all of the facts described are consistent with QOF T's interest in P being a qualified opportunity zone partnership interest for purposes of satisfying the 90-percent investment standard in section 1400Z–2(d)(1).

(*3*) *Analysis if P had purchased an existing building.* The conclusions would also apply if P's plans had been to buy and substantially improve a pre-existing commercial building. In addition, the fact that P's basis in the building has not yet doubled would not cause the building to fail to satisfy section 1400Z–2(d)(2)(D)(i)(III).

(D) *Example 4. Multiple applications of working capital safe harbor to tangible property*—(*1*) *Facts.* QOF A forms a domestic C corporation B to develop a large mixed-use real estate development that will consist of commercial and residential real property, owning almost all of the equity of B in exchange for cash. To raise additional working capital for the mixed-use real estate development, B also will borrow cash under a new revolving credit agreement with an unrelated lender. B has a master written plan for the completion of the commercial and residential real property over a 55-month period. The plan provides that the commercial real property will be completed over a 30 month schedule and subsequently, the residential real property will be completed over a 25 month schedule. The plan further provides that a portion of the commercial real property is unable to be used in a trade or business after the completion of the commercial real property since that portion of the commercial real property will be unusable during the residential construction phase. Pursuant to B's original master plan for the completion of the real estate development, QOF A acquires additional equity in B for cash after the completion of the commercial development phase, and B commences use of those working capital assets for residential development phase.

(*2*) *Analysis.* B's use of the cash for the commercial and residential phase qualified for the working capital safe harbor described in paragraph (d)(3)(v) of this section. In addition, all of B's commercial real property developed pursuant to B's original master plan is treated as qualified opportunity zone business property under paragraph (d)(3)(vi)(D) of this section.

* * * * *

(6) * * *

(i) For purposes of the *90-percent qualified opportunity zone business holding period* requirements set forth in sections 1400Z–2(d)(2)(B)(i)(III), 1400Z–2(d)(2)(C)(iii), and 1400Z–2(d)(2)(D)(i)(III), if a trade or business causes the QOF to fail the *90-percent investment standard* on a semiannual testing date, the QOF may treat the stock or partnership interest in that trade or business as qualified opportunity zone property for that semiannual testing date provided the trade or business corrects the failure within 6 months of the date on which the stock or partnership interest lost its qualification.

* * * * *

(iii) Each QOF is permitted only one correction for a trade or business pursuant to this paragraph (d)(6). If the entity, at the end of the additional six-month cure period, fails to qualify as a qualified opportunity zone business, then the QOF becomes subject to the penalty under section 1400Z–2(f)(1) for each month the entity failed to qualify as a qualified opportunity zone business beginning with the first month following the last month that the QOF met the *90-percent investment standard*.

(e) * * *

(2) *Prior periods.* With respect to the portion of a taxpayer's first taxable year ending after December 21, 2017, and for taxable years beginning after December 21, 2017, and on or before March 13, 2020, a taxpayer may choose either—

(i) To apply the section 1400Z–2 regulations, if applied in a consistent manner for all such taxable years (reliance by a taxpayer on paragraph (e)(2)(ii) of this section, § 1.1400Z2(a)–1(g)(2)(ii), § 1.1400Z2(b)–1(j)(2)(ii), § 1.1400Z2(d)–2(e)(2)(ii), or § 1.1400Z2(f)–1(d)(2)(ii), is disregarded solely for purposes of the consistency requirement under this paragraph (e)(2)(i)); or

* * * * *

■ **Par. 7.** Section 1.1400Z2(d)–2 is amended by revising paragraphs (d)(4)(i) and (ii), (e)(2) introductory text, and (e)(2)(i) to read as follows:

§ 1.1400Z2(d)–2 Qualified opportunity zone business property.

* * * * *

(d) * * *

(4) * * *

(i) *Qualified tangible property.* Tangible property used in a trade or business of an eligible entity satisfies the *substantially all* requirement of paragraph (d)(1) of this section if and only if the tangible property is qualified tangible property. Qualified tangible property is tangible property that satisfies the requirements of paragraph (d)(4)(ii), (iii) (subject to the limitation in paragraph (d)(4)(iv) of this section), or (v) of this section.

(ii) *70-percent use test.* Tangible property held by a trade or business is qualified tangible property to the extent, based on the number of days between two consecutive semiannual testing dates, not less than 70 percent of the total utilization of the tangible property by the trade or business occurs at a location within the geographic borders of a qualified opportunity zone (that is, the 70-percent use test).

* * * * *

(e) * * *

(2) *Prior periods.* With respect to the portion of a taxpayer's first taxable year ending after December 21, 2017, and for taxable years beginning after December 21, 2017, and on or before March 13, 2020, a taxpayer may choose either—

(i) To apply the section 1400Z–2 regulations, if applied in a consistent manner for all such taxable years (reliance by a taxpayer on paragraph (e)(2)(ii) of this section, § 1.1400Z2(a)–1(g)(2)(ii), § 1.1400Z2(b)–1(j)(2)(ii), § 1.1400Z2(d)–1(e)(2)(ii), or § 1.1400Z2(f)–1(d)(2)(ii), is disregarded solely for purposes of the consistency requirement under this paragraph (e)(2)(i)); or

* * * * *

■ **Par. 9.** Section 1.1400Z2(f)–1 is amended:

■ a. In paragraph (b)(2), by removing the language ''up to'' and adding in its place ''not more than'';

■ b. By revising paragraph (c)(3)(iii);

■ c. In the first sentence of paragraph (c)(3)(v)(B), by adding a comma after ''hog and pig farming'' and removing the word ''is'' and adding in its place ''comprise''; and

■ d. By revising paragraphs (d)(2) introductory text and (d)(2)(i).

The revisions read as follows:

§ 1.1400Z2(f)–1 Administrative rules-penalties, anti-abuse, etc.

* * * * *

(c) * * *

(3) * * *

(iii) *Example 3*—(A) *Facts.* Entity C is a QOF that meets the requirements of section 1400Z–2(d)(1). Entity C owns qualified opportunity zone stock in a domestic corporation described in section 1400Z–2(d)(2)(B) (Corporation C), which operates a qualified opportunity zone business. Entity C also owns Corporation D stock, which is not qualified opportunity zone stock, which stock is less than 10% of the assets of Entity C. Under section 1400Z–2(e)(2), these stock holdings cause Entity C to be related to both Corporation C and Corporation D. On date 1, under section 1400Z–2(e)(2), Individual S is not a related person with respect to Entity C,

Corporation C, or Corporation D. On that date, Individual S sells tangible property to Corporation C (Asset 1) for use in Corporation C's qualified opportunity zone business and sells a second asset to Corporation D (Asset 2). Both items sold were capital assets (as defined in section 1221), and had an adjusted basis of $0. As a result, Individual S realizes gain of $100 from the sale to Corporation C and $75 from the sale to Corporation D. At the time of the sale Individual S has a plan or intent to invest $175 in Entity C and to make deferral elections under section 1400Z–2(a)(1) with respect to the gain from the two sales. On date 2, for $175 Individual S acquired an eligible interest in Entity C, an acquisition that causes Individual S to become a related person with respect to Entity C within the meaning of section 1400Z–2(e)(2). *Analysis.* Under paragraph (c)(1) of this section, Individual S's $175 gain is not an eligible gain and cannot be the subject a deferral election under section 1400Z–2(a)(1). The gain fails to satisfy § 1.1400Z2a–1(b)(11)(i)(C) because of Individual S's plan to acquire sufficient equity in Entity C to become related to Corporations C and D. Moreover, for the same reason, the tangible property that Corporation C purchased from Individual S fails to satisfy the requirement that a purchase of qualified opportunity zone business property must be from an unrelated person. *See* sections 1400Z–2(d)(2)(D)(i)(I) and 179(d)(2)(A).

(B) *Circular movement of consideration.* The facts are the same as in paragraph (c)(3)(iii)(A) of this section (this Example 3), except that Entity C contributes the $100 and $75 (received from Individual S) to Corporations C and D, respectively, as part of a plan that includes each transaction described in paragraph (c)(3)(iii)(A) (collectively, the transaction series). Under the step transaction doctrine and circular cash flow principles, this circular movement of consideration is disregarded for Federal income tax purposes, including for purposes of section 1400Z–2 and the section 1400Z–2 regulations. Therefore, the transaction series is treated for Federal income tax purposes as a contribution by Individual S of Assets 1 and 2 to Entity C in exchange for an eligible interest in Entity C, followed by a contribution by Entity C of Assets 1 and 2 to Corporations C and D, respectively. This result also would obtain if Individual S were not related to Entity C immediately following Individual S's acquisition of its eligible interest from Entity C. *See* Rev. Rul. 83–142, 1983–2 C.B. 68; Rev. Rul. 78–397, 1978–2 C.B. 150.

* * * * *

(d) * * *

(2) *Prior periods.* With respect to the portion of a taxpayer's first taxable year ending after December 21, 2017, that began on March 13, 2020, a taxpayer may choose either—

(i) To apply the section 1400Z–2 regulations, if applied in a consistent manner for all such taxable years (reliance by a taxpayer on paragraph (d)(2)(ii) of this section, § 1.1400Z2(a)–1(g)(2)(ii), § 1.1400Z2(b)–1(j)(2)(ii), § 1.1400Z2(d)–1(e)(2)(ii), or § 1.1400Z2(d)–2(e)(2)(ii), is disregarded for purposes of the consistency requirement under this paragraph (d)(2)(i)); or

* * * * *

■ **Par. 10.** Section 1.1502–14Z is amended:

■ a. In paragraph (b)(1)(iv)(A), by removing the language ''the QOF SAG'' and adding in its place ''a QOF SAG'';

■ b. In the first sentence of paragraph (b)(1)(iv)(B), by removing the language ''the QOF SAG'' and adding in its place ''a QOF SAG'' and removing the language ''such QOF SAG'' and adding in its place ''a single QOF SAG'';

■ c. In paragraph (b)(1)(iv)(C), by removing the language ''the QOF SAG'' and adding in its place ''a QOF SAG'' and removing the language ''such QOF SAG'' and adding in its place ''that QOF SAG'';

■ d. In the first sentence of paragraph (b)(1)(v), by removing the language ''; instead, the rules in this paragraph (b)(1)(v) apply'' and adding in its place ''. Instead, those investment standard rules apply'';

■ e. In the first sentence of paragraph (c)(2)(i), by removing the language ''the investment'' and adding in its place ''an investment'';

■ f. In the fourth sentence of paragraph (c)(3) introductory text, by removing the language ''§ 1.1400Z2(b)–1(b)'' and adding in its place ''§ 1.1400Z2(a)–1(a)(1)'';

■ g. By revising the first sentence of paragraph (f)(2)(i);

■ h. In the first sentence of paragraph (f)(2)(ii)(A), by removing the language ''certain pre-existing QOF subs as QOF partnerships'' and adding in its place ''a pre-existing QOF sub as a QOF partnership'';

■ i. In the first sentence of paragraph (f)(2)(ii)(D)(*3*)(*i*), by removing the language ''same as paragraph'' and adding in its place ''same as in paragraph'';

■ j. In paragraph (f)(2)(iii)(A), by removing the language ''the pre-existing'' and adding in its place ''a pre-existing'';

■ k. In the last sentence of paragraph (g)(3)(ii), by removing the language ''includable amount'' and adding in its place ''amount includable'';

■ l. In the last sentence of paragraph (h)(3)(iii)(A), by removing the closing bracket at the end;

■ m. In the last sentence of paragraph (j)(1)(i), by removing the language ''that results in'' and adding in its place ''that result in'';

■ n. In the fourth sentence of paragraph (j)(3)(ii)(A), by removing the language ''taken into under'' and adding in its place ''taken into account under''; and

■ o. By revising paragraph (k)(2) introductory text.

The revisions read as follows:

§ 1.1502–14Z Application of opportunity zone rules to members of a consolidated group.

* * * * *

(f) * * *

(2) * * *

(i) * * * For each pre-existing QOF sub of a consolidated group, the consolidated group may make one of the alternative, irrevocable elections provided in paragraphs (f)(2)(ii) through (iv) of this section. * * *

* * * * *

(k) * * *

(2) *Prior periods.* With respect to the portion of a consolidated group's first taxable year ending after December 21, 2017, and for taxable years beginning after December 21, 2017, and on or before March 13, 2020, a consolidated group may choose either—

* * * * *

■ **Par. 11.** Section 1.1504–3 is amended:

■ a. In the paragraph (b) subject heading, by removing ''affiliation'' and adding in its place ''consolidation'';

■ b. In the first sentence of paragraph (b)(1), by removing ''the issuer'' and adding in its place ''any corporation'';

■ c. In the last sentence of paragraph (d)(1)(ii), by removing ''–1.1502–100'' and adding in its place ''1.1502–100''; and

■ d. By revising paragraph (e)(2) introductory text.

The revision reads as follows:

§ 1.1504–3 Treatment of stock in a QOF C corporation for purposes of consolidation.

* * * * *

(e) * * *

(2) *Prior periods.* With respect to the portion of a consolidated group's first taxable year ending after December 21, 2017, and for taxable years beginning after December 21, 2017, and on or

before March 13, 2020, a consolidated group may choose either—

* * * * *

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2020–07013 Filed 4–1–20; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2020–0036]

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone located in federal regulations for a recurring marine event. This action is necessary and intended for the safety of life and property on navigable waters during this event. During the enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo.

DATES: The regulations in 33 CFR 165.939 listed in entry (b)(12) in Table 165.939 will be enforced from 6:45 a.m. through 10:45 a.m. on July 18, 2020.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT William Fitzgerald, Chief of Waterways Management, U.S. Coast Guard Marine Safety Unit Cleveland; telephone 216–937–0124, email *william.j.fitzgerald@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the section entitled Safety Zones; Annual Events in the Captain of the Port Buffalo Zone listed in in table 165.939 entry (b)(12) in 33 CFR 165.939 for the Lake Erie Open Water Swim. Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within the safety zone during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or her designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Buffalo or her designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552 (a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that the safety zone need not be enforced for the full duration stated in this notice she may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Lexia M. Littlejohn,

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

[FR Doc. 2020–07048 Filed 4–3–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2020–0150; FRL–10007–40–Region 1]

Air Plan Approval; New Hampshire; Negative Declaration for the Oil and Gas Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. The revision provides the state's determination, via a negative declaration, that there are no facilities within its borders subject to EPA's 2016 Control Technique Guideline (CTG) for the oil and gas industry. The intended effect of this action is to approve this item into the New Hampshire SIP. This action is being taken in accordance with the Clean Air Act (CAA).

DATES: This direct final rule will be effective June 5, 2020, unless EPA receives adverse comments by May 6, 2020. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2020–0150 at *https://www.regulations.gov,* or via email to *mcconnell.robert@epa.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.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Bob McConnell, Environmental Engineer, Air and Radiation Division (Mail Code 05–2), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109–3912; (617) 918–1046. *mcconnell.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Table of Contents

I. Background
II. Summary of SIP Revision and EPA Analysis
III. Final Action
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I. Background

On October 27, 2016, EPA published in the **Federal Register** the ''Final Control Techniques Guidelines for the

Oil and Natural Gas Industry.'' See 81 FR 74798. The CTG provided information to state, local, and tribal air agencies to assist them in determining reasonably available control technology (RACT) for volatile organic compounds (VOC) emissions from select oil and natural gas industry emission sources. CAA section 182(b)(2)(A) requires that for ozone nonattainment areas classified as Moderate or above, states must revise their SIPs to include provisions to implement RACT for each category of VOC sources covered by a CTG document. CAA section 184(b)(1)(B) extends the RACT obligation to all areas of states within the Ozone Transport Region (OTR). Pursuant to CAA section 184(a), New Hampshire is a member state of the OTR. States subject to RACT requirements are required to adopt controls that are at least as stringent as those found within the CTG either via the adoption of regulations, or by issuance of single source Orders or Permits that outline what the source is required to do to meet RACT. If no source for a particular CTG exists within a state, the state must submit as a SIP revision a negative declaration documenting this fact.

II. Summary of SIP Revision and EPA Analysis

Negative Declaration for the 2016 Oil and Natural Gas Industry CTG

On December 17, 2019, New Hampshire submitted a negative declaration for the 2016 Oil and Natural Gas Industry CTG. The term ''negative declaration'' means that the state has explored whether any facilities subject to the applicability requirements of the CTG exist within the state and concluded that there are no such sources within its borders. This is consistent with EPA's understanding of where sources subject to the Oil and Natural Gas Industry CTG are located, and so we are approving New Hampshire's negative declaration into the SIP.

III. Final Action

We are approving a negative declaration for EPA's 2016 CTG entitled ''Control Techniques Guidelines for the Oil and Natural Gas Industry'' into the New Hampshire SIP.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective June 5, 2020 without further notice unless the Agency receives relevant adverse comments by May 6, 2020.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on June 5, 2020 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does

it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Volatile organic compounds.

Dated: March 27, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart EE—New Hampshire

■ 2. In § 52.1520, amend the table in paragraph (e) by adding an entry for ''Negative declaration for the 2016 Control Techniques Guideline for the Oil and Natural Gas Industry'' at the end of the table, to read as follows:

§ 52.1520 Identification of plan.

* * * * *

(e) * * *

NEW HAMPSHIRE NONREGULATORY

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approved date [3]	Explanations
*	*	*	*	*
Negative declaration for the 2016 Control Techniques Guidelines for the Oil and Natural Gas Industry.	Statewide	12/17/2019	4/6/2020 [Insert **Federal Register** citation].	Negative declaration.

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

[FR Doc. 2020–06809 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2019–0148; FRL–10007–04–Region 4]

Air Quality Plans; Florida; Infrastructure Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving portions of the State Implementation Plan (SIP) submission provided by the State of Florida, through the Florida Department of Environmental Protection (FDEP), through a letter dated September 18, 2018. This submission pertains to the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2015 8-hour ozone national ambient air quality standards (NAAQS). Whenever EPA promulgates a new or revised NAAQS, the CAA requires that each state adopt and submit a SIP submission to establish that the state's implementation plan meets infrastructure requirements for the implementation, maintenance, and enforcement of each such NAAQS. FDEP made the required SIP submission to assure that the Florida SIP contains provisions that ensure the 2015 8-hour ozone NAAQS is implemented, enforced, and maintained in Florida. EPA has in this action determined that Florida's infrastructure SIP submission satisfies certain required infrastructure elements for the 2015 8-hour ozone NAAQS.

DATES: This rule is effective May 6, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2019–0148. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* 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 *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, 30303–8960. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov* or via telephone at (404) 562–9043.

SUPPLEMENTARY INFORMATION:

I. Background

On October 1, 2015 (80 FR 65292, October 26, 2015), EPA promulgated revised primary and secondary NAAQS for ozone revising the 8-hour ozone NAAQS from 0.075 parts per million to a new more protective level of 0.070 ppm. Pursuant to section 110(a)(1) of the CAA, states are required to make a

SIP submission meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. This particular type of SIP submission is commonly referred to as an ''infrastructure SIP.'' EPA required states to submit these infrastructure SIP submissions for the 2015 8-hour ozone NAAQS to EPA no later than October 1, 2018.[1]

This action is approving portions of Florida's September 18, 2018[2] ozone infrastructure SIP submission for the applicable requirements of the 2015 8-hour ozone NAAQS. EPA is not acting on the interstate transport requirements of section 110(a)(2)(D)(i)(I) related to attainment and maintenance of the NAAQS. EPA will consider these requirements for Florida for the 2015 8-hour ozone NAAQS separately.

In a notice of proposed rulemaking (NPRM) published on December 17, 2019 (84 FR 68863), EPA proposed to approve portions of Florida's SIP submission dated September 18, 2018, intended to address the applicable infrastructure SIP requirements for the 2015 8-hour ozone NAAQS. The NPRM provides additional detail regarding the background and rationale for EPA's action.

II. Response to Comments

EPA received one comment seeking clarification and one set of adverse comments which are summarized and responded to below. The full set of comments are in the docket for this final rule.

Comment 1: A Commenter notes that EPA may have misidentified a website in the NPRM and seeks a clarification.

Response 1: EPA agrees with the Commenter. In the December 17, 2019, NPRM, EPA noted that Florida is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI) pursuant to subpart A to 40 CFR part 51—''Air Emissions Reporting Rule.'' The NEI is EPA's central repository for air emissions data and Florida made its latest update to the NEI on December 17, 2014. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website. In the December 17, 2019 (84 FR 68868), NPRM, EPA indicated the website was *http://www.epa.gov/ttn/chief/eiinformation.html.* However, as identified by the Commenter, the correct website is *https://www.epa.gov/air-emissions-inventories.*

Comment 2: A Commenter asserts that EPA cannot approve Florida's infrastructure SIP submission as demonstrating compliance with the CAA's interstate transport requirements in 110(a)(2)(D)(i)(II) with respect to interference with prevention of significant deterioration (PSD) and visibility programs for any other state because Florida's September 18, 2018, SIP submission did not address the interstate transport requirements of section 110(a)(2)(D)(i)(II). By way of background, CAA section 110(a)(2)(D)(i) contains two subsections: (D)(i)(I) and (D)(i)(II) that a state must address in infrastructure SIP submissions. Each of these subsections has two subparts resulting in four distinct components, commonly referred to by EPA as ''prongs.'' The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (''prong 1'') and interfering with maintenance of the NAAQS in another state (''prong 2''). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required for PSD of air quality in another state (''prong 3''), or to protect visibility in another state (''prong 4'').

The Commenter asserts that Florida did not address section 110(a)(2)(D)(i)(II) for PSD and visibility in the September 18, 2018, SIP submission because the State does not ''even mention the words 'Prong 3' or 'Prong 4.' '' As further evidence that the SIP submission does not address these requirements, the Commenter points to the fact that the State sent an email to EPA on November 13, 2019, to confirm that the State did intend the submission to meet those substantive requirements. The Commenter contends that ''EPA cannot act on email messages from states and pretend they are official SIP submissions from the states'' and that no state public notice was advertised on Prongs 3 or 4. As to the substance of the November 13, 2019 email, the Commenter claims that the State wrongly attempts to suggest that prong 3 and 4 are met by pointing to the prong 1 discussion in the September 18, 2018, SIP submission, and points to prior court cases pertaining to interstate transport that indicate EPA is required to give independent analysis to each prong of the interstate transport provisions of section 110(a)(2)(D). The Commenter also suggests that EPA has additional correspondence with the State related to the State's November 13, 2019, clarification email that should be included in the docket for the rulemaking.

Response 2: EPA disagrees with the Commenter's assertion that Florida did not address section 110(a)(2)(D)(i)(II) in its September 18, 2018, infrastructure SIP submission. In its September 13, 2013 ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)'' (2013 Guidance), EPA explains that a state may meet 110(a)(2)(D)(i)(II) (prong 3) by establishing in its infrastructure SIP submission that new major sources and major modifications are already subject to a comprehensive EPA-approved PSD permitting program.[3] EPA also notes in the 2013 Guidance that sources in nonattainment areas are not subject to PSD permitting and that states may rely on an existing EPA-approved nonattainment new source review (NNSR) program with respect to sources located in nonattainment areas.[4] For the visibility component of 110(a)(2)(D)(i)(II) (prong 4), EPA provides in the 2013 Guidance that states may meet this requirement by establishing in its infrastructure SIP submission that it already has an EPA-approved regional haze SIP that fully meets the requirements of 40 CFR 51.308.[5]

EPA's analysis of Florida's September 18, 2018, infrastructure SIP submission focused on whether the State provided relevant information to establish that Florida's existing SIP adequately prohibits emissions activities within the State that will ''interfere with measures required to be included in the applicable implementation plan for any other State . . . to prevent significant deterioration of air quality or to protect visibility,'' consistent with the requirements of CAA section 110(a)(2)(D)(i)(II). Based on Florida's transmittal letter for the September 18,

[1] In these infrastructure SIP submissions, states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into the federally-approved SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2).

[2] The September 18, 2018, SIP submission provided by FDEP was received by EPA on September 26, 2018.

[3] 2013 Guidance, p. 31.

[4] 2013 Guidance, pp. 31–32.

[5] 2013 Guidance, p. 33.

2018, SIP submission, and the actual content of the September 18, 2018, SIP submission, EPA believes Florida satisfied these requirements. In its September 18, 2018, transmittal letter, Florida states that the submission ''addresses *each* [emphasis added] of the CAA infrastructure elements for the 2015 Revised National Ambient Air Quality Standards (NAAQS) for Ozone (O_3).'' The State did not identify any sections it did not intend to address and further explained the provisions that it did intend to address in the introduction section of the September 18, 2018, SIP submission: ''[FDEP] Hereby confirms that the requirements of sections 110(a)(1) and the infrastructure elements required by sections 110(a)(2)(A) through (M) of the CAA are adequately addressed in Florida's existing approved SIP with respect to the implementation of the 2015 revised NAAQS.'' Moreover, on page 5 of the SIP submission, the State properly describes the requirements of CAA section 110(a)(2)(D)(i) to include the provisions of subparagraph (II) requiring states to prohibit emissions activity from the State from ''interfering with any other state's required plan under Part C of the CAA for prevention of significant deterioration and protection of visibility.'' Thus, though broadly worded in some cases, there are several indications in the September 18, 2018, SIP submission that the State intended the submission to address all of the applicable requirements of CAA section 110(a)(2), including the prong 3 and prong 4 requirements.

While EPA acknowledges that the September 18, 2018, SIP submission did not use the terms ''prong 3'' or ''prong 4'' to describe the requirements the State was addressing in the SIP submission, these are not statutory terms but rather EPA-developed shorthand for the two requirements in CAA section 110(a)(2)(D)(i)(II). Thus, EPA disagrees that it is a deficiency for the State not to include these specific terms in its SIP submission nor is the absence of these terms an indication that the State failed to perform the necessary analysis of these statutory requirements. Consistent with the 2013 Guidance regarding how a state may address the prong 3 requirements,[6] the SIP submission confirms on both pages 5 and 7 of the section 110(a)(2)(D)(i) analysis that the State has both PSD and NNSR permitting programs already in its existing SIP. In particular, the State notes on those pages that the approved SIP requires ''any new major source or major modification to undergo PSD or NNSR permitting and thereby demonstrate that it will not cause or contribute to a violation of any NAAQS or PSD increment in Florida *or any other state*'' (emphasis added). This language from the SIP submission is consistent with the language of CAA section 110(a)(2)(D)(i)(II) requiring that a state's plan demonstrate that emissions from the state will not interfere with another state's PSD permitting plan, as the PSD requirements are specifically concerned with ensuring that the construction of new or modified major sources will not lead to new violations of the NAAQS or increments. *See* CAA section 165(a)(3).

Similarly, the SIP submission is consistent with the 2013 Guidance regarding how a state may address the prong 4 requirements because the SIP revision explains at page 5 that Florida has a fully-approved regional haze SIP.[7] The State further explained on the same page that: ''This plan ensures that Florida will not interfere with visibility protection in other states.'' That statement is clearly in reference to the language describing the prong 4 requirements in 110(a)(2)(D)(i)(II).

EPA agrees with the Commenter that it would have been clearer if the State had provided sections in its September 18, 2018, SIP submission explicitly labeled ''prong 3'' and ''prong 4,'' or otherwise demarcated its analysis of these specific requirements in the same manner as the sections entitled ''prong 1'' and ''prong 2,'' but EPA does not agree that the exclusion of the terms ''prong 3'' and ''prongs 4'' in the submission means that the State did not in fact make a submission that addresses the interstate transport requirements with respect to the PSD and visibility prongs for the 2015 8-hour ozone NAAQS.

EPA also agrees with the Commenter that each of the four prongs of section 110(a)(2)(D)(i) are separate requirements that states and EPA must address, and that there are prior court decisions that confirm this basic point. EPA disagrees, however, that the State has failed to address prong 3 and 4 in the September 18, 2018, SIP submission, or that EPA has failed to evaluate the submission with respect to these prongs. EPA and the State have provided independent analysis for prongs 3 and 4, as discussed above. Florida's SIP submission satisfies the prong 3 requirements based on its SIP-approved PSD and NNSR permit programs, which require analysis and control of emissions that may impact another state's compliance with its own PSD requirements and satisfies the prong 4 requirements based on the State's fully-approved regional haze SIP. Not providing individual headings for each requirement of 110(a)(2)(D)(i) or prong within the submission does not support Commenter's assertion that the State or EPA failed to address each of these prongs independently.

EPA also disagrees with the Commenter's assertion that, by proposing to approve the September 18, 2018, SIP revision, EPA is inappropriately relying on the November 13, 2019, email from Florida instead of requiring a supplemental SIP submission. As previously acknowledged, EPA agrees that the SIP submission could have been clearer with respect to the infrastructure SIP requirements that the State was addressing, but the content of that SIP submission in fact did substantively address the requirements of section 110(a)(2)(D)(i)(II). In an abundance of caution, however, EPA requested confirmation of that fact from the State to include in the docket during EPA's public comment period for the proposed approval of Florida's September 18, 2018, SIP submission. The email merely confirmed Florida's intent regarding its September 18, 2018, SIP submission and did not provide new information regarding the Florida SIP or include new analysis to demonstrate that the Florida SIP meets the requirements of 110(a)(2)(D)(i)(II).

Additionally, the Commenter does not provide support for its contention that ''no state public notice was advertised on Prongs 3 and 4.'' EPA has re-examined the notice that the State provided concerning the content of the SIP submission. The State's September 18, 2018, revision that underwent public notice clearly stated that it addressed ''*each* [emphasis added] of the CAA infrastructure elements for the 2015 Revised National Ambient Air Quality Standards (NAAQS) for Ozone (O_3),'' and did not exclude any infrastructure SIP requirements. EPA does not agree that use of the specific terms prong 3 or prong 4 was necessary for public notice purposes, given the broad statement concerning the subject matter of the proposed SIP submission and given the actual substantive content of that proposed SIP submission.

Finally, the Commenter asserted that EPA has ''emails, records, and correspondence (including meeting minutes/notes)'' related to Florida's September 18, 2018, SIP submission, and in particular, related to the interstate transport requirements for PSD and visibility, that it did not include in the rulemaking docket. In response to the comment, EPA has

[6] 2013 Guidance, pp. 30–32.

[7] 2013 Guidance, pp. 32–35.

reviewed the docket and confirmed that it contains the appropriate documents necessary to reflect the basis for the agency's proposed and final action on the SIP submission. The relevant EPA staff have checked their individual files and have confirmed that they do not have any additional documents that should be included in the docket for this rulemaking. EPA notes that agency staff have regular communications with the states concerning SIP submissions and air quality planning generally. Such communications between a state and EPA are part of the normal SIP process.

III. Final Action

With the exception of interstate transport provisions pertaining to contribution to nonattainment or interference with maintenance in other states of section 110(a)(2)(D)(i)(I) (prongs 1 and 2), EPA is approving Florida's infrastructure submission provided on September 18, 2018, for the 2015 8-hour ozone NAAQS. EPA is approving Florida's infrastructure SIP submission for certain elements for the 2015 8-hour ozone NAAQS because the submission is consistent with section 110 of the CAA for those elements.

IV. Statutory and Executive Order Reviews

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

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: March 13, 2020.

Mary S. Walker,

Regional Administrator, Region 4.

Title 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart K—Florida

■ 2. Section 52.520(e) is amended by adding the entry ''110(a)(1) and (2) Infrastructure Requirements for the 2015 8-Hour Ozone NAAQS'' at the end of the table to read as follows:

§ 52.520 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED FLORIDA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	Federal Register notice	Explanation
* *	*	*	* *	* *
110(a)(1) and (2) Infrastructure Requirements for the 2015 8-Hour Ozone NAAQS.	9/18/2018	4/6/2020	[Insert citation of publication] ...	With the exception of Prongs 1 and 2 of section 110(a)(2)(D)(i)(I).

[FR Doc. 2020–06585 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2019–0305; FRL–10007–15–Region 4]

Air Plan Approval; Tennessee; Chattanooga Miscellaneous Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Chattanooga portion of the Tennessee State Implementation Plan (SIP) submitted by the State of Tennessee through the Tennessee Department of Environment and Conservation (TDEC) on behalf of the Chattanooga/Hamilton County Air Pollution Control Bureau (Bureau) on September 12, 2018. The SIP submittal removes and replaces the Chattanooga City Code, Air Pollution Control Ordinances pertaining to the Chattanooga-Hamilton County Air Pollution Control Board (Board), powers and duties of the Board, penalties, enforcement and permit fees. The SIP revision that EPA is approving is consistent with the requirements of the Clean Air Act (CAA or Act).

DATES: This rule will be effective May 6, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2019–0305. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* 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 *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can also be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Through a letter dated September 12, 2018, TDEC submitted a SIP revision on behalf of the Bureau requesting removal and replacement of certain air quality rules in the Chattanooga portion of the Tennessee SIP.[1] [2] This rulemaking approves the Chattanooga City Code Part II, Chapter 4, Section 4–4, ''Penalties for violation of chapter, permit or order,'' [3] Section 4–6, ''Air pollution control board; bureau of air pollution control; persons required to comply with chapter,'' [4] Section 4–7, ''Powers and duties of the board; delegation,'' [5] Paragraphs 4–8(a)(14), 4–8(c)(12), 4–8(d)(4) and 4–8(d)(6) in Section 4–8, ''Installation permit and certificate of operation,'' [6] Paragraph 4–

[1] The Bureau is comprised of Hamilton County and the municipalities of Chattanooga, Collegedale, East Ridge, Lakesite, Lookout Mountain, Red Bank, Ridgeside, Signal Mountain, Soddy Daisy, and Walden. The Bureau recommends regulatory revisions, which are subsequently adopted by the eleven jurisdictions. The Bureau then implements and enforces the regulations, as necessary, in each jurisdiction. Because the air pollution control regulations/ordinances adopted by the jurisdictions within the Bureau are substantively identical (except as noted later in this document), EPA refers solely to Chattanooga and the Chattanooga rules throughout the document as representative of the other ten jurisdictions for brevity and simplicity. *See* footnotes 3 through 8, later in this document.

[2] EPA received the SIP revision on September 18, 2018.

[3] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 4 (9/6/17); City of Collegedale—Section 14–304 (10/16/17); City of East Ridge—Section 8–4 (10/26/17); City of Lakesite—Section 14–4 (11/2/17); Town of Lookout Mountain—Section 4 (11/14/17); City of Red Bank—Section 20–4 (11/21/17); City of Ridgeside—Section 4 (1/16/18); City of Signal Mountain—Section 4 (10/20/17); City of Soddy-Daisy—Section 8–4 (10/5/17); and Town of Walden—Section 4 (10/16/17). The only substantive difference between the various jurisdictions' regulations is that Chattanooga Ordinance Part II, Chapter 4, Section 4–4 contains an additional sentence regarding fines and fees, which is discussed later in this document.

[4] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 6 (9/6/17); City of Collegedale—Section 14–306 (10/16/17); City of East Ridge—Section 8–6 (10/26/17); City of Lakesite—Section 14–6 (11/2/17); Town of Lookout Mountain—Section 6 (11/14/17); City of Red Bank—Section 20–6 (11/21/17); City of Ridgeside—Section 6 (1/16/18); City of Signal Mountain—Section 6 (10/20/17); City of Soddy-Daisy—Section 8–6 (10/5/17); and Town of Walden—Section 6 (10/16/17).

[5] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 7 (9/6/17); City of Collegedale—Section 14–307 (10/16/17); City of East Ridge—Section 8–7 (10/26/17); City of Lakesite—Section 14–7 (11/2/17); Town of Lookout Mountain—Section 7 (11/14/17); City of Red Bank—Section 20–7 (11/21/17); City of Ridgeside—Section 7 (1/16/18); City of Signal Mountain—Section 7 (10/20/17); City of Soddy-Daisy—Section 8–7 (10/5/17); and Town of Walden—Section 7 (10/16/17).

[6] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 8 (9/6/17); City of Collegedale—Section 14–308 (10/16/17); City of East Ridge—Section 8–8 (10/26/17); City of Lakesite—Section 14–8 (11/2/17); Town of Lookout Mountain—Section 8 (11/14/17); City of Red Bank—Section 20–8 (11/21/17); City of

Continued

10(a), ''Records,'' [7] and Section 4–17, ''Enforcement of chapter; procedure for adjudicatory hearings for violations'' into the Chattanooga portion of the Tennessee SIP.[8] [9]

In a notice of proposed rulemaking (NPRM) published on February 10, 2020 (85 FR 7491), EPA proposed to approve the revision to the Chattanooga portion of the Tennessee SIP provided on September 18, 2018. The NPRM provides additional detail regarding the background and rationale for EPA's action. Comments on the NPRM were due on or before March 2, 2020. EPA received no adverse comments on the NPRM.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the following provisions of Chattanooga City Code, Part II, Chapter 4, locally effective on October 3, 2017: Section 4–4, ''Penalties for violation of chapter, permit or order;'' Section 4–6, ''Air pollution control board; bureau of air pollution control; persons required to comply with chapter;'' Section 4–7, ''Powers and duties of the board; delegation;'' Paragraphs 4–8(a)(14), 4–8(c)(12), 4–8(d)(4) and 4–8(d)(6) in Section 4–8, ''Installation permit and certificate of operation;'' Paragraph 4–10(a) in Section 4–10, ''Records;'' and Section 4–17, ''Enforcement of chapter; procedure for adjudicatory hearings for violations.'' [10] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[11]

III. Final Action

EPA is approving the removal and replacement in the entirety of the following rules in the Chattanooga-Hamilton County portion of the Tennessee SIP with the version of the rules submitted on September 12, 2018: Chapter 4, Section 4–4, ''Penalties for violation of chapter, permit or order,'' Section 4–6, ''Air pollution control board; bureau of air pollution control; persons required to comply with chapter,'' Section 4–7, ''Powers and duties of the board; delegation,'' Paragraphs 4–8(a)(14), 4–8(c)(12), 4–8(d)(4) and 4–8(d)(6) in Section 4–8, ''Installation permit and certificate of operation,'' Paragraph 4–10(a), ''Records,'' and Section 4–17, ''Enforcement of chapter; procedure for adjudicatory hearings for violations.''

IV. Statutory and Executive Order Reviews

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

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

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a

Ridgeside—Section 8 (1/16/18); City of Signal Mountain—Section 8 (10/20/17); City of Soddy-Daisy—Section 8–8 (10/5/17); and Town of Walden—Section 8 (10/16/17).

[7] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 10 (9/6/17); City of Collegedale—Section 14–310 (10/16/17); City of East Ridge—Section 8–10 (10/26/17); City of Lakesite—Section 14–10 (11/2/17); Town of Lookout Mountain—Section 10 (11/14/17); City of Red Bank—Section 20–10 (11/21/17); City of Ridgeside—Section 10 (1/16/18); City of Signal Mountain—Section 10 (10/20/17); City of Soddy-Daisy—Section 8–10 (10/5/17); and Town of Walden—Section 10 (10/16/17).

[8] In this final action, EPA is also approving substantively similar changes in the following sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 17 (9/6/17); City of Collegedale—Section 14–17 (10/16/17); City of East Ridge—Section 8–17 (10/26/17); City of Lakesite—Section 14–17 (11/2/17); Town of Lookout Mountain—Section 17 (11/14/17); City of Red Bank—Section 20–17 (11/21/17); City of Ridgeside—Section 17 (1/16/18); City of Signal Mountain—Section 17 (10/20/17); City of Soddy-Daisy—Section 8–17 (10/5/17); and Town of Walden—Section 17 (10/16/17). The only substantive difference between the various jurisdictions' regulations is that Chattanooga City Code Part II, Chapter 4, Section 4–17 contains an additional paragraph concerning citation of violators to municipal court, which is discussed below.

[9] EPA received other revisions to the Chattanooga portion of the Tennessee SIP transmitted with the same September 12, 2018, cover letter. EPA will be considering action for those other SIP revisions in a separate rulemaking.

[10] EPA's approval also includes regulations/ordinances submitted for the other ten jurisdictions within the Bureau. See footnotes 3 through 8, above.

[11] *See* 62 FR 27968 (May 22, 1997).

copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations.

Dated: March 17, 2020.

Mary S. Walker,

Regional Administrator, Region 4.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart RR—Tennessee

■ 2. In § 52.2220(c), amend Table 4 by revising the entries for ''Section 4–4'', ''Section 4–6'', ''Section 4–7'', ''Section 4–8'', ''Section 4–10'', ''Section 4–17'' under the heading ''Article I. In General,'' to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

TABLE 4—EPA-APPROVED CHATTANOOGA REGULATIONS

State section	Title/subject	Adoption date	EPA approval date	Explanation
		Article I. In General		
*	*	*	*	* * *
Section 4–4	Penalties for violation of chapter, permit or order.	10/3/2017	4/6/2020, [Insert citation of publication].	EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Chattanooga-Hamilton County Air Pollution Control Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 4 (9/6/17); City of Collegedale—Section 14–304 (10/16/17); City of East Ridge—Section 8–4 (10/26/17); City of Lakesite—Section 14–4 (11/2/17); Town of Lookout Mountain—Section 4 (11/14/17); City of Red Bank—Section 20–4 (11/21/17); City of Ridgeside—Section 4 (1/16/18); City of Signal Mountain—Section 4 (10/20/17); City of Soddy-Daisy—Section 8–4 (10/5/17); and Town of Walden—Section 4 (10/16/17).
*	*	*	*	* * *
Section 4–6	Air pollution control board; bureau of air pollution control; persons required to comply with chapter.	10/3/2017	4/6/2020, [Insert citation of publication].	EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Chattanooga-Hamilton County Air Pollution Control Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 6 (9/6/17); City of Collegedale—Section 14–306 (10/16/17); City of East Ridge—Section 8–6 (10/26/17); City of Lakesite—Section 14–6 (11/2/17); Town of Lookout Mountain—Section 6 (11/14/17); City of Red Bank—Section 20–6 (11/21/17); City of Ridgeside—Section 6 (1/16/18); City of Signal Mountain—Section 6 (10/20/17); City of Soddy-Daisy—Section 8–6 (10/5/17); and Town of Walden—Section 6 (10/16/17).
Section 4–7	Power and duties of the board; delegation.	10/3/2017	4/6/2020, [Insert citation of publication].	EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Chattanooga-Hamilton County Air Pollution Control Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 7 (9/6/17); City of Collegedale—Section 14–307 (10/16/17); City of East Ridge—Section 8–7 (10/26/17); City of Lakesite—Section 14–7 (11/2/17); Town of Lookout Mountain—Section 7 (11/14/17); City of Red Bank—Section 20–7 (11/21/17); City of Ridgeside—Section 7 (1/16/18); City of Signal Mountain—Section 7 (10/20/17); City of Soddy-Daisy—Section 8–7 (10/5/17); and Town of Walden—Section 7 (10/16/17).
Section 4–8	Installation permit, temporary operating permit, certification of operation and solid fuel permit.	10/3/2017	4/6/2020, [Insert citation of publication].	Except paragraphs 4–8(a)(1)–(13), (a)(15), (b)(1)–(5), (c)(1)–(4), (d)(1)–(3), (d)(7), (d)(9), and (e)(1)–(2), approved 2/18/97, with an 8/16/95 local adoption date; and paragraphs 4–8(a)(16), (c)(5)–(11), (d)(5), (d)(8), (f), and (g), which are not approved into the SIP. Due to intervening numbering changes, the versions of paragraphs 4–8(a)(14), (d)(4), and (d)(6) with local adoption dates of both 8/16/95 and 10/3/17 are approved into the SIP.

TABLE 4—EPA-APPROVED CHATTANOOGA REGULATIONS—Continued

State section	Title/subject	Adoption date	EPA approval date	Explanation
				EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Chattanooga-Hamilton County Air Pollution Control Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 8 (9/6/17); City of Collegedale—Section 14–308 (10/16/17); City of East Ridge—Section 8–8 (10/26/17); City of Lakesite—Section 14–8 (11/2/17); Town of Lookout Mountain—Section 8 (11/14/17); City of Red Bank—Section 20–8 (11/21/17); City of Ridgeside—Section 8 (1/16/18); City of Signal Mountain—Section 8 (10/20/17); City of Soddy-Daisy—Section 8–8 (10/5/17); and Town of Walden—Section 8 (10/16/17).
*	*	*	*	* * *
Section 4–10	Records	10/3/2017	4/6/2020, [Insert citation of publication].	Except paragraph 4–10(b) approved 5/10/90, with a 7/20/89 local adoption date. EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 10 (9/6/17); City of Collegedale—Section 14–310 (10/16/17); City of East Ridge—Section 8–10 (10/26/17); City of Lakesite—Section 14–10 (11/2/17); Town of Lookout Mountain—Section 10 (11/14/17); City of Red Bank—Section 20–10 (11/21/17); City of Ridgeside—Section 10 (1/16/18); City of Signal Mountain—Section 10 (10/20/17); City of Soddy-Daisy—Section 8–10 (10/5/17); and Town of Walden—Section 10 (10/16/17).
*	*	*	*	* * *
Section 4–17	Enforcement of chapter; procedure for adjudicatory hearings.	10/3/2017	4/6/2020, [Insert citation of publication].	EPA's approval includes the corresponding sections of the Air Pollution Control Regulations/Ordinances for the remaining jurisdictions within the Bureau, which were locally effective as of the relevant dates below: Hamilton County—Section 17 (9/6/17); City of Collegedale—Section 14–17 (10/16/17); City of East Ridge—Section 8–17 (10/26/17); City of Lakesite—Section 14–17 (11/2/17); Town of Lookout Mountain—Section 17 (11/14/17); City of Red Bank—Section 20–17 (11/21/17); City of Ridgeside—Section 17 (1/16/18); City of Signal Mountain—Section 17 (10/20/17); City of Soddy-Daisy—Section 8–17 (10/5/17); and Town of Walden—Section 17 (10/16/17).
*	*	*	*	* * *

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[FR Doc. 2020–06582 Filed 4–3–20; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2019–0213; FRL–10006–97–Region 6]

Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA or Agency) is approving revisions to the Texas State Implementation Plan (SIP) that pertain to the Dallas-Fort Worth (DFW) area and the 1979 1-hour and 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard). The EPA is approving the plan for maintaining the 1-hour and 1997 ozone NAAQS through the year 2032 in the DFW area. The EPA is determining that the DFW area continues to attain the 1979 1-hour and 1997 8-hour ozone NAAQS and has met the five CAA criteria for redesignation. Therefore, the EPA is terminating all anti-backsliding obligations for the DFW area for the 1-hour and 1997 ozone NAAQS.

DATES: This rule is effective on May 6, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2019–0213. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *https://www.regulations.gov* or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

FOR FURTHER INFORMATION CONTACT: Robert Todd, EPA Region 6 Office, Infrastructure & Ozone Section, 1201 Elm Street, Suite 500, Dallas, TX 75270, 214–665–2156, *todd.robert@epa.gov*. To inspect the hard copy materials, please schedule an appointment with Mr. Todd or Mr. Bill Deese at 214–665–7253.

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

I. Background and Summary of Final Action

The background for this action is discussed in detail in our June 24, 2019 Proposal (84 FR 29471, ''Proposal''). In that document we proposed to: (1) Approve the plan for maintaining both the revoked 1979 1-hour and 1997 8-hour ozone NAAQS [1] through 2032 in the DFW area; (2) Determine that the DFW area is continuing to attain both the revoked 1-hour and 1997 ozone NAAQS; (3) Determine that Texas (''the State'') has met the CAA criteria for redesignation of the DFW area for the 1-hour and 1997 8-hour ozone NAAQS; and, (4) Terminate all anti-backsliding obligations for the DFW area for both the 1-hour and 1997 ozone NAAQS.

In this final action, we are approving the plan for maintaining both the 1-hour and 1997 ozone NAAQS through the year 2032 in the DFW area. We are also determining that the DFW area continues to attain both the 1-hour and 1997 ozone NAAQS and has met the five criteria in CAA section 107(d)(3)(E) for redesignation for these Standards. The EPA revoked the 1-hour and 1997 ozone NAAQS along with associated designations and classifications (69 FR 23951, April 30, 2004; and, 80 FR 12264, March 6, 2015), and thus, the DFW area has no designation under both the 1-hour or 1997 ozone NAAQS that can be changed through redesignation as governed by CAA section 107(d)(3)(E). Therefore, we are not promulgating a redesignation of the DFW area under CAA section 107(d)(3)(E). However, because the DFW area has met the five criteria in section 107(d)(3)(E) for redesignation, we are terminating all anti-backsliding obligations for the DFW area for both the revoked 1-hour and 1997 ozone NAAQS.

To determine the criteria under CAA section 107(d)(3)(E) are met, we determine: (1) That the area has attained the NAAQS; (2) that we have fully approved the applicable implementation plan for the area under CAA section 110(k); (3) that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and Federal air pollutant control regulations and other permanent and enforceable reductions; (4) that the area has a fully approved maintenance plan meeting the requirements of CAA section 175A; and, (5) that the state containing such area has met all requirements applicable to the area under CAA section 110 (Implementation plans) and part D (Plan Requirements for Nonattainment Areas).

As discussed in our Proposal, the Technical Support Document (TSD), and in the remainder of this preamble, the five criteria listed above have been met. In past actions, we have determined that the area has attained the 1-hour and 1997 ozone NAAQS due to permanent and enforceable measures (Criteria 1 and 3). As discussed in the Proposal and in this final action, air quality in the DFW area has been meeting the 1-hour standard since 2006 and the 1997 ozone standard since 2014. As documented in the Proposal and the TSD, numerous State, Federal and local measures have been adopted and implemented including, but not limited to, nitrogen oxide (NO_X) limits on all Portland cement kilns in Ellis County, and federal on- and off-road emissions control programs. These programs have resulted in significant reductions and resulted in attainment of the 1-hour and 1997 ozone standards.

We are also finding that the area has met all requirements under CAA section 110 and part D that are applicable for purposes of redesignation, and all such requirements have been fully approved (Criteria 2 and 5). As discussed in the Proposal, for the revoked ozone standards at issue here, over the past three decades the State has submitted numerous SIPs for the DFW area to implement those standards, improve air quality with respect to those standards, and address anti-backsliding requirements for those standards. The TSD documents many of these actions and EPA approvals. However, EPA has consistently held the position that not every requirement to which an area is subject is ''applicable'' for purposes of redesignation. *See, e.g.,* September 4, 1992, Memorandum from John Calcagni (''Calcagni Memorandum'').[2] As described in this memo, some of the Part D requirements, such as demonstrations of reasonable further progress, are designed to ensure that nonattainment areas continue to make progress toward attainment. EPA has interpreted these requirements as not ''applicable'' for purposes of redesignation under CAA section 107(d)(3)(E)(ii) and (v) because areas that are applying for redesignation to attainment are already attaining the standard.

Finally, we are fully approving the maintenance plan for the DFW area. As discussed in the Proposal, we agree that Texas has provided a plan that demonstrates that the DFW area will maintain attainment of the revoked 1-hour and 1997 standards until 2032. The plan also includes contingency measures that would be implemented in the DFW area should the area monitor a violation of these standards in the future.

II. Response to Comments

We received comments from Earthjustice (on behalf of Downwinders at Risk and the Sierra Club); and the Texas Commission on Environmental Quality (TCEQ or State). These comments are available for review in the docket for this rulemaking. Our responses to all relevant comments follow. Any other comments received were either deemed irrelevant or beyond the scope of this action, but are also included in the docket for this action.

We proposed to find that the DFW area met all five redesignation criteria in CAA section 107(d)(3)(E) for the revoked ozone standards, and consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *South Coast Air Quality Management District* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018) (''*South Coast II*''),[3] that the anti-backsliding obligations for the DFW area associated with these standards should therefore be terminated. In the alternative, we proposed to redesignate the DFW area to attainment for the revoked ozone standards, taking comment on whether we had authority to do so. In this action, based upon comments received, we are finalizing the first option.

Comment: Earthjustice states that ozone is a serious health problem in Dallas.

Response: We agree that ozone is a significant health issue in the DFW area, but we also recognize that significant progress has been made in reducing ozone levels in the area. This action recognizes that the DFW area has attained both the revoked 1-hour and 1997 ozone NAAQS. We also recognize that further air quality improvement is necessary in the area to meet the two current 2008 and 2015 ozone NAAQS and to protect public health. The DFW area was designated as nonattainment

[1] Throughout this document, we refer to the 1979 1-hour ozone NAAQS as the ''1-hour ozone NAAQS'' and the 1997 8-hour ozone NAAQS as the ''1997 ozone NAAQS.''

[2] As referenced in our Proposal, see ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992. To view the memo, please visit *https://www.epa.gov/sites/production/files/2016-03/documents/calcagni_memo_-_procedures_for_processing_requests_to_redesignate_areas_to_attainment_090492.pdf.*

[3] ''*South Coast I*'' refers to *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006).

for both the revoked 1-hour and 1997 ozone NAAQS and is designated as nonattainment for the two current (2008 and 2015) 8-hour ozone NAAQS.[4] As a result, the State and DFW area—including local governments, business and industry—have implemented measures to reduce emissions of NO_X and volatile organic compounds (VOC) that form ozone (*see, e.g.,* State Submittal, Section 2.4: Permanent and Enforceable Measures Reductions and the TSD for this action). Accordingly, the DFW area has seen its 1-hour ozone design values decrease from 147 parts per billion (ppb) in 1992 to 98 ppb in 2018. Likewise, the DFW area design values for the 8-hour ozone NAAQS have decreased from 100 ppb in 2003 to 76 ppb in 2018.[5] Because the area has attained the revoked 1-hour and 1997 ozone NAAQS, and has also met the other CAA statutory requirements for redesignation for these standards, we believe it is appropriate to terminate the anti-backsliding requirements associated with these revoked NAAQS.

The area will remain designated nonattainment for the 2008 and 2015 ozone NAAQS. The DFW area was recently reclassified as a Serious nonattainment area for the 2008 ozone NAAQS, and therefore the State must submit SIP revisions and implement controls to satisfy the statutory and regulatory requirements for a Serious nonattainment area for the 2008 ozone standard.[6]

Comment: Earthjustice states that EPA cannot lawfully or rationally apply the criteria at CAA section 107(d)(3)(E) to terminate anti-backsliding protections for the DFW area, because that statutory provision provides only minimum criteria that must be satisfied before a designated nonattainment area may be redesignated to attainment. Earthjustice states that the provision provides no authority to terminate anti-backsliding on the basis of an area meeting its criteria for a revoked standard. The commenter also states that EPA does not and cannot identify a source of authority for its application of the statutory provision for the purposes of terminating anti-backsliding provisions and has not purported to create regulations here under its general rulemaking authority of CAA section 301(a) to do so. Further, the commenter alleges that the EPA's reliance on *South Coast II* to support its authority to terminate DFW's anti-backsliding requirements for the two revoked ozone NAAQS is unlawful and arbitrary. Earthjustice argues that the D.C. Circuit in *South Coast II* held only that the redesignation substitute was unlawful because it fell short of certain statutory requirements and did not address any other reasons why the regulation was unlawful and arbitrary. The commenter alleges that *South Coast II* ''says nothing'' about whether EPA could lawfully authorize termination of anti-backsliding requirements in the circumstance addressed here, where the area continues to violate the 2008 and 2015 ozone NAAQS, and where termination ''weakens protections in the area.'' Earthjustice states that the *South Coast II* court's holding with respect to the EPA's authority to reclassify areas after revocation is irrelevant to the question of the EPA's authority to change an area's designation after revocation.

Response: We disagree that the EPA lacks authority to terminate an area's anti-backsliding requirements for a revoked NAAQS and that we may not do so here for the DFW area with respect to the two revoked ozone NAAQS in question. The commenter's suggestion that the EPA may not look to the statutory redesignation criteria in CAA section 107(d)(3)(E) for authority to terminate the DFW area's anti-backsliding requirements is contradicted by the D.C. Circuit's decision in *South Coast II.* In that decision, the court faulted the redesignation substitute, one of the EPA's mechanisms for terminating anti-backsliding, but only because it had addressed only some, and not all, of the statutory redesignation criteria:

> The redesignation substitute request 'is based on' the Clean Air Act's 'criteria for redesignation to attainment' under [CAA section 107(d)(3)(E)], 80 FR at 12,305, but it does not require full compliance with all five conditions in [CAA section 107(d)(3)(E)]. The Clean Air Act unambiguously requires nonattainment areas to satisfy all five of the conditions under [CAA section 107(d)(3)(E)] before they may shed controls associated with their nonattainment designation. The redesignation substitute lacks the following requirements of [CAA section 107(d)(3)(E)]: (1) The EPA has 'fully approved' the [CAA section 110(k)] implementation plan; (2) the area's maintenance plan satisfies all the requirements under [CAA section 175A]; and (3) the state has met all relevant [CAA section 110 and Part D] requirements. 80 FR at 12,305. Because the 'redesignation substitute' does not include all five statutory requirements, it violates the Clean Air Act. 882 F.3d at 1152.

We disagree that the D.C. Circuit, as commenters suggest, said nothing with respect to how anti-backsliding controls could be lawfully terminated for areas under a revoked NAAQS. The court stated that the Act ''unambiguously'' requires that all five statutory redesignation criteria be met before anti-backsliding controls (*i.e.,* controls associated with the nonattainment designation for a revoked NAAQS) could be shed. *Id.* The court's express basis for vacating the redesignation substitute was that the mechanism failed to incorporate all of the statutory criteria as preconditions. *Id.* (''Because the 'redesignation substitute' does not include all five statutory requirements, it violates the Clean Air Act.''). We do not agree with the commenter's suggestion that the EPA may not rely on the court's plain interpretation of the Act and act in accordance with it. The EPA had previously approved redesignation substitutes for the DFW area for the 1-hour ozone NAAQS and the 1997 ozone NAAQS. As discussed in our Proposal, this final action replaces our previous approvals of the DFW area redesignation substitutes for the 1-hour and 1997 ozone NAAQS.

Furthermore, we reject the commenter's suggestion that nonattainment of the newer, current NAAQS is a unique set of circumstances that would reasonably alter the EPA's ability to either redesignate an area or terminate anti-backsliding requirements for a prior NAAQS. Nothing in CAA section 107(d)(3) suggests that the EPA's approval of a redesignation or termination of anti-backsliding for one NAAQS should include evaluation of attainment of another newer NAAQS. It is common practice that areas designated nonattainment for an earlier, less stringent NAAQS come into compliance with that NAAQS, meet the requirements for redesignation for that NAAQS, and are redesignated to attainment for that NAAQS, while remaining nonattainment for a newer more stringent standard for the same pollutant. Indeed, with Congress' directive that the EPA review and revise the NAAQS as appropriate no less frequently than every five years, it would be nearly impossible for areas to be redesignated to attainment for an older NAAQS if nonattainment of a newer (often more stringent) standard barred EPA from approving

[4] For the 1-hour ozone NAAQS the DFW nonattainment area consists of Collin, Dallas, Denton, and Tarrant Counties (56 FR 56694, November 6, 1991). For the 1997 ozone NAAQS, the DFW nonattainment area included the four counties already listed, plus Ellis, Johnson, Kaufman, Parker, and Rockwall Counties (69 FR 23858, April 30, 2004). For the 2008 ozone NAAQS, the DFW nonattainment area included the nine counties already listed, plus Wise County (77 FR 30088, May 21, 2012). For the 2015 8-hour ozone NAAQS the DFW nonattainment area consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Tarrant, and Wise Counties (83 FR 25776, June 4, 2018).

[5] *See* the TCEQ ozone reports posted at *https://www.tceq.texas.gov/airquality/monops/ozone.*

[6] *See* (83 FR 25776, June 4, 2018), and (84 FR 44238, August 23, 2019).

redesignation requests for the older standard.

We also disagree that this action's effects terminating anti-backsliding requirements are in any way ''unique.'' Areas that are redesignated to attainment are permitted to stop applying nonattainment area New Source Review offsets and thresholds and transition to the Prevention of Significant Deterioration program, which the EPA does not agree is an unwarranted ''weakening'' of protections. In this case, because the DFW area remains nonattainment for the newer ozone NAAQS, it will continue to be subject to nonattainment new source review (NNSR) emissions offsets and threshold requirements, tailored to the current classifications that apply to the area. EPA does not agree with commenter's suggestion that areas that have reached attainment should be subject to a more stringent process to shed obligations under a revoked NAAQS than the process required to shed obligations for a current NAAQS. We do not agree that it is arbitrary or unlawful to hold areas that were nonattainment for a revoked NAAQS to the same standards that apply to areas that are nonattainment for the current NAAQS.

Finally, with respect to Earthjustice's comment that the *South Coast II* court's holding regarding reclassification does not support an interpretation that the EPA has the authority to alter designations, the EPA is not finalizing a change in designation for the area for the two revoked NAAQS. Because we are not redesignating the DFW area to attainment no further response to this specific comment is required.

Comment: Earthjustice states that EPA cannot lawfully or rationally change DFW's designation under revoked standards.

Response: The EPA is not changing the designation for the DFW area under the 1-hour or 1997 ozone NAAQS in this action. As noted above, the designations for these areas were revoked when the NAAQS were revoked. In this action, EPA is terminating the anti-backsliding requirements associated with the two revoked NAAQS in this area.

Comment: Earthjustice states that EPA arbitrarily fails to consider the consequences of terminating anti-backsliding protections. The commenter asserts that the EPA is not legally obligated to redesignate an area that meets criteria of CAA section 107(d)(3)(E), and that additionally, the EPA must also determine whether it *should* redesignate the area. Earthjustice states that finalization of this Proposal would ratify termination of key anti-backsliding protections, particularly the Serious area NNSR protections that would otherwise apply to proposed new and modified stationary sources and work to impose more stringent limits on harmful ozone-forming pollution attributable to those new and modified stationary sources. By authorizing DFW to have weaker protections than it otherwise would, while still having severely harmful levels of ozone air pollution, Earthjustice claims that the EPA's action irrationally deprives DFW communities of CAA public health protections intended to bring the area expeditiously into compliance with health-based ozone standards.

Response: As stated previously, we are not in this action redesignating the DFW area for the revoked NAAQS. Rather, we find that all five CAA statutory criteria for redesignation are met, and therefore anti-backsliding obligations for the revoked NAAQS are appropriately terminated.

We note that we have considered the consequence of terminating anti-backsliding protections specifically raised by the commenter, *i.e.,* the Serious classification requirements for NNSR. The commenter submitted their comments in a July 24, 2019 letter. In a final rule published August 23, 2019 we reclassified the area to Serious for the 2008 ozone standard (84 FR 44238). Thus, the Serious NNSR and other Serious ozone nonattainment requirements apply now and will continue to apply after this final rule.[7]

Comment: Earthjustice states that unhealthy levels of ozone and other air pollutants disproportionally affect communities of color in the DFW nonattainment area. Specifically, Earthjustice expressed concern about disproportionate impacts on the historic freedman town of Joppa, which is located southeast of downtown Dallas. Earthjustice includes a document with their submitted comments titled, ''EJSCREEN Report (Version 2017),'' dated March 05, 2018. The report shows environmental and demographic raw data (*e.g.,* the estimated concentration of ozone in the air), and shows what percentile each raw data value represents. These percentiles provide perspective on how the selected block group (Joppa) compares to the entire State, EPA region, and nation. For example, if Joppa is at the 95th percentile nationwide, this means that only 5 percent of the US population has a higher block group value than the average person in Joppa. The variables included in the report are particulate matter (PM), ozone, diesel PM, several categories within the National Air Toxics Assessment (NATA),[8] lead paint, wastewater discharge, and proximity to the following: traffic and traffic volume; Superfund sites; and Risk Management Plan facilities (potential chemical accident management plan). Earthjustice states that the weakened NNSR requirements will allow more VOC emissions and emissions of listed hazardous air pollutants than otherwise would be permitted, and the community of Joppa would bear a disproportionate burden of these emissions.

Response: The EPA appreciates the work the commenter has performed to evaluate potential disproportionate impacts in vulnerable communities; in this final action, however, we are addressing only the determination that the DFW area is attaining the revoked standards and meets the five criteria for redesignation, which leads to the termination of anti-backsliding measures. We note that emissions of PM and all other variables in the Commenter's EJSCREEN Report, with the exception of ground-level ozone, are outside the scope of this action.

The EJSCREEN Report provided by the commenter examined the geographic distribution of several pollutants and other variables and whether the community in Joppa is disproportionately impacted by these pollutants and variables. The approvability of this action is based on requirements for ozone and the revoked standards being considered here. As discussed elsewhere, because EPA reclassified the DFW area to Serious for the 2008 ozone NAAQS in 2019, new sources built in the DFW area must meet NNSR requirements consistent with the Serious area classification (84 FR

[7] The NNSR requirements in the existing Texas SIP contain a provision that cross references the designation of the area to 40 CFR part 81. *See* 30 TAC section 101.1(71). Because of the structure of this provision, the identification of an area's classification, and thus the related major source thresholds and offset ratios, is updated without any additional revision to the SIP. The EPA approved Texas SIP includes 30 TAC Section 116.12 (Nonattainment and Prevention of Significant Deterioration Review Definitions) and 30 TAC Section 116.150 (New Major Source or Major Modification in Ozone Nonattainment Area). These provisions require new major sources or major modifications at existing sources in the DFW area to comply with the lowest achievable emission rate and obtain emission offsets at the Serious classification ratio of 1.2 to 1.

[8] NATA is EPA's ongoing review of air toxics in the United States. EPA developed NATA as a screening tool for state, local and tribal air agencies. NATA's results help these agencies identify which pollutants, emission sources and places they may wish to study further to better understand any possible risks to public health from air toxics. For more information see *https://www.epa.gov/national-air-toxics-assessment.*

44238), just as they were required to do prior to the approval of the redesignation substitute for the 1997 ozone NAAQS. Therefore, terminating the NNSR requirements for either of the revoked NAAQS for the DFW area has no impact, much less a disproportionate impact. Texas will continue to have to work to reduce ozone precursors to meet the 2008 and 2015 ozone standards. Finally, we note that monitors throughout the DFW area have recorded concentrations meeting both the 1-hour and 1997 ozone standards for some time.[9]

Comment: Earthjustice states that EPA arbitrarily concludes that relevant statutory and executive order reviews are not required for this rule and EPA wrongly asserts that the proposed action would only accomplish a revision to the Texas SIP that EPA can only approve or disapprove. Earthjustice states that through this rule, EPA proposes to change and adopt national positions regarding its authority to redesignate areas under CAA section 107(d)(3)(E) and terminate anti-backsliding protections for revoked standards. Earthjustice states these actions are not SIP revisions and thus necessitate the statutory and executive order reviews EPA avoids by citing only a portion of the actions it is taking in this rulemaking. Earthjustice states that, in addition to the environmental justice concerns relevant to the review required by Executive Order 12898, EPA ignores other important considerations that are a part of rational decision-making like effects on children's health and other public health factors.

Response: As stated previously, we are not in this action redesignating the DFW area for the two revoked NAAQS. Earthjustice has not provided much detail regarding which statutory and executive order reviews it believes are applicable and that the EPA has not addressed. In section V of this notice, we discuss EPA's assessment of each statutory and executive order that potentially applies to this action. We note that the introductory paragraph to section V of the Proposal preamble contains a typographical error that may have caused some of the commenter's concern. The last sentence of that paragraph appears to indicate that the reason for EPA's proposed assessment that the action is exempt from the enumerated statutory and executive orders is solely that the action is a review of a SIP. However, that sentence was intended to be inclusive of all the reasons stated in the introductory paragraph, including that the approval of the request to terminate anti-backsliding does not impose new requirements on sources (*i.e.,* ''For that reason'' more appropriately would have read ''For these reasons'').

With respect to the commenter's concern that EPA has not adequately addressed environmental justice, we do not agree that Executive Order 12898 applies to this action because this action does not affect the level of protection provided to human health or the environment. In this action the level of protection is provided by the ozone NAAQS and this action does not revise the NAAQS. As noted earlier in this final action, the DFW area will remain designated nonattainment for the 2008 and 2015 ozone NAAQS. The DFW area was recently reclassified as a Serious nonattainment area for the 2008 ozone NAAQS, and therefore the State must submit SIP revisions and implement controls to satisfy the statutory and regulatory requirements for a Serious area for the 2008 ozone standard.[10]

With respect to commenter's concern that we have not adequately addressed executive orders regarding children's health, we do not agree that Executive Order 13045 applies to this action. Executive Order 13045 applies to ''economically significant rules under E.O. 12866 that concern an environmental health or safety risk that EPA has reason to believe may disproportionately affect children.'' *See* 62 FR 19885, April 23, 1997. As noted in the Proposal and below in section V of this preamble, this rule is not ''economically significant'' under E.O. 12866 because it will not have ''an annual effect on the economy of $100 million or more or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' 62 FR 19885.[11]

Comment: Earthjustice states that EPA should not revise the attainment designations in 40 CFR 81 because it has failed to consider the consequences of doing so, including whether changes in the designations listing will affect remaining maintenance plan and other requirements after redesignation.

Response: In this action, we are not revising the designations for the DFW area for the two revoked ozone NAAQS, and therefore the comments regarding consequences of changing the area's designation are beyond the scope of this final action. We are revising the 40 CFR part 81 tables for the DFW area, which currently reflect the approvals of the area's redesignation substitute from 2016. For revoked standards, the sole purpose of the part 81 table is to help identify applicable anti-backsliding obligations. Therefore, we are revising the part 81 tables to reflect that the DFW area has met all the redesignation criteria for the two revoked ozone NAAQS and therefore anti-backsliding obligations associated with those two revoked NAAQS are terminated.

Comment: Earthjustice states the DFW area did not attain by its Serious area attainment date for the 1997 8-hour ozone NAAQS and EPA didn't reclassify the area to Severe nonattainment, as required by CAA section 181(b)(2). Earthjustice states that EPA thus has overdue legal obligations to reclassify the DFW area to Severe under the 1997 ozone standard in line with the D.C. Circuit's *South Coast II* decision. Earthjustice states that our Proposal cannot proceed without the programs for the DFW area to address the CAA section 185 failure to attain fee program[12] and the CAA section 182(d)(1) vehicle miles traveled (VMT) program.[13] Earthjustice also states that EPA has an overdue legal obligation to promulgate a Federal Implementation Plan (FIP) for these programs in the DFW area.

Response: To respond to this comment, it is useful to recount the complicated history leading up to this action. The attainment deadline for the DFW Serious area for the 1997 ozone NAAQS was June 15, 2013 (*see* 75 FR 79302 (December 20, 2010)). EPA proposed to determine that the DFW area failed to attain by the June 15, 2013 attainment date and to reclassify the

[9] *See https://www.epa.gov/air-trends/air-quality-design-values.*

[10] *See* 83 FR 25576 and 84 FR 44238.

[11] *See* also ''Guide to Considering Children's Health When Developing EPA Actions: Implementing Executive Order 13045 and EPA's Policy on Evaluating Health Risks to Children.'' *https://www.epa.gov/children/guide-considering-childrens-health-when-developing-epa-actions-implementing-executive-order.*

[12] The CAA section 185 fee program requirements apply to ozone nonattainment areas classified as Severe or Extreme that fail to attain by the required attainment date. It requires each major stationary source of VOC or NO_X located in an area that fails to attain by its attainment date to pay an annual fee to the state for each ton of VOC or NO_X the source emits in excess of 80 percent of a baseline amount. The fees are paid until the area is redesignated to attainment or in the case of a revoked ozone standard, until the anti-backsliding obligations for the revoked standard area terminated.

[13] The 182(d)(1) VMT program (CAA section 182(d)(1)(A)) applies to ozone nonattainment areas classified as Severe or Extreme. It requires such areas to offset growth in emissions due to growth in VMT, reduce motor vehicle emissions as necessary to comply with RFP requirements, and choose from among and implement transportation control strategies and transportation control measures as necessary to demonstrate NAAQS attainment.

DFW area to Severe under the 1997 ozone NAAQS based upon monitoring data for 2010–2012 (80 FR 8274, February 17, 2015). Less than a month later, EPA revoked the 1997 8-hour ozone standard along with the associated designations and classifications effective on April 6, 2015 (80 FR 12264, 12296; March 6, 2015). It was EPA's interpretation at the time that we could not revise the classification of an area under a revoked ozone NAAQS and reclassification of an area upon its failure to attain by the attainment date was not retained as a regulatory anti-backsliding measure (80 FR 12264, 12297; March 6, 2015). Therefore, EPA did not finalize the February 2015 reclassification proposal. Beginning with the time period 2012–2014, monitored levels in the DFW area have met the revoked 1997 ozone standard. We proposed to make a clean data determination on April 28, 2015 (80 FR 23487) and we finalized that clean data determination in September 2015 (*see* 80 FR 52630), based upon the 2012–2014 monitoring data. A clean data determination suspends the requirement to submit SIPs that are designed to help an area achieve attainment, such as demonstrations of how an area will attain (attainment demonstrations) and showings of reasonable further progress to attainment, because the stated purpose of those elements will have already been fulfilled for an area that is attaining the standard. The current preliminary 2017–2019 design value for the area is 77 ppb as air quality has continued to improve in the DFW area.

On February 16, 2018, in the *South Coast II* decision, the D.C. Circuit determined that EPA erred in waiving the obligation to reclassify an area to a higher classification for the 1997 ozone NAAQS based on a failure to meet the 1997 attainment deadlines and as such EPA should continue to reclassify areas if they fail to attain the revoked 1997 standard. The court also vacated the portion of the rule that provided for the ''redesignation substitute'' approach to terminating anti-backsliding measures. As discussed elsewhere, the court made clear that anti-backsliding measures could only be terminated if all five criteria for redesignation under CAA section 107(d)(3)(E) have been met. At the time of the *South Coast II* decision, the DFW area had been monitoring attainment of the revoked 1997 ozone standard for four years, and had obtained redesignation substitutes for both revoked ozone NAAQS in 2016 (81 FR 78688, November 8, 2016).

In response to the court decision, Texas moved quickly to address the court's concerns regarding the redesignation substitutes that had been approved for the DFW area. Within 13 months of the *South Coast II* decision, Texas proposed and finalized at the state-level a demonstration that all five statutory criteria for redesignation for each of the revoked NAAQS had been met, including the preparation of a SIP revision to address maintenance of both NAAQS for the area through 2032. In this action, we are determining the DFW area has met the five CAA criteria for redesignation for both NAAQS and therefore we are terminating all anti-backsliding obligations for those NAAQS.

The commenter discusses two specific anti-backsliding measures associated with a Severe classification, the CAA section 185 failure to attain fee program and the CAA section 182(d)(1) VMT program. Earthjustice states that this proposal cannot proceed without such programs for the DFW area, because in commenter's view, the programs are required because EPA ''still has never addressed its failure to reclassify the area to severe.''. To require these programs at this time, however, when the area has met the 1997 standard for more than five years and the State has provided a demonstration that all five criteria for redesignation have been met, including a maintenance plan demonstrating that the area will continue to meet the standard for 10 more years, would be an unnecessary and unproductive exercise. The D.C. Circuit's rationale in requiring EPA to continue to reclassify areas under a revoked NAAQS and consequently impose more stringent emission controls, like those cited by commenters, was in service of ''constrain[ing] ozone pollution'' in order to attain that NAAQS. *South Coast II,* 882 F.3d at 1147 (''If EPA were allowed to remove the [attainment] deadlines * * * a state could go unpenalized *without ever attaining the NAAQS.*'') (emphasis added).

Moreover, even if EPA were to make a determination *today* that the DFW area failed to attain by its 2013 Serious area attainment date and to reclassify the DFW area to Severe, that determination alone would not immediately render Texas in default of the section 185 fee program and the section 182 VMT requirements, as commenters suggest. When EPA makes a determination that an area has failed to attain and reclassifies that area, the Act prescribes that the Administrator may establish new deadlines for the submission of SIPs to meet the requirements of the new classification. CAA section 182(i). So were EPA to make such a determination, we would establish some period of time for Texas to submit the section 185 fee program and the VMT programs. Under EPA's longstanding interpretation of the CAA 107(d)(3)(E) criteria, states requesting redesignation to attainment must meet only the applicable requirements of the Act that come due prior to the submittal of a complete redesignation request. *See* September 4, 1992 Calcagni memorandum at 2. (''For purposes of redesignation, a State must meet all requirements of section 110 and Part D that were applicable prior to submittal of the complete redesignation request. When evaluating a redesignation request, Regions should not consider whether the State has met requirements that come due under the Act after submittal of a complete redesignation request.''); September 17, 1993 Michael Shapiro memorandum.[14] (''Specifically, before EPA can act favorably upon any State redesignation request, the statutorily-mandated control programs of section 110 and part D *(that were due prior to the time of the redesignation request)* must have been adopted by the State and approved by EPA into the SIP'') (emphasis added). Given that for a revoked NAAQS EPA is using the five statutory redesignation criteria to determine whether anti-backsliding should be terminated, we think it is reasonable to apply the same interpretations that we would in the redesignation context. Here, EPA never finalized a reclassification of the DFW area to Severe and never established SIP submission deadlines for Texas to submit a 185 program or a VMT program. Even if we were to do so now, because Texas has already submitted its demonstration that it is meeting all five statutory redesignation criteria and its request to terminate the area's anti-backsliding for the 1997 ozone NAAQS, under EPA's long-standing interpretation of the 107(d)(3)(E) criteria, those SIP programs are not within the scope of requirements considered by EPA in evaluating whether the criteria have been met.

Other states have faced somewhat similar situations in the past. One analogous example is the St. Louis area, which was designated as a Moderate ozone nonattainment area for the 1979 1-hour ozone NAAQS. This area failed to attain by its attainment date, and EPA

[14] *See* the September 17, 1993 memorandum from Michael Shapiro, ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992'' at *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2_old/19930917_shapiro_sips_redesignation_ozone_co_naa.pdf.*

did not timely issue its determination of that fact. Petitioners challenging EPA's eventual determination that the area did not attain attempted to argue that EPA had de facto made the determination years earlier than its actual 2001 rulemaking, via statements made in a letter to the Governor suggesting that air quality problems remained after the area's attainment date or by the negative implication of not having included the St. Louis area on a list of areas that had attained by the attainment date. The D.C. Circuit ruled that neither of these actions constituted the requisite determination of whether the area attained, agreeing with the Agency that ''if there has not been a rulemaking there has not been an attainment determination.'' *See Sierra Club* v. *Whitman,* 285 F.3d 63, 66 (D.C. Cir. 2002). Nor did the court endorse environmental petitioners' claim that EPA's 2001 determination that St. Louis failed to attain should be ''converted to the date the statute envisioned [*i.e.,* 1997], rather than the actual date of EPA's action.'' *Id.* at 68. The court ruled that the Administrative Procedure Act prohibits retroactive rulemaking, that there is no indication that Congress intended the CAA to be an exception to that prohibition, and that back-dating the effective date of EPA's determination of failure to attain would be arbitrary. *See id.* Specifically, the court stated, ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.'' *Id.*

The situation faced in the St. Louis 1-hour ozone nonattainment area resembles the current situation in the DFW area in another way. That is, after EPA issued the determination that St. Louis had failed to attain by the Moderate attainment deadline and reclassified the area to Serious, the St. Louis area came into attainment of the NAAQS and submitted its request to be redesignated *prior to the deadlines* to submit the Serious area requirements associated with the reclassification. In evaluating Missouri's request to redesignate St. Louis, EPA followed its longstanding interpretation of CAA section 107(d)(3)(E) and evaluated the redesignation based on whether the state had all of its required Moderate SIPs approved, but not based on whether the state had submitted and EPA had approved Serious area plans. Petitioners challenged this precise issue, arguing that Missouri was required to have submitted the Serious area requirements for the St. Louis area before it was permitted to move on to redesignation. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). The court flatly rejected petitioners' position. The 7th Circuit recognized that St. Louis was required to have been bumped up and treated as a Serious nonattainment area, and therefore subject to the more stringent requirements of that classification such as requiring sources of more than 50 tons (rather than 100 tons) of precursor chemicals to install control measures, but that there would be ''some lead time'' for covered sources to limit their emissions. *Id.* And, ''[b]efore that time arrived, St. Louis met the national ozone standard,'' and the court viewed this as a critical point. *See id.* It agreed with EPA that a reasonable interpretation of CAA section 107(d)(3)(E) was to adjudge St. Louis' redesignation request based on ''whatever actually was in the plan and already implemented *or due at the time of attainment.*'' *Id.* At the heart of the court's disagreement with petitioners was the petitioners' view that reclassification ''was some sort of punishment;'' whereas the court interpreted Congress' reclassification requirements as an instruction to reclassified areas ''to take additional steps . . . to achieve an adequate reduction in ozone, [so] it would be odd to require them even when they turned out to be unnecessary.'' *Id.* In the court's view, ''[r]eclassification was a combination of (a) goad (clean up or suffer expensive measures), and (b) palliative (sterner measures expedite compliance). Once an area has meet [sic] the national air quality standard, neither rationale calls for extra stringency; indeed the statutory system would not be much of a goad if the tighter controls must continue even after attainment.'' *Id.* at 542.

The St. Louis example is therefore informative to the current DFW situation in two ways. First, it suggests that the section 185 fee program SIP and the VMT SIP are not required submissions until EPA promulgates a rulemaking finding that the DFW area failed to attain by its attainment date and reclassifies the area and that such finding cannot be inferred without actual agency action. *See Sierra Club* v. *Whitman,* 285 F.3d at 66. Second, the St. Louis history indicates that even if EPA were to promulgate a finding today that the DFW area failed to attain by its 2013 attainment date, the evaluation being undertaken in this current action of whether the DFW area has met the statutory criteria for redesignation would not include the section 185 fee program or the VMT requirements, because the deadlines to submit those requirements would necessarily be established in the future, and Texas' March 29, 2019 request to terminate its anti-backsliding obligations for the DFW area under the 1997 ozone NAAQS would therefore pre-date any such deadlines.

Additionally, with respect to 185 fees, we note that the Act is explicit that the program begins if a Severe or Extreme area is found to have failed to attain by the applicable attainment deadline for those classifications. *See* CAA § 185(a) (noting that the program will apply ''if the area . . . has failed to attain the [NAAQS] for ozone by the applicable attainment date''). The earliest possible Severe attainment deadline under the Act would have been June 15, 2019. As the DFW area attained the 1997 ozone standard long before any Severe attainment deadline, fees would never be collected for failure to attain the 1997 ozone standard. To require the State to submit a program that could never be triggered does not serve the ultimate goal of the CAA, which is to have areas attain the various NAAQS that EPA establishes as expeditiously as practicable, not to create unnecessary paperwork exercises that could never achieve any environmental benefit.

With respect to the CAA section 182(d)(1)(A) VMT requirements, we note that such programs generally contain three elements: (1) Specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in the Severe nonattainment area, (2) reduction in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to comply with the reasonable further progress requirements of the Act, and (3) adoption and implementation of measures specified in section 108(f) of the Act as necessary to demonstrate attainment of the NAAQS. Even if EPA had promulgated a final determination that the DFW area failed to attain in 2013, or if EPA were to promulgate such a determination today, the Agency's action in 2015 clean data determination finding that the DFW area was attaining the NAAQS [15] would have the effect of

[15] 80 FR 52630, 52631 (September 1, 2015) (''Finalizing the CDD suspends the requirements for the TCEQ to submit an attainment demonstration or other SIPs related to attainment of the 1997 ozone NAAQS in the DFW area for so long as the area is attaining the standard (40 CFR 51.1118)'').

suspending the second and third elements—the RFP and attainment elements of the section 182(d)(1)(A) VMT SIP requirements.[16] As noted above, a clean data determination suspends the requirement to submit attainment-related planning SIPs for so long as the area continues to attain, and those requirements are permanently terminated when EPA finds that the redesignation criteria have been met. Therefore, even if we had reclassified the DFW area to Severe for the 1997 ozone NAAQS or were to do so now, and the first element of the VMT SIP at that point became or would become a required submission, these latter two VMT elements would not have been required to be submitted due to the clean data determination for the 1997 ozone NAAQS, and they are terminated now because the DFW area has met the CAA five criteria for redesignation.

If the State were now required to address section 182(d)(1)(A)'s first element, the requirement to offset any growth in emissions from growth in VMT or numbers of vehicle trips, following a bump up to a Severe classification, the first step would be to determine if there had been an increase in motor vehicle emissions in the area due to growth in VMT or vehicle trips between the base year used in SIP planning and 2014, the area's attainment year. As EPA has explained in its guidance on the VMT offset element,[17] it would only be necessary to adopt and implement a program of offsetting transportation control measures or other transportation control strategies if it is determined that there had been an increase in motor vehicle emissions due to increase in VMT or vehicle trips during that period. Again, however, because the area has not been reclassified as a Severe nonattainment area, no analysis of whether there has been such an increase in emissions from growth in VMT is required under the Act, no determination regarding such an analysis has been made or is required, and consequently no requirement to offset any such undetermined growth in emissions through implementation of TCMs has been triggered. Therefore, it is flatly incorrect for the commenter to assert that a Severe area VMT program must be implemented before EPA can take final action in this rule.

The commenter additionally argues that EPA has an overdue legal obligation to promulgate a FIP for the 185 fee and VMT programs. EPA has no authority to issue a FIP for these Severe area requirements. We have authority to promulgate a FIP only after we (1) find that a State has failed to make a required SIP submission or find that the SIP submission does not satisfy the minimum criteria found in 40 CFR 51, Appendix V (a ''finding of failure to submit'') or (2) disapprove a SIP submission in whole or in part. After making such a finding or disapproving a SIP submission we are required to promulgate a FIP within 2 years unless we approve a SIP submission that corrects the deficiency. *See* CAA section 110(c)(1). We have not made a finding of failure to submit for a 185 fee or VMT program nor have we disapproved a SIP revision addressing either of these programs for the DFW area. Thus, we do not have the authority to promulgate a FIP for these programs in the DFW area.[18]

Comment: Earthjustice states that EPA arbitrarily flouts important considerations relevant to this rulemaking, and states that this action's consequences on interstate and intrastate ozone transport are not considered. Earthjustice states that EPA failed to consider how redesignation will affect Texas' interstate ozone transport obligations under existing regulations and how redesignation of the DFW area will affect attainment in other Texas areas, such as San Antonio and Houston, both of which struggle with existing ozone pollution and are in nonattainment for several standards. Earthjustice states EPA must consider the interstate and intrastate consequences of redesignating and relaxing anti-backsliding controls in the DFW area.

Response: We are not redesignating the DFW area for the revoked 1-hour and 1997 ozone NAAQS. We disagree that EPA is required under the CAA to consider the effect of this action on interstate and intrastate ozone transport before it may terminate the DFW area's anti-backsliding requirements with respect to the two revoked ozone NAAQS in question, and we do not agree that such considerations are relevant to this rulemaking. At the outset, we note that the State is projecting DFW area ozone precursor emissions will decrease, reducing the DFW area's impact on other areas.

Interstate ozone transport is addressed under CAA section 110(a)(2),[19] and Texas' interstate transport obligations under the Act are not in any way altered by this action. To the extent that Texas has outstanding interstate ozone transport obligations under CAA section 110(a)(2)(D), they remain obligated to address those statutory requirements after finalization of this action.

The TCEQ has also adopted Serious Area attainment plans for the Houston and DFW areas for the 2008 8-hour ozone standard, and those submittals—including any obligation to address intrastate transport as necessary to attain the NAAQS—will also be evaluated in separate actions.

Comment: Earthjustice states that EPA's Proposal leaves important modeling questions unaddressed. Earthjustice states EPA predicts that point source NO_X emissions will increase slightly between 2014 and 2020, then expects these NO_X emissions to remain identical until 2032. In its TSD, EPA does not explain how it arrived at its modeling prediction and given the tremendous growth of industrial facilities in the Dallas area due, in part, to oil and gas extraction activities it is difficult to see how this prediction holds. Similarly, EPA fails to explain how VOC emissions from point sources will remain essentially identical between 2014 and 2032. Earthjustice also questions whether these predictions are technically sound or with a ''margin of error'' that might result in putting the Dallas area in nonattainment for either or both standards if future relaxed new source review permit controls are put in place.

Response: As described in our Proposal and TSD, EPA evaluated the

[16] ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard'' Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995. To view the memo please visit *https://www.epa.gov/ground-level-ozone-pollution/reasonable-further-progress-attainment-demonstration-and-related.*

[17] *See* page 7 of ''Implementing Clean Air Act Section 182(d)(1)(A): Transportation Control Measures and Transportation Control Strategies to Offset Growth in Emissions Due to Growth in Vehicle Miles Travelled'', Office of Transportation and Air Quality, EPA–420–B–12–053, August 2012. This guidance is available at *https://nepis.epa.gov/Exe/ZyPDF.cgi/P100EZ4X.PDF?Dockey=P100EZ4X.PDF.*

[18] Although the commenter does not explicitly argue for this, they seem to suggest that EPA should consider the VMT and 185 fee programs as having already been due in the past and Texas to be delinquent in submitting such programs, even though EPA never finalized a reclassification for the DFW area. Because of the complexity of the CAA's SIP provisions and the interrelationship between federal and state action, the EPA believes it is inappropriate to impose any retroactive effect on decisions in a manner that would create deadlines that have long passed. EPA has historically refused to do this, and courts have supported this position. *See, e.g., Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002).

[19] *See* ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2),'' Memorandum from Stephen D. Page, September 13, 2013. This document is available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf.*

emission inventories (EIs) submitted by the State in its Maintenance Plan and we found the State's approach and methods of calculating the base year and future year EIs appropriate.[20] We disagree that we or the State did not provide an explanation for holding the point source VOC emissions constant for the projection years for the purposes of demonstrating that the standard would be maintained. As TCEQ explains in its SIP, it was following EPA guidance (noting that emissions trends for ozone precursors have generally declined) and thus, for planning purposes, TCEQ found it reasonable to hold point source emissions constant, rather than show such emissions as declining.[21] For projection year EIs, TCEQ designated the 2016 EI as the baseline from which to project future-year emissions because using the most recent point source emissions data would capture the most recent economic conditions and any recent applicable emissions controls. As TCEQ further describes in its SIP, TCEQ noticed that the 2014 attainment year VOC emissions are higher than future-year emissions projected from the sum of the 2016 baseline emissions plus available emission credits.[22] Therefore, future point source VOC emissions were projected by using the 2014 values as a conservative estimate for all future interim years. This approach is consistent with EPA's EI Guidance document at 21.

For point source NO_X emissions, TCEQ took a different approach that is also conservative and fully explained in the SIP submittal. We disagree that there is any disparity. As explained in the SIP submittal, TCEQ held the most recent year (2016) emissions constant and accounted for growth through adjustments for cement kilns.[23] Each of the interim year NO_X EIs were adjusted to account for available, unused emissions credits. TCEQ also assumed that additional emissions would occur based on the possible use of emission credits, which are banked emissions reductions that may return to the DFW area in the future through the use of emission reduction credits (ERCs) and discrete emissions reduction credits (DERCs). All banked (*i.e.,* available for use in future years) and recently-used ERCs and DERCs were added[24] to the future year inventories. We believe this is a conservative estimate because historical use of the DERC has been less than 10 percent of the projected rate—including all the banked ERCs and DERCs in the 2020 inventory assumes a scenario where all available banked credits would be used in 2020, which is inconsistent with past credit usage.

Despite the conservative assumptions for point source growth, the total emissions estimated by the State for all anthropogenic sources of NO_X and VOC in the DFW area for 2020, 2026, and 2032 are lower than those estimated for 2014 (the attainment inventory year). Consistent with the Calcagni Memorandum regarding a Maintenance Demonstration, ''[a] State may generally demonstrate maintenance of the NAAQS by either showing that future emissions of a pollutant or its precursors will not exceed the level of the attainment inventory or by modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS.'' Calcagni memorandum at 2. Because the State's estimated future EIs for the DFW area do not exceed the 2014 attainment year EI, we do not expect the area to have emissions sufficient to cause a violation of the 1-hour or 1997 ozone NAAQS.

In addition, NNSR offsets will continue to be required in the DFW area addressed in this action because all nine counties are also designated nonattainment, and currently classified as Serious, under the 2008 ozone NAAQS.[25] The required NNSR offset for the DFW area at this time is 1.2:1 for sources emitting at least 50 tons per year, consistent with the Serious area requirements provided in CAA section 182(c)(10). Whether a new or modified major source in the DFW area chooses to offset NO_X or VOC or a combination of the two, the offsets must be made in the same ozone nonattainment area.

Finally, despite population and economic growth, emissions of NO_X and VOC in the DFW area have been decreasing since 1990. Emissions of NO_X in the DFW area have dropped from approximately 587.93 tons per day (tpd) (1990 base year under the 1-hour ozone NAAQS) to 442.08 tpd (2011 base year under the 2008 ozone NAAQS) and emissions of VOC have dropped from approximately 771.02 tpd (1990 base year) to 475.65 tpd (2011 base year)[26] *See* 59 FR 55586, November 8, 1994, and 80 FR 9204, February 20, 2015.[27] The DFW SIP must be further revised to meet the emission reductions required by CAA section 182(c)(2)(B) for the Serious ozone nonattainment classification under the 2008 ozone NAAQS.[28] This progress reflects efforts by the State, area governments and industry, federal measures, and others.[29]

Comment: Earthjustice states the DFW area did not meet its Moderate attainment date under the 2008 NAAQS and EPA will reclassify the area to Serious nonattainment. Commenter states that once EPA completes that action, ''the new source review requirements will snap back to serious area level and other serious areas requirements will again apply.'' This will cause the area's NSR requirements to ''roller coaster'' to no purpose. The commenter adds that if EPA insists on finalizing the proposal, it should wait to do so until after it reclassifies the DFW area.

Response: EPA appreciates the commenter's attention to this process detail. We reclassified the DFW area to Serious under the 2008 8-hour ozone

[20] *See https://www.epa.gov/moves/emissions-models-and-other-methods-produce-emission-inventories#locomotive.*

[21] *See* EPA's ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' published May 2017, EPA–454/b–17–002. Section 5, beginning on p. 119 of this Guidance document addresses *Developing Projected Emissions Inventories.* This Guidance document is available on EPA's website at *https://www.epa.gov/air-emissions-inventories/air-emissions-inventory-guidance-documents.*

[22] Not to be confused with the 2016 baseline and as noted earlier in this action, the 2014 base year EIs for NO_X and VOC represent the first year in which the DFW area is attaining both the 1-hour and 1997 ozone NAAQS and thus, the 2014 EI is also called the attainment inventory. The 2014 attainment inventory provides a starting point against which to evaluate the EI levels estimated for future years.

[23] Recently authorized emission limits from permits, consent decrees, and agreed orders were used to project emissions, which is a representative and conservative approach to emissions growth.

[24] The ERCs were divided by 1.15 before being added to the future year EIs to account for the NNSR permitting offset ratio for Moderate ozone nonattainment areas. Since the area is now classified as a Serious ozone nonattainment area however, any ERCs actually used will have to be divided by 1.2. See the SIP submittal for more specific detail on how Texas assumed and calculated the ERC and DERC use for the future EI years.

[25] Wise County is also included in the DFW Serious nonattainment area under the 2008 ozone NAAQS (84 FR 44238).

[26] The 1990 base year includes 126.09 tpd in biogenic VOC emissions. Biogenic emissions, *i.e.,* emissions from natural sources such as plants and trees, are not required to be included in the 2011 base year.

[27] We approved the area's Reasonable Further Progress (RFP) plan for the Moderate ozone NAAQS under the 2008 ozone NAAQS showing 15% emission reductions from 2011 through the attainment year (2017), plus an additional 3% emission reductions to meet the contingency measure requirement.

[28] The State recently adopted a SIP revision to meet RFP Serious area requirements for the DFW area with an additional average of 3% emission reductions from 2017 through the attainment year (2020), plus an additional 3% emissions reductions to meet the contingency measure requirement (*see https://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-ozone* for the State's Serious area RFP). *See* also 84 FR 44238.

[29] *See* also *https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health.*

NAAQS effective September 23, 2019 (84 FR 44238). Therefore, the commenter's concern that we should wait to finalize our proposal until the area is reclassified under the 2008 NAAQS is satisfied.

Comment: Earthjustice asserts that EPA must either create regulations to authorize termination of anti-backsliding protections when certain conditions are met or reverse its duly adopted, nationally applicable position that EPA lacks authority to redesignate areas under revoked standards. Earthjustice states that either action would be reviewable exclusively in the D.C. Circuit. Earthjustice further asserts that even if aspects of EPA's action constitute a locally or regionally applicable action that overbears the nationally applicable aspects of the action, Earthjustice believes that EPA's action would still be ''based on a determination of nationwide scope and effect'' (citing CAA section 307(b)(1)). Earthjustice asserts that ''EPA expressly proposed in its FR publication to base action on that determination (via either pathway),'' but also states that if a more specific finding and publication were necessary, that EPA is obligated to make the finding and publish it because EPA's action here is a determination of nationwide scope and effect. The commenter concludes that the venue for judicial review of this action therefore necessarily lies in the D.C. Circuit.

Response: First, as noted earlier, the EPA is not in this action changing DFW's designation, so Earthjustice's comments on that point are beyond the scope of this final action. Second, we disagree that promulgation of a regulation authorizing the action taken here is necessary or being undertaken in this notice. As mentioned earlier in this final action, we believe the D.C. Circuit's decision in *South Coast II* regarding the vacatur of the redesignation substitute mechanism made clear that under the CAA, areas may shed anti-backsliding controls where all five redesignation criteria are met. Through this final action, we are replacing our previous approvals of the redesignation substitutes for the DFW area for the revoked 1979 1-hour and 1997 ozone NAAQS, because that mechanism was rejected by the D.C. Circuit for its failure to include all five statutory redesignation criteria. Per the D.C. Circuit's direction, this action examines all five criteria, finds them to be met in the DFW area, and terminates the relevant anti-backsliding obligations for the DFW area, thereby replacing the prior invalid approvals for the DFW area. We do not agree that given the circumstances here, the parties must wait for EPA to promulgate a national regulation codifying what the D.C. Circuit has already indicated the CAA allows before we may replace the redesignation substitutes for the DFW area.

As such, we do not agree that this action is reviewable exclusively in the D.C. Circuit. *See* CAA section 307(b)(1). To the extent the commenter is asserting otherwise, we do not agree that this is a ''nationally applicable'' action under CAA section 307(b)(1). This final action approves a request from the State of Texas to find that the State has met all five of the statutory criteria for redesignation under CAA section 107(d)(3)(E) for the DFW area and it approves the submitted CAA section 175A(d) maintenance plan for the DFW area into the Texas SIP. The legal and immediate effect of the action terminates anti-backsliding controls for only the DFW area with respect to two revoked NAAQS and amends the 40 CFR part 81 tables accordingly for only the DFW area. Nothing in this action has legal effects in any area of the country outside of the DFW area or Texas on its face. *See Dalton Trucking, Inc.* v. *EPA,* 808 F.3d 875, 881 (D.C. Cir. 2015) (''To determine whether a final action is nationally applicable, 'this Court need look only to the face of the rulemaking, rather than to its practical effects.''' (internal citations omitted)). The fact that this is the second area in the country for which EPA will have approved termination of anti-backsliding per CAA requirements after *South Coast II* does not entail that the action itself is ''nationally applicable.''

Earthjustice next contends that even if it is true that EPA's final action is not nationally applicable but is locally or regionally applicable, that judicial review of this action should still reside in the D.C. Circuit because EPA's action is based on a determination of nationwide scope or effect. The commenter alleges that ''EPA has expressly proposed in its FR publication to base action on that determination (via either pathway).'' This is plainly untrue. Nowhere in the Proposal or in this final action did EPA make a finding that the action is based on a determination of nationwide scope or effect. The requirements under CAA section 307(b)(1) that would allow for review of a locally or regionally applicable action in the D.C. Circuit—*i.e.,* that EPA makes a finding that the action is based on a determination of nationwide scope or effect and that EPA publishes such a finding—have not been met. *See Dalton Trucking,* 808 F.3d at 882.

Comment: The TCEQ states that our past failure to provide for a legally valid mechanism for termination of anti-backsliding obligations for revoked standards has created uncertainty and our reluctance to redesignate for the revoked standards creates severe economic consequences for the public, regulated industry, and states. TCEQ added that (1) certainty on the issue of how the EPA must act to remove anti-backsliding requirements is an absolute necessity for states, potentially impacted regulated businesses, and citizens and (2) continued implementation of programs required for revoked, less stringent standards is costly and takes resources away from states and localities that are necessary to meet more stringent standards.

Response: We understand the value of regulatory certainty. We also understand that there is a cost for implementing required programs for revoked, less stringent standards. We have endeavored to provide flexibility to states on implementation approaches and control measures. The D.C. Circuit has upheld our revocation of previous ozone standards as long as sufficient anti-backsliding measures are maintained. In *South Coast II,* the court was clear that anti-backsliding measures could be shed if all five requirements for redesignation in CAA section 107(d)(3)(E) had been met. We are finding here that Texas has met all redesignation criteria necessary for termination of the anti-backsliding measures.

Comment: TCEQ states that (1) we continue to have authority to redesignate areas from ''nonattainment'' to ''attainment'' post-revocation of a NAAQS and (2) if we determine we do not have authority to redesignate areas to attainment post-revocation, we clearly have authority to determine that an area has met all redesignation requirements necessary for termination of anti-backsliding requirements. TCEQ states that EPA should redesignate the DFW area to attainment under the revoked 1-hour and 1997 ozone NAAQS. TCEQ states that EPA has the authority to, and should, revise the listings in Part 81 of the Code of Federal Regulations to show the DFW area as an attainment area under the revoked 1-hour and 1997 ozone NAAQS and make clarifying changes to the Part 81 tables to promote public understanding of what measures are required for areas under revoked standards.

Response: EPA disagrees with Commenter regarding our authority to redesignate an area under the revoked 1-hour and 1997 ozone NAAQS. As explained above, in revoking both the 1-hour and 1997 ozone standards, EPA revoked the associated designations

under those standards and stated we had no authority to change designations. *See* 69 FR 23951, April 30, 2004, 80 FR 12264, March 6, 2015, and *NRDC* v. *EPA,* 777 F.3d 456 (D.C. Cir. 2014) (explaining that EPA revoked the 1-hour NAAQS ''in full, including the associated designations'' in the action at issue in *South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 882 (D.C. Cir, 2006 (''*South Coast I*''). The recent D.C. Circuit decision addressing reclassification under a revoked NAAQS did not address EPA's interpretation that it lacks the ability to alter an area's designation post-revocation of a NAAQS. Moreover, the court's reasoning for requiring EPA to reclassify areas under revoked standards was that a reclassification to a higher classification is a control measure that constrains ozone pollution by imposing stricter measures associated with the higher classification. The same logic does not apply to redesignations, because redesignations do not impose new controls and can provide areas the opportunity to shed nonattainment area controls, provided doing so does not interfere with maintenance of the NAAQS. Therefore, we do not think it follows that the EPA is required to statutorily redesignate areas under a revoked standard simply because the court held that the Agency is required to continue to reclassify areas to a higher classification when they fail to attain. However, consistent with the *South Coast II* decision, we do have the authority to determine that an area has met all the applicable redesignation criteria for a revoked ozone standard and terminate the remaining anti-backsliding obligations for that standard. We are therefore revising the tables in 40 CFR part 81 to reflect that the DFW area has attained the revoked 1979 1-hour and revoked 1997 8-hour NAAQS, and that all anti-backsliding obligations with respect to those two NAAQS are terminated.

Comment: TCEQ stated that when we began stating that we no longer make findings of failure to attain or reclassify areas for revoked standards, we provided no rationale supporting why we would no longer do so.

Response: As noted above, in the Phase I rule to implement the 1997 ozone standard, we revoked the 1-hour NAAQS and designations for that standard (*see* 69 FR 23951, 23969–70, April 30, 2004). Accordingly, there was neither a 1-hour standard against which to make findings for failure to attain nor 1-hour nonattainment areas to reclassify. We also explained that it would be counterproductive to continue to impose new obligations with respect to the revoked 1-hour standard given on-going implementation of the newer 8-hour 1997 NAAQS. *Id. at* 23985. We recognize that subsequent court decisions, such as the *South Coast II* decision, have affected our view. The *South Coast II* decision vacated our waiver of the statutory attainment deadlines associated with the revoked 1997 ozone NAAQS, for areas that fail to meet an attainment deadline for the 1997 ozone standard, and we are determining how to implement that decision going forward.

Comment: TCEQ commented that if we interpreted revocation of ozone standards as limiting our authority to implement all statutory rights and obligations, including the rights of states to be redesignated to attainment, it would cause an absurd result: *i.e.,* implementing anti-backsliding measures in perpetuity. The commenter added that it would subvert one of the foundational principles of the CAA—restricting the right of states to be freed from obligations that apply to nonattainment areas upon the states achieving the primary purpose of Title I of the CAA—to attain the NAAQS.

Response: The ''absurd result'' noted by the commenter is that an area would need to implement anti-backsliding measures in perpetuity. Through this action we are terminating anti-backsliding controls for the DFW area upon a determination that the five statutory criteria of CAA section 107(d)(3)(E) have been met. Therefore, although we are not redesignating the DFW area to attainment for the revoked ozone standards, the ''absurd result'' noted by the commenter does not remain.

The EPA does believe it is appropriate for states to be freed from anti-backsliding requirements in place for the revoked NAAQS in certain circumstances, and we believe the court in *South Coast II* was clear that this could be done if all the CAA criteria for a redesignation had been met.

Comment: TCEQ commented that the CAA makes no distinction between revoked or effective standards regarding EPA's authority to redesignate. TCEQ also commented that reading the CAA section granting authority for designations generally, it is apparent that Congress intended the same procedures be followed regardless of the status of the NAAQS in question. TCEQ added that nothing in CAA section 107 creates differing procedures when we revoke a standard or qualifies our mandatory duty to act on redesignation submittals from states.

Response: None of the substantive provisions of the CAA make distinctions between revoked and effective NAAQS and the redesignation provision in section 107 is no different. Nonetheless, as noted above, at the time that we revoked the ozone NAAQS in question, we also revoked all designations associated with that NAAQS. We therefore do not think a statutory redesignation is available for an area that no longer has a designation. However, in *South Coast II,* the D.C. Circuit found that the CAA allows areas under a revoked NAAQS to shed anti-backsliding controls if the statutory redesignation criteria are met.

Comment: The TCEQ suggests that the EPA should expand upon the rationale provided in our Proposal for our decision to take no action on the maintenance motor vehicle emission budgets (MVEBs) related to the 1-hour and 1997 ozone NAAQS.

Response: The conformity discussion in our May 21, 2012 rulemaking (77 FR 30160) to establish classifications under the 2008 ozone NAAQS explains that our revocation of the 1-hour standard under the 1997 ozone Phase I implementation rule and the associated anti-backsliding provisions were the subject of the *South Coast I* litigation (*South Coast Air Quality Management District* v. *EPA,* 472 F.3d at 882). The Court in *South Coast I* affirmed that conformity determinations need not be made for a revoked standard. Instead, areas would use adequate or approved MVEBs that had been established for the now revoked NAAQS in transportation conformity determinations for the new NAAQS until the area has adequate or approved MVEBs for the new NAAQS. As explained in our June 24, 2019 proposal, the DFW area already has NO_X and VOC MVEBs for the 2008 ozone NAAQS, which are currently used to make conformity determinations for both the 2008 and 2015 ozone NAAQS for transportation plans, transportation improvement programs, and projects according to the requirements of the transportation conformity regulations at 40 CFR part 93.[30]

The TCEQ offers its own basis to expand the rationale for EPA's action by citing the transportation conformity regulations at 40 CFR 93.109(c), which provides that a regional emissions analysis for conformity is only required for a nonattainment or maintenance area until the effective date of revocation of the applicable NAAQS. The TCEQ concludes that this sufficiently justifies

[30] *Transportation Conformity Guidance for the South Coast II Court Decision,* EPA–420–B–18–050. November 2018, available on EPA's web page at *https://www.epa.gov/state-and-local-transportation/policy-and-technical-guidance-state-and-local-transportation.*

EPA's determination not to act on the MVEBs in this SIP submittal because the effective date of revocation for both the 1-hour and 1997 ozone NAAQS has passed, and therefore a regional emissions analysis for conformity is no longer required for these NAAQS in the DFW area. However, EPA notes that 40 CFR 93.109 represents the criteria and procedures for determining conformity *in cases where a determination is required.* As previously explained, the DFW area is not required to demonstrate conformity under the revoked 1-hour and 1997 ozone NAAQS, hence 40 CFR 93.109(c) is not an applicable rationale for the DFW area.

Comment: TCEQ stated that we have the authority to, and should, revise the designations listing in 40 CFR 81 to better reflect the status of applicable anti-backsliding obligations for the areas.

Response: We believe that we have the authority to revise the tables in 40 CFR 81 to better reflect the status of applicable anti-backsliding obligations, particularly because those tables currently reflect the invalid redesignation substitutes that this final action is replacing. We are making ministerial changes to the tables for the 1-hour and 1997 ozone standards in 40 CFR 81.344 to better reflect the status of applicable anti-backsliding obligations for the DFW area.

III. Final Action

A. Plan for Maintaining the Revoked Ozone Standards

We are approving the maintenance plan for both the revoked 1-hour and 1997 ozone NAAQS in the DFW area because we find it demonstrates the two ozone NAAQS (1979 1-hour and 1997 8-hour) will be maintained for 10 years following this final action (in fact, the State's plan demonstrates maintenance of those two standards through 2032). As further explained in our Proposal and above, we are not approving the submitted 2032 NO_X and VOC MVEBs for transportation conformity purposes because mobile source budgets for more stringent ozone standards are in place in the DFW area. We are finding that the projected emissions inventory which reflects these budgets is consistent with maintenance of the revoked 1-hour and 1997 ozone standards.

B. Redesignation Criteria for the Revoked Standards

We are determining that the DFW area continues to attain the revoked 1-hour and 1997 ozone NAAQS. We are also determining that all five of the redesignation criteria at CAA section 107(d)(3)(E) for the DFW area have been met for these two revoked standards.

C. Termination of Anti-Backsliding Obligations

We are terminating the anti-backsliding obligations for the DFW area with respect to the revoked 1-hour and 1997 ozone NAAQS. Consistent with the *South Coast II* decision, anti-backsliding obligations for the revoked ozone standards may be terminated when the redesignation criteria for those standards are met. This final action replaces the redesignation substitute rules that were previously promulgated for the revoked 1-hour and 1997 ozone NAAQS (81 FR 78688, November 8, 2016.).

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the air quality designation status of geographical areas and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements. While we are not in this action redesignating any areas to attainment, we are approving the state's demonstration that all five redesignation criteria have been met. Similar to a redesignation, the termination of anti-backsliding requirements in this action does not impose any new requirements.

With regard to the SIP approval portions of this action, 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, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, where EPA is acting on the SIPs in this action, we are merely approving State law as meeting Federal requirements and are not imposing additional requirements beyond those imposed by State law.

For these reasons, this action as a whole:

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of

this action must be filed in the United States Court of Appeals for the appropriate circuit by June 5, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen oxides, Ozone, Volatile organic compounds.

List of Subjects in 40 CFR Part 81

Dated: March 19, 2020.

Kenley McQueen,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart SS—Texas

■ 2. In § 52.2270(e), the second table titled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding an entry at the end of the table for ''Dallas-Fort Worth Redesignation Request and Maintenance Plan for the 1-hour and 1997 8-hour Ozone Standards''.

The addition reads as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State approval/ effective date	EPA approval date	Comments
* *	*	*	*	* *
Dallas-Fort Worth Redesignation Request and Maintenance Plan for the 1-hour and 1997 8-hour Ozone Standards.	Dallas Fort-Worth, TX	3/29/2019	4/6/2020, [Insert **Federal Register** citation].	

■ 3. Section 52.2275 is amended by revising paragraph (m) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(m) Termination of Anti-backsliding Obligations for the Revoked 1-hour and 1997 8-hour ozone standards. Effective May 6, 2020 EPA has determined that the Dallas-Fort Worth area has met the Clean Air Act criteria for redesignation. Anti-backsliding obligations for the revoked 1-hour and 1997 8-hour ozone standards are terminated in the Dallas-Fort Worth area.

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 4. The authority citation for Part 81 continues to read as follows:

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

■ 5. In § 81.344:

■ a. In the table titled ''Texas—Ozone (1-Hour Standard)'' revise the entry for ''Dallas-Fort Worth Area'' and footnote 3.

■ b. In the table titled ''Texas—1997 8-Hour Ozone NAAQS (Primary and secondary)'' revise the entry for ''Dallas-Fort Worth, TX'' and footnote 5 and remove footnote 6.

The revisions read as follows:

§ 81.344 Texas

* * * * *

TEXAS—OZONE

[1-Hour standard] [1]

Designated area	Designation		Classification	
	Date [2]	Type	Date [2]	Type
* *	*	*	*	*
Dallas-Fort Worth Area: Collin County.[3] Dallas County.[3] Denton County.[3] Tarrant County.[3]	See footnote 3	See footnote 3	See footnote 3	See footnote 3.
* *	*	*	*	*

* * * * * * * *

[3] The Dallas-Fort Worth Area was designated and classified as Moderate nonattainment on November 15, 1990. The area was classified as Serious nonattainment on March 20, 1998 and was so designated and classified when the 1-hour ozone standard, designations and classifications were revoked. The area has since attained the 1-hour ozone standard and met all the Clean Air Act criteria for redesignation. All 1-hour ozone standard anti-backsliding obligations for the area are terminated effective May 6, 2020.

* * * * *

TEXAS—1997 8-HOUR OZONE NAAQS

[Primary and secondary] [1]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* *	*	* *	*	*
Dallas-Fort Worth, TX:	See footnote 5	See footnote 5	See footnote 5	See footnote 5.
Collin County.[5]				
Dallas County.[5]				
Denton County.[5]				
Ellis County.[5]				
Johnson County.[5]				
Kaufman County.[5]				
Parker County.[5]				
Rockwall County.[5]				
Tarrant County.[5]				
* *	*	* *	*	*

* * * * * * *

[5] The Dallas-Fort Worth, TX area was designated and classified as a Moderate nonattainment area effective June 15, 2004. The area was classified as Serious nonattainment effective January 19, 2011. The area has since attained the 1997 ozone standard and met all the Clean Air Act criteria for redesignation. All 1997 8-hour ozone standard anti-backsliding obligations for the area are terminated effective May 6, 2020.

* * * * *

[FR Doc. 2020–06198 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 85, No. 66
Monday, April 6, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0212; Product Identifier 2018–SW–097–AD]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Sikorsky Aircraft Corporation Model S–76C helicopters. This proposed AD was prompted by reports of inaccurate main gear box (MGB) indications in flight. This proposed AD would require updating the remote data acquisition unit (RDAU) software and re-identifying the RDAU and, for certain helicopters, updating the software of the display unit (DU) and re-identifying the DU. 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 21, 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 your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, 124 Quarry Road, Trumbull, CT 06611; phone: 1–800–Winged–S; email: *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *https://www.sikorsky360.com.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0212; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Min Zhang, Aviation Safety Engineer, Boston ACO Branch, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7161; email: *min.zhang@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–2020–0212; Product Identifier 2018–SW–097–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

The FAA has received reports of inaccurate MGB indications in flight. There have been seven inaccurate oil pressure indications in-flight, including one event in which the flight crew called ''Mayday,'' and considered ditching the helicopter. There have been no comprehensive root cause findings, but there have been multiple erroneous indications and annunciations, as well as hardware subcomponent failures. There is a possibility of an elevated operating temperature effect on subcomponent reliability, which causes instability in the power supply output. In at least one incident, the malfunction was due to a rare soft failure of a capacitor in the +15Vdc power supply circuit on the engine processor board installed in channel B of the RDAU. This condition resulted in multiple erroneous values and annunciations on channel B, and if not addressed, could cause the flight crew to land immediately, and consequent possible loss of the helicopter, injury, or fatality. To address this issue, this proposed AD would require updating the RDAU software and re-identifying the RDAU and, for certain helicopters, updating the software of the DU and re-identifying the DU.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following Sikorsky service information.

Alert Service Bulletin 76–31–3, Revision B, dated June 26, 2018; Alert Service Bulletin 76–31–4, Revision A, dated May 30, 2018; and Alert Service Bulletin 76–31–5, dated July 31, 2018. This service information describes procedures for updating the RDAU software and re-identifying the RDAU. This service information also describes procedures for sending the inspection results to Sikorsky Aircraft Corporation. These documents are distinct since they apply to specific helicopter models in different configurations (different part numbered RDAU units).

Service Bulletin 76–006, Revision A, dated August 23, 2018. This service information describes procedures for updating the software of DU part number 76450–01098–101, and re-identifying the DU as part number 76450–01098–108. This service information also describes procedures

for sending the inspection results to Sikorsky Aircraft Corporation.

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

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.''

Differences Between This Proposed AD and the Service Information

The service information recommends accomplishing the update of the RDAU software and re-identification of the RDAU and, for certain helicopters, update of the software of the DU and re-identification of the DU, depending on service information, no later than a specific calendar date (April 30, 2019 for Alert Service Bulletin 76–31–3, Revision B, dated June 26, 2018; June 30, 2019 for Alert Service Bulletin 76–31–4, Revision A, dated May 30, 2018; or July 31, 2019 for Alert Service Bulletin 76–31–5, dated July 31, 2018). In developing an appropriate compliance time for this AD, the FAA considered factors including the manufacturer's recommendation, the degree of urgency associated with the subject unsafe condition, and the average utilization of the affected fleet. After considering these factors, the FAA finds that a 500 hour time-in-service compliance time (which is approximately one year based on the average annual flight hours for Sikorsky Aircraft Corporation Model S–76C helicopters) represents an appropriate interval of time for affected helicopters to continue to operate without compromising safety.

Costs of Compliance

The FAA estimates that this proposed AD affects 99 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Update RDAU software (99 helicopters)	3 work-hours × $85 per hour = $255	*	$255	$25,245
Update display units (52 helicopters)	7 work-hours × $85 per hour = $595	*	595	30,940
Reporting (99 helicopters)	1 work-hour × $85 per hour = $85	$0	85	8,415

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

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

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA 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):

Sikorsky Aircraft Corporation: Docket No. FAA–2020–0212; Product Identifier 2018–SW–097–AD.

(a) Comments Due Date

The FAA must receive comments by May 21, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Sikorsky Aircraft Corporation Model S–76C helicopters, certificated in any category, equipped with remote data acquisition unit (RDAU) part number 76450–01098–106, 76450–01098–107, or 76450–01098–109.

(d) Subject

Joint Aircraft Service Component (JASC) Code 3100, Indicating/recording system.

(e) Unsafe Condition

This AD was prompted by reports of inaccurate main gear box (MGB) indications in flight. The FAA is issuing this AD to address inaccurate MGB indications in flight, resulting in multiple erroneous values/annunciations on channel B, which could cause the flight crew to land immediately, and consequent possible loss of the helicopter, injury, or fatality.

(f) Compliance

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

(g) RDAU and Display Unit (DU) Updates

Within 500 hours time-in-service after the effective date of this AD, do the actions specified in paragraphs (g)(1) through (4) of this AD, as applicable to your helicopter.

(1) For helicopters equipped with RDAU part number 76450–01098–109, update the RDAU software and re-identify the RDAU in accordance with Section 3., Paragraphs A. through J. of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–3, Revision B, dated June 26, 2018, except you are not required to return the RDAU to Parker Fluid Systems Division (FSD).

(2) For helicopters equipped with RDAU part number 76450–01098–107, update the RDAU software and re-identify the RDAU in accordance with Section 3., Paragraphs A. through J. of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–4, Revision A, dated May 30, 2018, except you are not required to return the RDAU to Parker FSD.

(3) For helicopters equipped with RDAU part number 76450–01098–106, update the RDAU software and re-identify the RDAU in accordance with Section 3., Paragraphs A. through K. of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–5, dated July 31, 2018, except you are not required to return the RDAU to Parker FSD.

(4) For helicopters equipped with RDAU part number 76450–01098–106, update the software of DU part number 76450–01098–101 and re-identify the DU as part number 76450–01098–108, in accordance with Section 3., Paragraphs A. through J. of the Accomplishment Instructions of Sikorsky Service Bulletin 76–006, Revision A, dated August 23, 2018, except you are not required to return the DU to Parker FSD.

(h) Parts Installation Limitations

As of the effective date of this AD, no person may install, on any helicopter, a DU part number 76450–01098–101, unless it has been modified in accordance with the requirements of paragraph (g)(4) of this AD.

(i) Reporting

At the applicable time specified in paragraph (i)(1) or (2) of this AD, submit a report of compliance with the actions specified in paragraphs (g)(1) through (4) of this AD, as applicable to your helicopter. The report must include the document number and title of the service information used, the owner and/or operator of the helicopter, the submitter's name, date, and the helicopter serial number. Submit the report to Sikorsky Aircraft Corporation in accordance with Section 3., Paragraph A. (Record of Compliance) of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–3, Revision B, dated June 26, 2018; Section 3., Paragraph L. of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–4, Revision A, dated May 30, 2018; Section 3., Paragraph M. of the Accomplishment Instructions of Sikorsky Alert Service Bulletin 76–31–5, dated July 31, 2018; or Section 3., Paragraph L. of the Accomplishment Instructions of Sikorsky Service Bulletin 76–006, Revision A, dated August 23, 2018, as applicable to your helicopter.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(j) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraphs (g)(1) and (i) of this AD, if those actions were performed before the effective date of this AD using Sikorsky Alert Service Bulletin 76–31–3, dated March 2, 2018; or Sikorsky Alert Service Bulletin 76–31–3, Revision A, dated March 29, 2018.

(2) This paragraph provides credit for the actions required by paragraphs (g)(2) and (i) of this AD, if those actions were performed before the effective date of this AD using Sikorsky Alert Service Bulletin 76–31–4, dated May 17, 2018.

(3) This paragraph provides credit for the actions required by paragraphs (g)(4) and (i) of this AD, if those actions were performed before the effective date of this AD using Sikorsky Service Bulletin 76–006, dated July 26, 2018.

(k) Paperwork Reduction Act Burden Statement

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

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m)(1) of this AD.

(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.

(m) Related Information

(1) For more information about this AD, contact Min Zhang, Aviation Safety Engineer, Boston ACO Branch, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7161; email: *min.zhang@faa.gov.*

(2) For service information identified in this AD, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, 124 Quarry Road, Trumbull, CT 06611; phone: 1–800–Winged–S; email: *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *https://www.sikorsky360.com.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Issued on March 31, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–07047 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0598; Product Identifier 2018–SW–030–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Textron, Inc. (Type Certificate Previously Held by Bell Helicopter Textron, Inc.) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bell Textron, Inc. (Type Certificate previously held by Bell Helicopter Textron, Inc.) (Bell) Model 204B, 205A, 205A–1, 205B, 212, 214B, 214B–1, 412, 412CF, and 412EP helicopters. This proposed AD was prompted by a report of a shoulder harness seat belt comfort clip (comfort clip) interfering with the seat belt inertia reel. This proposed AD would require removing comfort clips from service and inspecting the seat belt shoulder harness (harness) for a rip or an abrasion. 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 21, 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 Bell Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone 817–280–3391; fax 817–280–6466; or at *https://www.bellcustomer.com.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

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–2018–0598; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kuethe Harmon, Safety Management Program Manager, DSCO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5198; email: *Kuethe.Harmon@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–2018–0598; Product Identifier 2018–SW–030–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

The FAA proposes to adopt a new AD for certain Bell Model 204B, 205A, 205A–1, 205B, 212, 214B, 214B–1, 412, 412CF, and 412EP helicopters. This proposed AD was prompted by a series of service bulletins issued by Bell, reporting an issue with certain comfort clips part-numbers (P/Ns) D7LZ–6560286–A, D7LZ–6560286–B, and 504636–401, which are installed on seat belt assemblies. A design review by Leonardo S.p.A Helicopter (formerly Agusta S.p.A., Finmeccanica S.p.A.) indicates the use of the affected comfort clips could jeopardize, in cases of impact or deceleration, the correct functionality of the seat belt or the seat belt inertia reel.

Bell Model 204B, 205A, 205A–1, 205B, and 212 helicopters were not delivered with comfort clips, but due to design similarity, the FAA has included them in this proposed AD because owners/operators may install the comfort clips post-delivery. Bell consequently reported in its service bulletins that it will stop delivering and selling the comfort clips.

The actions of this proposed AD are intended to prevent the seat belt from locking, potentially resulting in injury to the occupant during an emergency landing.

Related Service Information

The FAA reviewed Bell Alert Service Bulletin (ASB) 204B–15–70 for Model 204B helicopters, Bell ASB 205–15–113 for Model 205A and 205A–1 helicopters, Bell ASB 205B–15–66 for Model 205B helicopters, Bell ASB 212–15–156 for Model 212 helicopters, Bell ASB 412–15–170 for Model 412 and 412EP helicopters, and Bell ASB 412CF–15–60 for Model 412CF helicopters, all dated January 20, 2016. The FAA also reviewed Bell ASB 214–15–76, dated January 11, 2016, for Model 214B and 214B–1 helicopters. This service information specifies removing the comfort clips from all crew and passenger seat belt assemblies.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require, within 50 hours time-in-service (TIS), removing from service each comfort clip P/Ns D7LZ–6560286–A, D7LZ–6560286–B, and 504636–401, from the seat belt assembly and inspecting each harness for a rip and an abrasion. If there is a rip or abrasion, this proposed AD would require removing the harness from service before further flight.

After the effective date of this AD, this proposed AD would prohibit installing any comfort clip P/Ns D7LZ–6560286–A, D7LZ–6560286–B, or 504636–401 on any helicopter.

Differences Between This Proposed AD and the Service Information

The service information specifies a compliance time of within 100 flight hours or no later than February 21, 2016, and does not specify inspecting each harness for a rip or an abrasion. This proposed AD would require a compliance time of within 50 hours TIS and would require inspecting each harness for a rip or an abrasion. The FAA determined that including an

inspection for harness damage is necessary to correct the unsafe condition.

Costs of Compliance

The FAA estimates that this proposed AD would affect 210 helicopters of U.S. registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor costs are estimated at $85 per work-hour.

Removing a comfort clip would take about 0.5 work-hour, for an estimated cost of $43 per clip.

Inspecting a harness would take about 0.25 work-hour, for an estimated cost of $21 per harness.

If required, replacing a harness would take about 1 work-hour and parts would cost about $1,050 for an estimated cost of $1,135 per harness.

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):

Bell Textron, Inc. (Type Certificate Previously Held by Bell Helicopter Textron, Inc.): Docket No. FAA–2018–0598; Product Identifier 2018–SW–030–AD.

(a) Comments Due Date

The FAA must receive comments by May 21, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bell Textron, Inc. (Type Certificate previously held by Bell Helicopter Textron, Inc.) Model 204B, 205A, 205A–1, 205B, 212, 214B, 214B–1, 412, 412CF, and 412EP helicopters, certificated in any category, with a shoulder harness seat belt comfort clip (comfort clip) part numbers (P/Ns) D7LZ–6560286–A, D7LZ–6560286–B, or 504636–401, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code: 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by a report of a comfort clip interfering with the seat belt inertia reel. The FAA is issuing this AD to prevent the seat belt from locking. The unsafe condition, if not addressed, could result in injury to the occupant during an emergency landing.

(f) Compliance

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

(g) Required Actions

(1) Within 50 hours time-in-service (TIS):

(i) Remove from service each comfort clip P/Ns D7LZ–6560286–A, D7LZ–6560286–B, or 504636–401 from the shoulder harness seat belt (harness).

(ii) Inspect each harness for a rip and an abrasion. If there is a rip or any abrasion, before further flight, remove from service the harness.

(2) After the effective date of this AD, do not install comfort clip P/Ns D7LZ–6560286–A, D7LZ–6560286–B, or 504636–401 on any helicopter.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, DSCO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: *9-ASW-190-COS@faa.gov.*

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

(i) Related Information

(1) For more information about this AD, contact Kuethe Harmon, Safety Management Program Manager, DSCO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5198; email *kuethe.harmon@faa.gov.*

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

Issued on March 31, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–07086 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1, 11, 16, and 129

[Docket No. FDA–2019–N–3325]

RIN 0910–AH31

Laboratory Accreditation for Analyses of Foods; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period for the proposed rule and for its information collection provisions.

SUMMARY: The Food and Drug Administration (FDA or we) is

extending for a second time the comment period for the proposed rule, and for the information collection related to the proposed rule, entitled ''Laboratory Accreditation for Analyses of Foods'' that appeared in the **Federal Register** of November 4, 2019. We are taking this action in response to a request from several food industry associations to extend open comment periods while their members focus on continuity of critical infrastructure operations due to the recent COVID–19 public health declaration. We also are taking this action to keep the comment period for the information collection provisions associated with the rule consistent with the comment period for the proposed rule.

DATES: FDA is further extending the comment period on the proposed rule published November 4, 2019 (84 FR 59452), which was first extended February 28, 2020 (85 FR 11893). Submit either electronic or written comments on the proposed rule by July 6, 2020. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 (PRA) by July 6, 2020 (see the ''Paperwork Reduction Act of 1995'' section of the proposed rule).

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 July 6, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 6, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–3325 for ''Laboratory Accreditation for Analyses of Foods.'' 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: Timothy McGrath, Food and Feed Laboratory Operations, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rm. 3142, Rockville, MD 20857, 301–796–6591, email: *timothy.mcgrath@fda.hhs.gov.*

With regard to the information collection: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, email: *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 4, 2019 (84 FR 59452), we published a proposed rule entitled ''Laboratory Accreditation for Analyses of Foods'' with a 120-day comment period on the provisions of the proposed rule and on the information collection provisions that are subject to review by the Office of Management and Budget under the PRA (44 U.S.C. 3501–3521). In the **Federal Register** of February 28, 2020 (85 FR 11893), we published an extension of the comment period for the proposed rule, and for the information collection related to the proposed rule, until April 6, 2020. The purpose of the first extension was to allow interested persons an additional opportunity to consider the proposal.

After we extended the comment period by 30 days, the outbreak of COVID–19, the disease caused by the novel coronavirus, caused the World Health Organization to declare a global pandemic.[1] The President subsequently proclaimed that the COVID–19 outbreak in the United States constitutes a

[1] See *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.*

national emergency.[2] Soon thereafter the U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency issued guidance identifying, for the COVID–19 pandemic, which infrastructure sectors are critical to maintain necessary services and functions; one is the food and agriculture sector.[3]

FDA has received a request for a 120-day extension of all open comment periods for food-related proposed regulations, draft guidance documents, and **Federal Register** notices to allow the food industry to focus its efforts on COVID–19 response efforts and assuring that food production continues without pause (Ref. 1). FDA has considered the request in light of the role of the Food and Agriculture Sector in maintaining critical infrastructure and recognizing that the comment period currently is scheduled to close during the acute response to COVID–19. We have concluded that it is reasonable to extend for approximately 90 days the comment period for the Laboratory Accreditation for Analyses of Foods proposed rule. The Agency believes that this extension, together with the original 30-day extension, allows adequate time for any interested persons to consider the proposal fully and submit comments. We also are extending the comment period for the information collection provisions to make the comment period for the information collection provisions the same as the comment period for the provisions of the proposed rule. To clarify, FDA is requesting comment on all issues raised by the proposed rule.

II. Reference

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov.*

1. Letter from Food & Beverage Issue Alliance to Frank Yiannas, Deputy Commissioner for Food Policy and Response, and Susan T. Mayne, Director of the Center for Food Safety and Applied Nutrition, March 23, 2020.

Dated: April 1, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–07171 Filed 4–3–20; 8:45 am]

BILLING CODE 4164–01–P

[2] See *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[3] See *https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2020–0150; FRL–10007–41–Region 1]

Air Plan Approval; New Hampshire; Negative Declaration for the Oil and Gas Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. The revision provides the state's determination, via a negative declaration, that there are no facilities within its borders subject to EPA's 2016 Control Technique Guideline (CTG) for the oil and gas industry. The intended effect of this action is to propose approval of these items into the New Hampshire SIP. This action is being taken in accordance with the Clean Air Act.

DATES: Written comments must be received on or before May 6, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2020–0150 at *https://www.regulations.gov,* or via email to *mcconnell.robert@epa.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.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Bob McConnell, Environmental Engineer, Air and Radiation Division (Mail Code 05–2), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts 02109–3912; (617) 918–1046. *mcconnell.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: March 27, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

[FR Doc. 2020–06810 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 18

[ET Docket No. 19–226; FCC 19–126; FRS 16618]

Human Exposure to Radiofrequency Electromagnetic Fields

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on expanding the range of frequencies for which its radiofrequency (RF) exposure limits apply; on applying localized exposure limits above 6 GHz in parallel to the localized exposure limits already established below 6 GHz; on specifying the conditions and methods for averaging the RF exposure, in both time and area, during evaluation for compliance with the RF exposure limits in the rules; on addressing new RF exposure issues raised by wireless power transfer (WPT) devices; and on the definition of a WPT device.

DATES: Comments are due on or before May 6, 2020, and reply comments are due on or before May 21, 2020.

ADDRESSES: Interested parties may submit comments and replies, identified by ET Docket No. 19–226, by any of the following methods:

- *Federal Communications Commission's Website: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Mail:* 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.
- *People with Disabilities:* Contact the Commission to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Martin Doczkat, email: *martin.doczkat@fcc.gov* of the Office of Engineering and Technology Electromagnetic Compatibility Division; the Commission's RF Safety Program, *rfsafety@fcc.gov;* or call the Office of Engineering and Technology at (202) 418–2470. For information regarding the Paperwork Reduction Act (PRA) information collection requirements contained in this document, contact Nicole Ongele, Office of Managing Director, at (202) 418–2991 or *Nicole.Ongele@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), ET Docket No. 19–226, FCC 19–126, adopted November 27, 2019 and released December 4, 2019. The complete text of the document is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. on Fridays in the FCC Reference Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554. The complete text of the document is also available electronically on the Commission's website at *https://www.fcc.gov/engineering-technology* or by using the search function on the Commission's Electronic Comment Filing System (ECFS) web page at *https://fcc.gov/cgb/ecfs/* or on the FCC's Electronic Document System (EDOCS) web page at *https://apps.fcc.gov/edocs.* Alternative formats (Braille, large print, electronic files, audio format) are available to persons with disabilities by sending an email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

Comment Filing Procedures

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, 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 the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.* Filers should follow the instructions provided on the website for submitting comments. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number, ET Docket No. 19–226.
- *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.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Dr., Annapolis Junction, Annapolis, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

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 & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Ex Parte Rules—Permit-But-Disclose

Pursuant to § 1.1200(a) of the Commission's rules, this *NPRM* 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 § 1.1206(b). In proceedings governed by § 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.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980 (''RFA''), the Commission has prepared this present Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in the *NPRM.* The Commission requests written public comment on this IRFA. Comments must be filed in accordance with the same deadlines as comments filed in response to the *NRPM* and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

Paperwork Reduction Act of 1995

The *NPRM* contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general Public, the Office of Management and Budget (OMB), and other federal agencies to comment on the proposed information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. 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.

Synopsis

I. Introduction

1. This *NPRM* focuses on developing a record encompassing RF exposure limits and compliance issues raised by recent developments in technology that have changed the way wireless devices are used, frequency bands of operation, how supporting wireless infrastructure is deployed, and how RF sources are assessed for compliance with the Commission's existing RF exposure limits. These recent developments include using millimeter-wave and submillimeter-wave frequencies for mobile applications, devices that can time-average their power output to increase transmission efficiency, adaptive array antennas used by fluctuating multi-beam sources, and devices that can transfer power wirelessly. These and other similar applications of RF energy being developed raise questions as to how to determine compliance with the RF exposure limits. This *NPRM* seeks comment on the Commission's proposals to apply RF exposure limits in additional frequency ranges beyond those currently specified in the Commission's RF exposure rules; on applying localized exposure limits above 6 GHz, in parallel with the existing localized exposure limits below 6 GHz; on specifying the conditions and methods for averaging RF exposure, in both time and area, during evaluation for compliance with the rules; and on addressing new issues raised by WPT devices.

2. This *NPRM* proposes methods and seeks comment on how to best incorporate new RF technologies, new methods and techniques for RF transmission, and new usages for a variety of spectrum bands into the Commission's preexisting exposure framework. In particular, on the topic of body-worn spacing during testing of cell phones, the Commission continues to strive to ensure that such spacing represents realistic values for present-day technology and common usage. As part of this effort, the Commission explores the issue of approval for equipment using new methods and technologies.

A. Extension of Exposure Limits to Additional Frequencies

3. The Commission's existing RF exposure rules provide for evaluation of the specific absorption rate (SAR) exposure level within the frequency range of 100 kHz to 6 GHz, and for evaluation of maximum permissible exposure (MPE) field strength and power density within the frequency range of 300 kHz to 100 GHz. The standards for localized SAR that are normally applied for testing compliance of consumer devices operating below 6 GHz were derived from the whole body limits; the Commission currently employs a similar derivation to apply localized limits where appropriate for testing consumer devices above 6 GHz. However, this approach is not formalized in the Commission's rules. Previously, the Commission sought comment on whether it should establish specific exposure limits and protocols outside the frequency ranges presently used for evaluation of SAR and/or MPE. Further, some inductive wireless chargers operate at frequencies below 100 kHz, and Commission staff have been approached by parties seeking guidance on how to determine compliance for wireless car chargers generally operating at similarly low frequencies.

4. The Commission is aware of three existing guidelines for RF exposure that extend to frequencies below 100 kHz: International Commission on Non-Ionizing Radiation Protection (ICNIRP) *Guidelines for Limiting Exposure to Time-Varying Electric and Magnetic Fields (1Hz—100 kHz)* (2010); Institute of Electrical and Electronic Engineers, Inc. (IEEE) *Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz* (IEEE Std C95.1–2005) and *Standard for Safety Levels with Respect to Human Exposure to Electric, Magnetic, and Electromagnetic Fields, 0 Hz to 300 GHz* (IEEE Std C95.1–2019); and Health Canada Safety Code 6—*Limits of Human Exposure to Radiofrequency Electromagnetic Energy in the Frequency Range from 3 kHz to 300 GHz* (2015). While these guidelines are aimed at prevention of electrostimulation due to electric fields induced internally within the human body in the presence of an external electromagnetic field outside the body and have similar values for limiting the internal electric field (E_i), they have different approaches to the dosimetry used to derive their respective MPE limits on external fields from those E_i values. The Commission seeks comment on the significance of the difference between these guidelines.

5. While each of the standards appears to provide appropriate E_i guidelines, the ICNIRP 2010 guidelines are the most widely accepted from an international perspective. The Commission proposes to adopt limits on E_i similar to the ICNIRP 2010 guidelines into its rules for frequencies between 3 kHz to 10 MHz. The Commission does not propose to apply these guidelines below 3 kHz. The Commission seeks comments on these proposals and other relevant and authoritative standards that commenters deem appropriate for consideration.

6. The Commission proposes to overlay ICNIRP 2010 electrostimulation limits for E_i on its existing SAR limits for frequencies between 100 kHz and 10

MHz. Because of the fast response time of neural stimulation relative to heating, it is appropriate to apply electrostimulation limits without time averaging (in addition to time-averaged SAR limits) to fields at frequencies well above 100 kHz. This proposal would place E_i alongside SAR as a co-primary limit between 100 kHz and 10 MHz (*i.e.,* both Ei and SAR limits must be met between 100 kHz and 10 MHz). The Commission does not propose to amend or extend its MPE limits on external fields. By not amending or extending MPE limits on external fields, the Commission's policy that MPE limits are secondary remains intact. Guidance on how to comply with both limits within this frequency range may be developed as necessary for particular applications. The Commission proposes that its policy on recommended best practices for evaluation techniques to comply with both E_i and SAR in the frequency range between 100 kHz and 10 MHz should be contained in its Bulletins and in other supplemental materials, such as the Commission's Office of Engineering and Technology Laboratory's Knowledge Database (KDB). The Commission seeks comment on these proposed numerical limits and on the guidance for demonstrating compliance with such limits.

7. Although the radio spectrum is managed up to 3,000 GHz (3 THz), the Commission's exposure limits are currently specified only up to 100 GHz. The Commission is unaware of any reason the limits should be different above 100 GHz. As frequency increases up to 3,000 GHz (3 THz), body penetration is reduced and ultimately approaches zero. Accordingly, there is no reason to expect that thermal effects will effectively change at the increasingly higher frequencies. Accordingly, the Commission proposes to extend the same constant exposure limits that presently apply from 6 GHz to 100 GHz up to an upper frequency of 3,000 GHz (3 THz), which is considered to be the upper bound of existing radiofrequency bands. Starting at 300 GHz or a wavelength of 1,000 micrometers (μm), standards have been developed for lasers primarily for application in industrial settings. In an effort by standards bodies to match the laser standards, RF limits have been increased at millimeter wave frequencies; however, the Commission does not feel it is appropriate to relax its limits at higher frequencies for exposure from consumer communication devices, considering the already minimal skin depth at 100 GHz. Accordingly, the Commission proposes to extend its existing exposure limits to 3,000 GHz (3 THz) to stay ahead of the possibility of technologies being introduced that are nascent or unknown today. The Commission notes that most of the services being contemplated in the Spectrum Horizons proceeding in ET Docket No. 18–21 operate within the 95–275 GHz frequency range, but there may be other potential applications or services being contemplated above this frequency range. The Commission seeks comment on this proposal. Specifically, it seeks comment on the frequency range over which these proposed limits would apply.

B. Localized Exposure Limits for Higher Frequencies

8. New technologies that employ techniques such as adaptive array antennas created by fluctuating multi-beam sources create complex energy fields that present challenges for current RF measurement methods. Because portable devices are being developed for operation at higher frequencies for future 5G services, the Commission proposes a localized exposure limit above 6 GHz of 4 mW/cm² averaged over 1 cm² for the general population, applicable up to the upper frequency boundary of 3 THz, and seeks comment on this proposal. The Commission notes that both the ICNIRP guidelines and the IEEE standards specify a spatial maximum power density of 20 times the whole-body MPE limit (*e.g.,* between 3 and 10 GHz), generally averaged over 1 cm². The Commission proposes a localized exposure limit above 6 GHz for occupational settings of 20 mW/cm² averaged over 1 cm², which is consistent with the typical ratio of 5:1 for the occupational limits relative to the general population limits. The Commission tentatively concludes not to adopt an extremity limit at this time.

9. The proposed general population localized power density value of 4 mW/cm² matches the exposure limit specified at 6 GHz in the IEEE Std C95.1–1991 standard referenced in the Commission's rules. Based on planar models, this standard suggests that a power density of 4 mW/cm² just above 6 GHz is consistent with the Commission's 1-gram SAR limit of 1.6 W/kg at 6 GHz. Also, the thermal perception threshold at frequencies approaching 100 GHz for large areas of exposure is indicated at about 4 mW/cm². Maintaining 4 mW/cm² across the entire frequency range of 6 GHz to 3 THz will avoid any potential discontinuity between SAR and power density limits at 6 GHz, while also preventing the possibility of perception of warmth at higher millimeter-wave frequencies. The Commission seeks comment on all elements of this proposal, and on whether its lower-power exemptions above 6 GHz should be changed for a localized power density limit in this frequency range.

10. Recognizing the ongoing work in standards bodies to establish an in-tissue power density in lieu of free-space power density—analogous to SAR below 6 GHz—the Commission also seeks comment on whether it should instead adopt such a limit, and if so what that limit should be, or if it should withhold consideration of an in-tissue power density limit until after the standards have been published at a later date. Commenters may also propose other approaches for determining appropriate exposure limits at higher frequencies, with an analysis and justification for using any such protocol.

C. Averaging Area for Higher Frequencies

11. In the *2016 Spectrum Frontiers R&O and FNPRM,* the Commission acknowledged as reasonable a spatial averaging area of 20 cm² for power density above 10 GHz—as provided by ICNIRP for a whole-body exposure limit. However, as the Commission continues to consider this issue, it finds little support in the technical literature for specifying a large averaging area with respect to the whole-body limit when an averaging area for a spatial maximum limit for localized exposure is stipulated. Moreover, ICNIRP maintains an averaging area of 1 cm² for spatial maximum power densities over the frequency range of 10 GHz to 300 GHz. There is growing consensus that a range of from one to a few square centimeters would be a more appropriate averaging area for localized spatial maximum power density limits rather than the much larger values (20 cm² or 100 cm²) that are provided for the whole-body limits in recent published versions of technical standards, *e.g.,* ICNIRP and IEEE.

12. For the reasons noted, the Commission proposes a 1 cm² averaging area to be applicable to localized exposure conditions where the averaged power density would not exceed 4 mW/cm² for the general population (20 mW/cm² for occupational settings). The 1 cm² area is approximately the same size as any of the surfaces of a 1-g cube used for portable device SAR evaluation below 6 GHz in the Commission's rules, and the Commission notes that this is the guidance that the FCC Laboratory currently offers for pertinent equipment authorizations. The Commission invites comment on this proposal. It also seeks comment on whether it may also be

appropriate to specify a spatial peak limit coupled with this 1 cm^2 averaging area to avoid significant excursions under actual non-uniform exposure conditions on a millimeter scale. The Commission is aware that this 1 cm^2 averaging area is generally smaller than the actual size of antenna arrays being contemplated for use by millimeter-wave portable devices, and it seeks comment on whether this factor presents insuperable or significant difficulties, and on other technically valid and practical alternatives.

D. Transmitter-Based and Device-Based Time-Averaging

13. Recent technology has been developed to allow for the optimization of the time-averaged transmit power of a device over a predefined time window, using past transmit power levels as a reference to determine the maximum time-averaged SAR over that period. Based on the device's own management of time-averaged SAR, a maximum allowable transmit power for a future fixed time interval would be determined. The device would then operate at a power equal to or less than the maximum allowable transmit power, depending on factors such as the amount of data to be transmitted and network conditions. The device would either back off from a higher transmit power to a lower power when the calculated time-averaged SAR approaches the SAR limit, or the device could transmit at a higher power when the device gains an additional margin between the calculated time-averaged SAR and the SAR limit. The recent generation of wireless devices (*e.g.,* 4G LTE) transmit in short bursts that are variable depending on operational network and user demands. The Commission's current rules for source-based time-averaging do not account for the variable nature of such transmissions. The technology being developed utilizes both the power level and the time-averaging duration in a dynamic manner, depending on the operating conditions of the device, to determine SAR compliance in real time. For example, a device could temporarily increase power to accommodate a high upload rate and/or poor propagation conditions, and then reduce power during less demanding periods based on the available SAR margin for the designated time-averaging period.

14. The Commission proposes that such active accounting and control of the instantaneous output power of the device be defined as *device-based time averaging* in its rules, because the Commission expects, especially for portable devices with multiple transmitters, that the cumulative transmissions from all RF sources in the device be accounted for in the SAR margin calculations. The Commission recognizes that a device may have a plurality of RF sources, some of which might be power-controlled by the device and others which might not, and so it seeks comment on how to reliably and predictably distinguish any such device from a conventional device intending to be certified under its existing source-based time-averaging rules.

15. The Commission seeks comment on whether to permit this device-based time averaging where the instantaneous transmit power and duration of each transmission burst can be managed by the device over some time period in a way that will ensure compliance with the RF exposure rules. It also seeks input as to what specifications it should adopt that will confirm compliance and be applied clearly and consistently to devices coming on the market. The Commission proposes to allow a practical extension of its existing ''source-based'' definition in its rules to include ''device-based'' time averaging. The Commission proposes to add this definition to distinguish such a device from those devices already being authorized, and recognizes its responsiveness and applicability to an individual RF source while compliance is ultimately controlled by the device itself, based on the device tracking transmission bursts and power levels over time.

16. It is unclear how SAR measurement results based on static conditions at certain power levels may be applied to support device compliance for dynamic conditions where both operational and user exposure conditions are continuously changing. It will be necessary to select the various parameters for applying source-based time-averaging to non-periodic transmissions that are random and dynamic, which can be influenced by device operating configurations, network and propagation conditions, and user operating conditions to ensure that the final measured exposure values still provide sufficient margins for various use configurations. The Commission seeks comment on the range and type of parameters that should be considered to apply the proposed time-averaging principles. For example, is it possible to develop one or more standard transmission sequences that would reasonably replicate typical operating conditions? Alternatively, would the averaging be demonstrated through modeling of the device's software or firmware, and how would this modeling be implemented? How will the Commission determine that the device software and/or firmware achieve compliance? The Commission seeks comment on the above and any other factors as they may relate to consideration of device-based time-averaging in the equipment authorization process.

17. With respect to the appropriate time-averaging period, the Commission notes two references for specifying time-averaging limits: (1) The ICNIRP standard that provides for averaging over 6 minutes at 10 GHz, and reduces to 10 seconds at 300 GHz on a complex basis; and (2) the IEEE standard that provides for an averaging time of 25 minutes at 6 GHz, dropping to 10 seconds at 300 GHz. However, since the Commission does not limit temporal-peak SAR or power density, all of the energy available in a time-averaging period could be deposited in an instant, resulting in a well-defined temperature rise, yet still be compliant with the rules. Thus, using the extended time-averaging periods of 6 or 30 minutes as set forth in the Commission's rules in other contexts, or either of the alternative time windows specified by ICNIRP and IEEE, could allow for inappropriate temperature rises in extreme cases when intense exposure occurs for only a brief period. By reducing the time-averaging period, the maximum possible temperature rise can be limited to a reasonable magnitude. The potential temperature rise (ΔT) due to an impulse exposure is proportional to the product of the allowed continuous-spatial-peak SAR (SAR_{csp}) and the time-averaging period (Δt), so that a maximum time-averaging period (Δt) can be calculated from a specified temperature rise (ΔT) from $\Delta t = c \cdot \Delta T / SAR_{csp}$ where c is the specific heat of tissue. SAR_{csp} at higher frequencies occurs at the skin surface, and it is dependent on the SAR or power density limit (for this calculation 1.6 mW/g or 4.0 mW/cm^2), as well as the depth of energy absorption into tissue. In turn, the depth of absorption is frequency-dependent. Determination of SAR_{csp} was approached with standard calculations using a planar model of uniform dry skin. Based on this approach, 100 seconds is a supportable averaging time up to about 3 GHz, with smaller averaging times down to one second at higher frequencies. This would permit a device to actively track its RF emissions while limiting potential temperature rise in tissue due to an impulse to a value of about 0.1°C, less than would be perceptible by the general population. Therefore, the Commission proposes and seeks comment on the following

maximum time windows to be allowed for any frequency for devices seeking to implement device-based time averaging techniques:

PROPOSED MAXIMUM AVERAGING TIMES FOR DEVICE-BASED TIME-AVERAGING

Frequency (GHz)	< 2.9	2.9–7.125	7.125–10.5	10.5–15.4	15.4–24	24–37	37–53	53–95	>95
Time (seconds)	100	49	27	14	7	4	3	2	1

In deriving this table, as a matter of simplicity and practicality, the Commission considered the bands and bandwidths it expects will be utilized for various types of devices and services, and developed distinct parameters for each frequency range. The Commission seeks comment on this approach and whether it has best delineated these frequency ranges for the purpose of time-averaging limits. Any comment should include a rigorous technical analysis in support of the position that is advocated.

E. Wireless Power Transfer Devices

18. *Definition.* WPT devices have been authorized for several years under the Commission's Part 15 rules or Part 18 rules, depending on whether any communication functionality is provided between the transmitting unit (TU) and the receiving unit (RU). These new and enhanced WPT products will seek an ubiquitous position in modern households and workplaces, and will require unique considerations in the equipment authorization process. Accordingly, the Commission proposes to define WPT devices under Part 18 of its rules as follows: A wireless power transfer (WPT) device is a category of Industrial, Scientific, and Medical (ISM) equipment which generates and emits RF energy for local use by inductive, capacitive, or radiative coupling, for transfer of electromagnetic energy between a power transfer unit (TU) and receiving unit(s) (RU) of a WPT system.

19. The Commission seeks comment on the proposed definition. Is there an alternative definition that would better reflect the technological developments in this area? It also seeks to allow non-communications feedback—for example, the RU modulates its resistance to create a ''feedback'' to the TU to indicate its charge level—as being compliant with Part 18 rules. Based on the distinction between locally-operated wireless power transfer equipment and wireless power transfer equipment that operates at a distance, should the Commission also consider a separate definition for wireless power transfer equipment that provides for the charging of receiving units located at a distance from the transfer unit, as this type of equipment may not meet the above proposed definition for ''local'' operation? The Commission invites comments and input on these issues.

20. *Locally operated wireless power transfer systems.* Part 18 allows the use of potentially unlimited power if a device operates within a designated Industrial, Scientific and Medical (ISM) frequency band, so long as the device operates ''locally.'' Because the Commission's rules do not define what would constitute ''local'' usage, measurement and compliance challenges arise in assessing wireless power transfer devices that provide charging of receiving units located at a distance from the wireless power transfer transmitting unit. The Commission seeks comment on whether the term ''local'' should be defined in terms of distance between the transmitting and receiving units. If the Commission defines ''local'' based on this distance, what is the maximum distance between the transmitting and receiving units that should be considered as ''local'' operation?

21. The Commission notes that the International Special Committee on Radio Interference (CISPR) is considering a definition for the primary device of a wireless power transfer system that states that the term ''local'' is used differently in the context of wireless power transfer from other ISM devices: ''for the case of WPT systems that operate inductively, 'local' may imply that the separation distance between the primary (TU) and secondary (RU) WPT devices should not be greater than 50 centimeters (cm).'' Based on CISPR's proposal, should the Commission use 50 cm as the maximum distance for wireless power transfer devices that operate ''locally'' (excluding wireless power transfer at-a-distance devices, as discussed below) under Part 18?

22. *Wireless power transfer at-a-distance.* The Commission seeks comment on a suitable definition and operating parameters for wireless power transfer devices that provide charging of receiving units located at a distance from the power transfer unit (*i.e.,* 50 cm or greater), with future developments intended at distances suitable for room-size operation, and while the RU is in motion. This would cover wireless power transfer devices that do not meet the definition of a locally operated wireless power transfer device, *i.e.,* within a proposed maximum distance between the transmitting and receiving unit(s) as discussed above. Should the Commission consider the size and coherence of the electromagnetic field created, rather than its distance from the transmitting unit? The challenge with these types of wireless power transfer devices is that charging at a distance can create an RF field distribution in three dimensions with an undefined or varying beam shape depending on the design. Moreover, the location of maximum RF exposure will be an area where various beams intersect, and the direction/location and intensity of the beams can change with the location of the target receiving unit(s). Instead—or in addition—should the size and/or shape of the maximum field determine whether the energy is used in reference to the distance between the transmitting unit and any receiving unit(s)? What parameters should be used for such a consideration?

23. The Commission further seeks comment on what factors it should consider to ensure that the RF beam from the transmitting unit is closely concentrated at the receiving unit, such that RF energy along the path(s) does not exceed the applicable RF exposure limit for any human that may be situated along the path(s), or create the potential for harmful interference to other services. How should the Commission evaluate compliance of wireless power transfer at-a-distance devices with potential movements of humans in the RF field and the potential for very close proximity of the receiving unit to humans? The Commission believes that these devices should comply with its rules under all operating conditions, including movements of people around and in the field. Should the Commission propose to establish frequency bands and power limits specifically for wireless power transfer at-a-distance devices either under Part 15 or Part 18 of its rules, including operation in designated ISM frequency bands (instead of allowing unlimited power in these bands, as Part 18 currently permits)? If the Commission establishes power limits, what should be the basis for such limits, and should any consideration be given

to potential harmful interference to other non-part 18 devices, given the popularity of these ISM frequency bands for consumer devices? With respect to the potential for harmful interference from wireless power transfer devices to active medical devices that may be worn or implanted (*e.g.,* body worn insulin pumps, implantable cardiac pacemakers, implantable deep brain stimulators (DBS), spinal cord stimulators, and the like), what mitigation techniques should be required?

24. Finally, the Commission seeks input on the following issues: Under what category of spectrum use should the Commission consider wireless power transfer, *e.g.,* either ISM under Part 18, Part 15, or new rule part? What radio frequency bands are most suitable for wireless power transfer? What steps are required to ensure that radiocommunication services, including the radio astronomy service, as well as active medical devices, as indicated above, are protected from wireless power transfer operations?

25. *Certification.* Under Part 18, wireless power transfer equipment is currently authorized pursuant to the Supplier's Declaration of Conformity (SDoC) rules (formerly the Declaration of Conformity rules), with the option to use the Certification rules.

26. Because of the continuing evolution of wireless power transfer technology, and the potential use at higher power and in closer proximity to humans, the Commission proposes to require wireless power transfer equipment for both consumer and non-consumer applications to be subject to its Certification rules. Certification will allow the Commission to ensure that a wireless power transfer device complies with its RF exposure rules which may be achieved by determining whether the device qualifies for an RF exposure exemption, or whether a routine RF exposure evaluation is required. The FCC Laboratory presently provides guidance that requires applicants for authorization of wireless power transfer devices to consult with the FCC Laboratory on measurement procedures prior to equipment authorization, but exempts certain low-power wireless power transfer devices from this requirement (KDB Publication 680106). These low-power wireless power transfer devices include those that operate on frequencies below 1 MHz, at power levels less than 15 watts, only in mobile device exposure condition (>20 cm from the body), and only use single primary and secondary coils in close proximity. The Commission seeks comment on whether it should adopt a rule to exempt such low-power wireless power transfer devices from requiring certification and instead allow them to continue to be authorized using its SDoC procedure. In addition, are there other criteria the Commission should consider when exempting wireless power transfer devices from the certification requirement and, if so, what are they, and why?

II. Initial Regulatory Flexibility Analysis

27. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *NPRM.* The Commission requests written public comment on the IRFA, which is contained in Appendix C to the *NPRM.* Comments must be identified as responses to the IRFA and must be filed by the deadline for comments provided in this *NPRM.*

28. In the IRFA, the Commission noted that the National Environmental Policy Act of 1969 (NEPA) requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment. To meet its responsibilities under NEPA, the Commission has adopted requirements for evaluating the environmental impact of its actions. One of several environmental factors addressed by these requirements is human exposure to radiofrequency (RF) energy emitted by FCC-regulated transmitters, facilities, and devices.

29. The *NPRM* proposes to amend Parts 1, 2, and 18 of its rules relating to the compliance of FCC-regulated transmitters, facilities, and devices with the guidelines for human exposure to radiofrequency (RF) energy. Specifically, the Commission is proposing to make certain revisions in its rules that it believes will result in more efficient, practical and consistent application of its RF exposure compliance procedures. The *NPRM* seeks to develop a record that will enable the Commission to meet the challenges presented by evolving technological advances not resolved in the previous RF exposure proceedings. The *NPRM* seeks comment on expanding the range of frequencies for which the RF exposure limits apply; on applying localized exposure limits above 6 GHz in parallel with the localized exposure limits already established below 6 GHz; on specifying the conditions under which and the methods by which the limits are averaged, in both time and area, during evaluation for compliance with the rules; and on addressing new issues raised by Wireless Power Transfer devices.The proposed action is authorized under Sections 1, 4(i), 4(j), 301, 203, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 302a, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), 403; the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.;* and Section 704(b) of the Telecommunications Act of 1996, Public Law 104–104.

30. The Commission identified the small entities to which the proposed rules would apply as being made up of entities from the following categories: International Broadcast Stations; Satellite Telecommunications Providers; All Other Telecommunications; Fixed Satellite Small Transmit/Receive Earth Stations; Fixed Satellite Very Small Aperture Terminal (VSAT) Systems; Mobile Satellite Earth Stations; Wireless Telecommunications Carriers (except satellite); Licenses Assigned by Auction; Paging Services; 2.3 GHz Wireless Communications Services; 1670–1675 MHz Services; Wireless Telephony; Broadband Personal Communications Service; Advanced Wireless Services; Narrowband Personal Communications Services; Lower 700 MHz Band Licensees; Upper 700 MHz Band Licensees; 700 MHz Guard Band Licensees; Specialized Mobile Radio, 220 MHz Radio Service—Phase I Licensees; 220 MHz Radio Service—Phase II Licensees; Private Land Mobile Radio; Fixed Microwave Services; 39 GHz Service; Local Multipoint Distribution Service; 218–219 MHz Service; Location and Monitoring Service; Rural Radiotelephone Service; Air-Ground Radiotelephone Service; Aviation and Marine Radio Services; Offshore Radiotelephone Service; Multiple Address Systems; 1.4 GHz Band Licensees; Incumbent 24 GHz Licensees; Future 24 GHz Licensees; Broadband Radio Service and Educational Broadband Service; Television Broadcasting; Radio Broadcasting; Auxiliary, Special Broadcast, and Other Program Distribution Services; Multichannel Video Distribution and Data Service; Amateur Radio Service; Personal Radio Services; Public Safety Radio Services; IMTS Resale Carriers; and Wireless Carriers and Service Providers.

31. The proposed rules in the *NPRM* do not duplicate, overlap, or conflict with other Federal rules. The proposals being made in the *NPRM* may require

additional analysis and mitigation activities regarding compliance with the Commission's RF exposure limits for certain facilities, operations, and transmitters, such as some wireless base stations, particularly those on rooftops, and some antennas at multiple transmitter sites. In other cases, current analytical requirements are being relaxed. The Commission also sought comments on potential alternatives.

Statement of Authority for the Actions Proposed

32. Sections 1, 4(i), 4(j), 301, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), 403; the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.;* and section 704(b) of the Telecommunications Act of 1996, Public Law 104–104.

List of Subjects in 47 CFR Parts 1, 2, and 18

Communications equipment, Radio.
Federal Communications Commission.

Cecilia Sigmund,
Federal Register Liaison Officer.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposed to amend 47 CFR parts 1, 2, and 18 as follows:

PART 1—PRACTICE AND PROCEDURE

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

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

■ 2. Section 1.1307 is amended by adding in alphabetical order the definition of ''*Device-based time averaging*'' to paragraph (b)(2) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

(2) * * *

Device-based time averaging is where the instantaneous transmit power and duration of each transmission burst is managed by the device over some specified *time-averaging period* to ensure compliance with the RF exposure limits.

* * * * *

■ 3. Section 1.1310 is revised to read as follows:

§ 1.1310 Radiofrequency radiation exposure limits.

(a) Between 3 kHz and 10 MHz (inclusive), internal electric field limits as set forth in paragraph (f) of this section shall be used to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b). Specific absorption rate (SAR) shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in § 1.1307(b) within the frequency range of 100 kHz to 6 GHz (inclusive). Power density (PD) shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in § 1.1307(b) for the frequency range above 6 GHz.

(b) The SAR limits for occupational/controlled exposure are 0.4 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 8 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit for occupational/controlled exposure is 20 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). The PD limits for occupational/controlled exposure are 5 mW/cm^2, as averaged over the whole body, and a peak spatial-average PD of 20 mW/cm^2, averaged over any 1 cm^2. Exposure may be averaged over a time period not to exceed 6 minutes to determine compliance with occupational/controlled SAR limits.

(c) The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit is 4 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). The PD limits for general population/uncontrolled exposure are 1 mW/cm^2, as averaged over the whole body, and a peak spatial-average PD of 4 mW/cm^2, averaged over any 1 cm^2. Exposure may be averaged over a time period not to exceed 30 minutes to determine compliance with general population/uncontrolled SAR limits.

(d)(1) Evaluation with respect to the SAR and/or PD limits in this section must demonstrate compliance with both the whole-body and peak spatial-average limits. Evaluation with respect to both the SAR and PD limits in this section and in § 2.1093 of this chapter, as well as the internal electric field limits in this section where applicable, shall be done using technically supported measurement or computational methods and exposure conditions in advance of authorization (licensing or equipment certification) and in a manner that facilitates independent assessment and, if appropriate, enforcement. Numerical computation of SAR must be supported by adequate documentation showing that the numerical method as implemented in the computational software has been fully validated; in addition, the equipment under test and exposure conditions must be modeled according to protocols established by FCC-accepted numerical computation standards or available FCC procedures for the specific computational method.

(2) The limits for maximum permissible exposure (MPE) listed in Table 1 to paragraph (e)(1) of this section, which have been derived from whole-body SAR limits, may be used instead of whole-body SAR and/or PD limits as set forth in paragraphs (a) through (c) of this section to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b), except for portable devices as defined in 47 CFR 2.1093 as these evaluations shall be performed according to the SAR and/or PD provisions, and internal electric field provisions where applicable, in § 2.1093 of this chapter.

(3) The MPE limits listed in Table 1 to paragraph (e)(1) of this section, the SAR and/or PD limits as set forth in paragraph (a) through (c) of this section and in § 2.1093 of this chapter, and the internal electric field limits listed in Table 2 to paragraph (f) of this section are for continuous exposure, that is, for indefinite time periods. Except for internal electric field, as described in (f) of this section, exposure levels higher than the limits are permitted for shorter exposure times, as long as the average exposure over a period not to exceed the specified averaging time in Table 1 to paragraph (e)(1) of this section or source-based time averaging requirement of §§ 2.1091(d)(2) and 2.1093(d)(5) for general population exposure is less than the limits. Detailed information on our policies regarding procedures for evaluating compliance with all of these exposure limits can be found in the FCC's *OET Bulletin 65,* ''Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,'' and in supplements to *Bulletin*

65, all available at the FCC's internet website: *http://www.fcc.gov/rfsafety* and in the Office of Engineering and Technology (OET) Laboratory Division Knowledge Database (KDB) (*https://www.fcc.gov/kdb*).

Note 1 to Paragraph (d): SAR is a measure of the rate of energy absorption due to exposure to RF electromagnetic energy. These SAR limits to be used for evaluation in paragraphs (a) through (d) of this section are based generally on criteria published by the American National Standards Institute (ANSI) for localized SAR in Section 4.2 of ANSI/IEEE Std C95.1–1992 These criteria for SAR evaluation are similar to those recommended by the National Council on Radiation Protection and Measurements (NCRP) in NCRP Report No. 86, Section 17.4.5. Limits for whole body SAR and peak spatial-average SAR are based on recommendations made in both of these documents.

(e)(1) Table 1 to paragraph (e)(1) sets forth limits for Maximum Permissible Exposure (MPE) to radiofrequency electromagnetic fields.

TABLE 1 TO PARAGRAPH (E)(1)—LIMITS FOR MAXIMUM PERMISSIBLE EXPOSURE (MPE)

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm^2)	Averaging time (minutes)
(A) Limits for Occupational/Controlled Exposure				
0.3–3.0	614	1.63	*100	6
3.0–30	1842/f	4.89/f	*900/f^2	6
30–300	61.4	0.163	1.0	6
300–1,500			f/300	6
1,500–3,000,000			5	6
(B) Limits for General Population/Uncontrolled Exposure				
0.3–1.34	614	1.63	*100	30
1.34–30	824/f	2.19/f	*180/f^2	30
30–300	27.5	0.073	0.2	30
300–1,500			f/1500	30
1,500–3,000,000			1.0	30

f = frequency in MHz. * = Plane-wave equivalent power density, electric and magnetic field strengths are root-mean-square (rms).

Note 2 to Paragraph (E)(1): The MPE limits in Table 1 to paragraph (e)(1) of this section are based generally on criteria published by the NCRP in NCRP Report No. 86, Sections 17.4.1, 17.4.1.1, 17.4.2 and 17.4.3 In the frequency range from 100 MHz to 1500 MHz, these MPE exposure limits for field strength and power density are also generally based on criteria recommended by the ANSI in Section 4.1 of ''ANSI/IEEE Std C95.1–1992. Peak spatial-average PD limits of 4 mW/cm^2 for general population/uncontrolled exposure and 20 mW/cm^2 for occupational/controlled exposure in the frequency range from 6 GHz to 300 GHz are generally based on criteria recommended at 6 GHz by the ANSI in Section 4.4 of ANSI/IEEE Std C95.1–1992, and on thermal perception thresholds at frequencies above 6 GHz.

* * * * *

Note 3 to paragraph (F): Internal electric field shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in § 1.1307(b) within the frequency range of 3 kHz to 10 MHz (inclusive). Internal electric fields shall be determined as a vector average in a contiguous tissue volume of $2 \times 2 \times 2$ cubic millimeters. Internal electric fields induced by electric or magnetic fields including transient or very short-term peak fields shall be regarded as instantaneous values not to be time-averaged.

TABLE 2 TO PARAGRAPH (F)—LIMITS FOR INTERNAL ELECTRIC FIELD

Frequency range (MHz)	Internal electric field strength (rms) (V/m)
(A) Limits for Occupational/Controlled Exposure	
0.003–10	270f
(B) Limits for General Population/Uncontrolled Exposure	
0.003–10	135f

f = frequency in MHz.

Note 3 to paragraph (f): Internal electric field limits in Table 2 to paragraph (f) of this section are generally based on guidelines recommended by the International Commission on Non-Ionizing Radiation Protection (ICNIRP) in ''ICNIRP Guidelines for Limiting Human Exposure to Time-Varying Electric and Magnetic Fields (1 Hz to 100 kHz).''

Note 4 to § 1.1310: *Sources cited in this section.* 1. ANSI/IEEE Std C95.1–1992 . ''IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,'', copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc. (IEEE), New York, New York 10017. 2. ''ICNIRP Guidelines for Limiting Human Exposure to Time-Varying Electric and Magnetic Fields (1 Hz to 100 kHz),'' Published in Volume 99, Issue 6, Pages 818–836, copyright 2010 by the Health Physics Society and available at *http://www.icnirp.org.* 3. NCRP Report No. 86 ''Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields,'' copyright 1986 by NCRP, Bethesda, Maryland 20814.

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 4. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 5. Section 2.1091 is amended by revising paragraph (d) to read as follows:

§ 2.1091 Radiofrequency radiation exposure evaluation: mobile devices.

* * * * *

(d)(1) Applications for equipment authorization of mobile RF sources subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in § 1.1310 of this chapter as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request. In general, maximum time-averaged power levels must be used for evaluation. All unlicensed personal communications service (PCS) devices and unlicensed

NII devices shall be subject to the limits for general population/uncontrolled exposure.

(2) For purposes of analyzing mobile transmitting devices under the occupational/controlled criteria specified in § 1.1310 of this chapter, time averaging provisions of the limits may be used in conjunction with maximum duty factor to determine maximum time-averaged exposure levels under normal operating conditions.

(3) Such time averaging provisions based on maximum duty factor may not be used in determining exposure levels for devices intended for use by consumers in general population/uncontrolled environments as defined in § 1.1310 of this chapter. However, either ''source-based'' time averaging, based on an inherent property of the RF source, or ''device-based'' time averaging based on an inherent capability of the device in direct control of the RF source, is allowed.

* * * * *

■ 6. Section 2.1093 is amended by revising paragraph (d) to read as follows:

§ 2.1093 Radiofrequency radiation exposure evaluation: portable devices.

* * * * *

(d)(1) Applications for equipment authorization of portable RF sources subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in § 1.1310 of this chapter as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request. In general, maximum time-averaged power levels must be used for evaluation. All unlicensed personal communications service (PCS) devices and unlicensed NII devices shall be subject to the limits for general population/uncontrolled exposure.

(2) Evaluation of compliance with the SAR limits can be demonstrated by either laboratory measurement techniques or by computational modeling. The latter must be supported by adequate documentation showing that the numerical method as implemented in the computational software has been fully validated; in addition, the equipment under test and exposure conditions must be modeled according to protocols established by FCC-accepted numerical computation standards or available FCC procedures for the specific computational method. Guidance regarding SAR, PD, internal electric field, and MPE measurement techniques, where applicable, can be found in the Office of Engineering and Technology (OET) Laboratory Division Knowledge Database (KDB). The staff guidance provided in the KDB does not necessarily represent the only acceptable methods for measuring RF exposure or RF emissions, and is not binding on the Commission or any interested party.

(3) For purposes of analyzing portable RF sources under the occupational/controlled SAR criteria specified in § 1.1310 of this chapter, the time averaging provisions of these SAR criteria may be used to determine maximum time-averaged exposure levels under normal operating conditions.

(4) The time averaging provisions for occupational/controlled SAR/PD criteria, based on maximum duty factor, may not be used in determining typical exposure levels for portable devices intended for use by consumers, such as cellular telephones, that are considered to operate in general population/uncontrolled environments as defined in § 1.1310 of this chapter. However, either ''source-based'' time averaging, based on an inherent property of the RF source, or ''device-based'' time averaging based on an inherent capability of the device in direct control of the RF source, is allowed, as described in paragraph (d)(6) of this section.

(5) Visual advisories (such as labeling, embossing, or on an equivalent electronic display) on portable devices designed only for occupational use can be used as part of an applicant's evidence of the device user's awareness of occupational/controlled exposure limits. Such visual advisories shall be legible and clearly visible to the user from the exterior of the device. Visual advisories must indicate that the device is for occupational use only, refer the user to specific information on RF exposure, such as that provided in a user manual and note that the advisory and its information is required for FCC RF exposure compliance. Such instructional material must provide the user with information on how to use the device in order to ensure compliance with the occupational/controlled exposure limits. A sample of the visual advisory, illustrating its location on the device, and any instructional material intended to accompany the device when marketed, shall be filed with the Commission along with the application for equipment authorization. Details of any special training requirements pertinent to limiting RF exposure should also be submitted. Holders of grants for portable devices to be used in occupational settings are encouraged, but not required, to coordinate with end-user organizations to ensure appropriate RF safety training.

(6) General population/uncontrolled exposure limits defined in § 1.1310 of this chapter apply to portable devices intended for use by consumers or persons who are exposed as a consequence of their employment and may not be fully aware of the potential for exposure or cannot exercise control over their exposure. No communication with the consumer including either visual advisories or manual instructions will be considered sufficient to allow consumer portable devices to be evaluated subject to limits for occupational/controlled exposure specified in § 1.1310 of this chapter.

(7) ''Device-based'' time averaging, based on an inherent capability of the device in direct control of the RF source(s) within a device, is permitted if the protocols established to track the instantaneous transmit power over a time averaging period not to exceed the values listed in Table 1 for the specific operating frequencies of each transmitter have been validated against available FCC procedures for the ''device-based'' time averaging method to be used by the device.

TABLE 1 TO PARAGRAPH (d)—MAXIMUM AVERAGING TIMES FOR DEVICE-BASED TIME AVERAGING

Frequency (GHz):	<2.9	2.9–7.125	7.125–10.5	10.5–15.4	15.4–24	24–37	37–53	53–95	>95
Time (seconds):	100	49	27	14	7	4	3	2	1

* * * * *

PART 18—INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

■ 7. The authority citation for part 18 continues to read as follows:

Authority: 47 U.S.C. 4, 301, 302, 303, 304, 307.

■ 8. Amend § 18.107 by adding paragraph (k) to read as follows:

§ 18.107 Definitions.

* * * * *

(k) *Wireless power transfer (WPT) equipment.* A category of ISM equipment which generates and emits RF energy for local use by inductive, capacitive or radiative coupling, for transfer of electromagnetic energy between a power transfer unit (TU) and receiving unit(s) (RU) of a WPT system.

* * * * *

■ 9. Add § 18.123 to read as follows:

§ 18.123 Transition Provisions for Wireless Power Transfer Equipment.

All wireless power transfer equipment that are manufactured, imported, marketed or installed on or after [DATE 6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE] shall comply with all the provisions for wireless power transfer devices of this part.

■ 10. Amend § 18.203 by adding paragraph (d) to read as follows:

§ 18.203 Equipment authorization.

* * * * *

(d) Wireless power transfer equipment shall be authorized under the Certification procedure prior to use or marketing, in accordance with the relevant sections of part 2, subpart J of this chapter.

■ 11. Amend § 18.207 by adding paragraph (e)(6) to read as follows:

§ 18.207 Technical report.

* * * * *

(e) * * *

(6) For wireless power transfer equipment, a statement confirming compliance for radio frequency radiation exposure in accordance with the requirements in 47 CFR 1.1307(b), 1.1310, 2.1091, and 2.1093, as appropriate. Applications for equipment authorization of RF sources operating under this section must contain a statement confirming compliance with these requirements. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

[FR Doc. 2020–06966 Filed 4–3–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200331–0095]

RIN 0648–BJ66

Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder Fishery; Fishing Year 2020

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes management measures for the 2020 summer flounder recreational fishery. The implementing regulations for this fishery require NMFS to publish recreational measures for the fishing year and to provide an opportunity for public comment. The intent of this action is to constrain recreational catch to the summer flounder recreational harvest limit and thereby, prevent overfishing on the summer flounder stock.

DATES: Comments must be received by April 21, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0033, by either of the following methods:

Electronic submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

- Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0033,*
- Click the ''Comment Now!'' icon, complete the required fields, and
- Enter or attach your comments.

—OR—

Mail: Submit written comments to Michael Pentony, Regional Administrator, Greater Atlantic Region, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Emily Keiley, Fishery Policy Analyst, (978) 281–9116.

SUPPLEMENTARY INFORMATION:

Background

Summer flounder is cooperatively managed by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission). The Council and the Commission's Summer Flounder Management Board (Board) meet jointly each year to recommend recreational management measures for summer flounder. NMFS must implement coastwide measures or approve conservation equivalent measures per 50 CFR 648.102(d) as soon as possible following the Council and Commission's recommendation. This action proposes maintaining conservation equivalency for 2020, as jointly recommended by the Council and Board.

Recreational Management Measures Process

The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) established a Monitoring Committee for summer flounder consisting of representatives from the Commission, the Council, state marine fishery agencies from Massachusetts to North Carolina, and NMFS. The FMP's implementing regulations require the Monitoring Committee to review scientific and other relevant information annually. The objective of this review is to recommend management measures to the Council that will constrain landings within the recreational harvest limit (RHL) for the upcoming fishing year. The FMP limits the choices for the types of measures to minimum and/or maximum fish size, per angler possession limit, and fishing season.

The Council and the Board then consider the Monitoring Committee's recommendations and any public comment in making their recommendations. The Council forwards its recommendations to NMFS for review. The Commission similarly adopts recommendations for the states. NMFS is required to review the Council's recommendations to ensure that they are consistent with the target specified for summer flounder in the FMP and all applicable laws and Executive Orders before ultimately implementing measures for Federal waters. Commission measures are final at the time they are adopted.

Summer Flounder Conservation Equivalency Process

Conservation equivalency, as established by Framework Adjustment 2 (66 FR 36208; July 11, 2001), allows each state to establish its own recreational management measures (possession limits, size limits, and fishing seasons) to achieve its state management target partitioned by the Commission from the coastwide RHL, as long as the combined effect of all of the states' management measures achieves the same level of conservation as would Federal coastwide measures. Framework Adjustment 6 (71 FR 42315; July 26, 2006) allowed states to form regions for conservation equivalency in order to minimize differences in regulations for anglers fishing in adjacent waters.

The Council and Board annually recommend that either state- or region-specific recreational measures be developed (conservation equivalency) or that coastwide management measures be implemented to ensure that the RHL will not be exceeded. Even when the Council and Board recommend conservation equivalency, the Council must specify a set of non-preferred coastwide measures that would apply if conservation equivalency is not approved for use in Federal waters.

When conservation equivalency is recommended, and following confirmation by the Commission that the proposed state or regional measures developed through its technical and policy review processes achieve conservation equivalency, NMFS may waive, for the duration of the fishing year, the permit condition found at 50 CFR 648.4(b), which requires Federal permit holders to comply with the more restrictive management measures when state and Federal measures differ. In such a situation, federally permitted summer flounder charter/party permit holders and individuals fishing for summer flounder in the exclusive economic zone (EEZ) are subject to the recreational fishing measures implemented by the state in which they land summer flounder, rather than the coastwide measures. Conservation equivilency expires at the end of each fishing year (December 31).

In addition, the Council and the Board must recommend precautionary default measures when recommending conservation equivalency. The Commission would require adoption of the precautionary default measures by any state that either does not submit a summer flounder management proposal to the Commission's Summer Flounder Technical Committee, or that submits measures that are not conservationally equivalent to the coastwide measures.

The development of conservation equivalency measures happens at both the Commission and the individual state level. The selection of appropriate data and analytical techniques for technical review of potential state conservation equivalent measures and the process by which the Commission evaluates and recommends proposed conservation equivalent measures are wholly a function of the Commission and its individual member states. Individuals seeking information regarding the process to develop specific state or regional measures or the Commission process for technical evaluation of proposed measures should contact the marine fisheries agency in the state of interest, the Commission, or both.

Once the states and regions select their final 2020 summer flounder management measures through their respective development, analytical, and review processes and submit them to the Commission, the Commission will conduct further review and evaluation of the submitted proposals, ultimately notifying NMFS as to which proposals have been approved or disapproved. NMFS has no overarching authority in the development of state or Commission management measures but is an equal participant along with all the member states in the review process. NMFS neither approves nor implements individual states' measures, but retains the final authority either to approve or to disapprove the use of conservation equivalency in place of the coastwide measures in Federal waters. NMFS will publish its determination on 2020 conservational equivalency as a final rule in the **Federal Register** following review of the Commission's determination and any other public comment on this proposed rule.

2020 Summer Flounder Recreational Management Measures

The 2020 summer flounder RHL is 7.69 million lb (3,488 mt), which is the same as the 2019 RHL. Based on preliminary Marine Recreational Information Program (MRIP) data through October 2019 (wave 5) summer flounder landings are projected to be 7.74 million lb (3,510 mt), which is 1 percent above the 2019 and 2020 RHL of 7.69 million lb (3,488 mt). At the time the Council and Board approved 2020 recreational measures, data were only available through wave 4 (August 2019), which resulted in projected harvest of 7.06 million lb (3,202 mt), 8 percent below the 2020 RHL. The Council and Board consider the uncertainty around the recreational harvest estimates by maintaining status quo measures if the coastwide percent standard error (PSE) around the recreational estimate encompasses the following year's RHL. This was the case using projections through wave 4, and, therefore, the Council and Board did not approve a liberalization in measures for 2020. The revised projections using data through wave 5 are also within the PSE; therefore, no -adjustments are needed.

Based on the Council's and the Board's recommendations, and as part of the conservation equivalency process, NMFS also proposes a suite of non-preferred coastwide measures identified by the Council and Board, which would be in effect should NMFS not approve conservation equivalency. These measures are expected to constrain the overall recreational landings to the 2020 recreational harvest limit, should conservation equivalency be disapproved based on the Commission's recommendation letter. For 2020, non-preferred coastwide measures approved by the Council and Board are a 19-inch (48.3-cm) minimum fish size, a four-fish per person possession limit, and an open season from May 15–September 15. These measures are identical to the non-preferred 2019 coastwide measures. The coastwide measures become the default management measures in the subsequent fishing year, in this case 2021, until the joint process establishes either coastwide or conservation equivalency measures for the next year.

The 2020 precautionary default measures recommended by the Council and Board are identical to those in place for 2019: A 20.0-inch (50.8-cm) minimum fish size; a two-fish per person possession limit; and an open season of July 1–August 31, 2020. These measures may be assigned by the Commission if conservation equivalency is approved but a state or region does not submit a conservationally equivilent proposal.

Similar to 2016–2019, the 2020 management program adopted by the Commission divides the coastline into six management regions: (1) Massachusetts; (2) Rhode Island; (3) Connecticut-New York; (4) New Jersey; (5) Delaware-Virginia; and (6) North Carolina. Each state within a region must implement identical or equivalent measures (size limits, bag limit, and fishing season length), and the combination of those measures must be sufficient to constrain landings to the recreational harvest limit.

Through the Commission process, states may submit proposals for conservationally equivalent measures that would maintain status quo harvest levels relative to the preliminary 2019

recreational harvest. Proposals for conservationally equivalent state measures will be reviewed by the Board's Technical Committee in late March, and the Board will consider final approval in early April 2020. Following the Board's consideration of final 2019 state measures, the Commission must submit a letter to NMFS stating whether the states have met the conservation objectives under Addendum XXXII to the Commission's Interstate FMP and that catch is expected to constrain catch to the 2020 recreational harvest limit. Once that letter is received, NMFS will be able to publish a final recreational management measures rule with a conservation equivalency determination for 2020.

Regulatory Corrections

Additionally, this proposed rule includes a revision to the regulations implementing the FMP to update text that is unnecessary, outdated, unclear, or otherwise could be improved. NMFS proposes these changes consistent with section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), which provides that the Secretary of Commerce may promulgate regulations necessary to ensure that amendments to a fishery management plan (FMP) are carried out in accordance with the FMP and the Magnuson-Stevens Act. The regulation at § 648.102(d)(2) describes conservationally equivalent measures that states or regions would develop for summer flounder. In a prior action promulgating regulations for Framework Adjustment 14 (84 FR 65699; November 29, 2019), we intended to replace ''minimum fish sizes'' in this regulation with ''minimum and/or maximum fish sizes'' to reflect Framework Adjustment 14's addition of maximum size limits as a management measure available for summer flounder recreational fisheries. This change was inadvertently left out of the rule. To correct this error this action proposes to replace ''minimum fish sizes'' with ''minimum and/or maximum fish sizes.''

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures. According to the commercial ownership database, 389 for-hire affiliate firms generated revenues from recreational fishing for various species during the 2016–2018 period. All of those business affiliates are categorized as small businesses. The SBA defines a small for-hire recreational fishing business is defined as a firm with receipts of up to $7.5 million. Estimating what proportion of the overall revenues for these for-hire firms came from fishing activities for an individual species is not possible. Nevertheless, given the popularity of summer flounder as a recreational species in the Mid-Atlantic and New England, generated revenues are likely very important for many of these firms at certain times of the year. The 3-year average (2016–2018) combined gross receipts (all for-hire fishing activity combined) for these small entities was $52,156,152, ranging from less than $10,000 for 119 entities (lowest value $124) to over $1,000,000 for 8 entities (highest value $2.9 million).

This proposed action would waive Federal measures in lieu of state measures designed to reach the 2020 harvest limit. The economic impacts of the proposed measures in this action will be affected in part by the specific set of measures implemented at the state level for summer flounder conservation equivalency. The impacts are likely to vary by state, but are expected to be very similar to measures that were in place in 2019. The summer flounder recreational measures under conservation equivalency are expected to neither reduce nor increase recreational satisfaction or for-hire revenues when compared to 2019. Demand for for-hire trips is expected to remain approximately the same as in 2019. Thus, market demand is expected to be similar in 2020, although this is likely to vary by state depending on each state's current measures and how they choose to modify them in 2020.

Because the 2020 measures are expected to be mostly identical to 2019, this rule will not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required and none has been prepared.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 31, 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 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.102, paragraph (d)(2) is revised to read as follows:

§ 648.102 Summer flounder specifications.

* * * * *

(d) * * *

(2) *Conservation equivalent measures.* Individual states, or regions formed voluntarily by adjacent states (*i.e.,* multi-state conservation equivalency regions), may implement different combinations of minimum and/or maximum fish sizes, possession limits, and closed seasons that achieve equivalent conservation as the coastwide measures established under paragraph (e)(1) of this section. Each state or multi-state conservation equivalency region may implement measures by mode or area only if the proportional standard error of recreational landing estimates by mode or area for that state is less than 30 percent.

* * * * *

■ 3. In § 648.107, the introductory text to paragraph (a) is revised to read as follows:

§ 648.107 Conservation equivalent measures for the summer flounder fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2020 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106. This determination is based on a recommendation from the Summer

Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

[FR Doc. 2020–07061 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200331–0094]

RIN 0648–BI28

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Removal of Regulations Implementing the Closed Area I Hook Gear Haddock Special Access Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: We propose to remove regulations that implement the Closed Area I Hook Gear Haddock Special Access Program. The Omnibus Essential Fish Habitat Amendment 2 eliminated the year-round Closed Area I, rendering the Closed Area I Hook Gear Haddock Special Access Program unnecessary. Eliminating the Closed Area I Hook Gear Haddock Special Access Program would reduce confusion and inconsistency with other regulations.

DATES: Written comments must be received on or before May 6, 2020.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2019–0104, by either of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal eRulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0026;*
2. Click the ''Comment Now!'' icon and complete the required fields; and
3. Enter or attach your comments.

• *Mail:* Submit written comments to Michael Pentony, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on the Closed Area I Hook Gear Haddock SAP.''

Instructions: All comments received that were timely and properly submitted are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). 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 us.

FOR FURTHER INFORMATION CONTACT: Spencer Talmage, Fishery Management Specialist, phone: (978) 281–9232; email: *Spencer.Talmage@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

NMFS published an interim final rule (69 FR 67779; November 19, 2004), implementing measures approved under Framework Adjustment 40–A to the Northeast Multispecies Fishery Management Plan (FMP). Among other measures, Framework 40–A created the Closed Area I Hook Gear Haddock Special Access Program (CAI HGH SAP) to provide vessels with additional opportunities in Closed Area I to target healthy stocks. The CAI HGH SAP allowed vessels to access the groundfish year-round Closed Area I if they followed certain gear and other restrictions.

The Omnibus Essential Fish Habitat Amendment 2 (83 FR 15240, April 9, 2018) eliminated the year-round closure of Closed Area I. The area once covered by Closed Area I is now open to vessels fishing with hook gear, with the exception of the Georges Bank Dedicated Habitat Research Area and the seasonal Closed Area I North Closure (February 1—April 15). The CAI HGH SAP does not overlap with either the Georges Bank Dedicated Habitat Research Area or Closed Area I North Closure, and as such does not allow any activity otherwise prohibited by these areas. As a result, the CAI HGH SAP is now unnecessary, redundant, and inconsistent with the changes made by the Omnibus Essential Fish Habitat Amendment 2 because the program provides special access to an area that is already open to the groundfish fleet in the time that the SAP is effective.

Under section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act, the Regional Administrator is authorized to make changes to regulations that are necessary to carry out any fishery management plan or amendment. We are proposing to amend the regulations in § 648.14, § 648.81, § 648.82, and § 648.85 to remove references to the CAI HGH SAP and to make a minor correction to a cross-reference.

This action would not change the allocation to the Incidental Catch Total Allowable Catch (TAC) defined in § 648.85(b)(5)(ii). Such a change would require a substantive change to prior New England Fishery Management Council allocation decisions, and it is more appropriate for the New England Fishery Management Council to consider these changes in a future action. During the biennial specifications process, 2 percent of the Georges Bank (GB) cod sub-Annual Catch Limit for the common pool is designated as the Incidental Catch TAC. The Incidental Catch TAC is split between the Regular B Day-at-Sea Program, the Eastern United States/Canada Haddock SAP, and the CAI HGH SAP. The Incidental Catch TAC is a cap on catch of GB Cod in these programs, and does not affect the overall amount of GB cod available to vessels fishing outside of these programs in the common pool.

Because no changes are being made to this process, 16 percent of the Incidental Catch TAC will continue to be allocated to the CAI HGH SAP during each biennial specifications process. This does not affect the quota available to the common pool groundfish fishery. The New England Fishery Management Council may choose to take further action on the allocation of the Incidental Catch TAC.

On December 17, 2019, NMFS published a final rule (84 FR 68798) prohibiting gillnet fishing in the Nantucket Lightship and Closed Area I Closure Areas, in order to comply with a Federal Court order. That rule only affects vessels fishing with gillnet gear, and vessels fishing with hook gear may still fish in Closed Area I without declaring into the CAI HGH SAP. This action to eliminate the CAI HGH SAP was not affected by the prohibition of gillnet fishing in Closed Area I.

Classification

The National Marine Fisheries Service (NMFS) Assistant Administrator has made a preliminary determination that this proposed rule is consistent with section 305(d) and other provisions of the Magnuson-Stevens Act, and other applicable law. In making the final determination, we will consider the data, views, and comments received during the public comment period, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866. This proposed rule is expected to be an Executive Order 13771 deregulatory action.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual determination for this determination follows.

For purposes of the Regulatory Flexibility Act, NMFS established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. The determination of whether the entity is large or small is based on the average annual revenue for the most recent 3 years for which data are available (in this case, from 2016 through 2018).

To participate in the CAI HGH SAP, vessels must possess a limited access multispecies permit (categories A, D, E, or F). Therefore, entities holding one or more limited access multispecies permits are the entities that have the potential to be directly impacted by this action. According to the commercial database, there were 557 entities that had at least one of the relevant limited access permits during 2018, the last year for which affiliation information is available. Of these entities, 81 did not have revenues. There were 476 entities that reported revenues during 2018. Of these, 6 were classified as large and 470 were classified as small businesses.

A vessel that declares into the CAI HGH SAP is subject to additional notification, reporting requirements and gear modification requirements, but with the elimination of Closed Area I on April 19, 2018, the CAI HGH SAP no longer provides special access to any closed areas. There is no longer a beneficial reason to participate in the program, and no vessels participated in fishing year 2018. As a result, the proposed elimination of the CAI HGH SAP would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the PRA. This requirement has been submitted to OMB for approval under Control Number 0648–0202.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: March 31, 2020.

Samuel D. Rauch III,

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

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

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.14:

■ a. Revise paragraphs (k)(6)(ii)(B), (11)(i)(A)(*4*), (11)(vi), (12)(i)(B), and paragraph (12)(ii);

■ b. Remove paragraph (k)(12)(vi); and

■ c. Redesignate paragraph (k)(12)(vii) as (vi).

The revisions read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(6) * * *

(ii) * * *

(B) *Hook gear.* Fail to comply with the restrictions on fishing and gear specified in § 648.80(a)(3)(v), (a)(4)(v), (b)(2)(v), and (c)(2)(iv) if the vessel has been issued a limited access NE multispecies permit and fishes with hook gear in areas specified in § 648.80(a), (b), or (c).

* * * * *

(11) * * *

(i) * * *

(A) * * *

(*4*) If fishing both outside and inside of the areas specified for a SAP under § 648.85(b)(3) and (7), under a NE multispecies DAS in the Eastern U.S./Canada Area specified in § 648.85(a)(1), fail to abide by the DAS and possession restrictions under § 648.85(b)(7)(v)(A)(2) through (4).

* * * * *

(vi) *Closure of the U.S./Canada Area for all persons.* If fishing under a NE multispecies DAS or on a sector trip, declare into, enter, or fish in the Eastern U.S./Canada Area specified in § 648.85(a)(1) if the area is closed under the authority of the Regional Administrator as described in § 648.85(a)(3)(iv)(D) or (E), unless fishing in the Closed Area II Yellowtail Flounder/Haddock SAP specified in § 648.85(b)(3) or the Eastern U.S./Canada Haddock SAP Program specified in § 648.85(b)(7).

(12) * * *

(i) * * *

(B) If a vessel is fishing under a Category B DAS in the Closed Area II Yellowtail Flounder SAP specified in § 648.85(b)(3), the Regular B DAS Program specified in § 648.85(b)(6), or the Eastern U.S./Canada Haddock SAP specified in § 648.85(b)(7), remove any fish caught with any gear, including dumping the contents of a net, except on board the vessel.

(ii) *General restrictions for vessel and operator permit holders.* Discard legal-sized NE regulated multispecies, ocean pout, or Atlantic halibut while fishing under a SAP, as described in §§ 648.85(b)(3)(xi) or 648.85(b)(7)(v)(I).

* * * * *

■ 3. In § 648.81, revise paragraph (a)(5)(ii)(C) to read as follows:

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

(a) * * *

(5) * * *

(ii) * * *

(C) Fishing in the CA II Yellowtail Flounder/Haddock SAP or the Eastern U.S./Canada Haddock SAP Program as specified in § 648.85(b)(3)(ii) or (b)(7)(ii), respectively.

* * * * *

■ 4. In § 648.82, by revise paragraph (e)(3) to read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(e) * * *

(3) *Regular B DAS Program 24-hr clock.* For a vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), that remains fishing under a Regular B DAS for the entire fishing trip (without a DAS flip), DAS shall accrue at the rate of 1 full DAS for each calendar day, or part of a calendar day fished. For example, a vessel that fished on 1 calendar day from 6 a.m. to 10 p.m. would be charged 24 hr of Regular B DAS, not 16 hr; a vessel that left on a trip at 11 p.m. on the first calendar day and returned at 10 p.m. on the second calendar day would be charged 48 hr of Regular B DAS instead of 23 hr, because the fishing trip would have spanned 2 calendar days. For the purpose of calculating trip limits specified under § 648.86, the amount of DAS deducted from a vessel's DAS allocation shall determine the amount of fish the vessel can land legally. For a

vessel electing to fish in the Regular B DAS Program, as specified at § 648.85(b)(6), while also fishing in an area subject to differential DAS counting pursuant to paragraph (n)(1)(i) of this section, Category B DAS shall accrue at the rate described in this paragraph (e)(3), unless the vessel flips to a Category A DAS, in which case the vessel is subject to the pertinent DAS accrual restrictions of paragraph (n)(1) of this section for the entire trip. For vessels electing to fish in both the Regular B DAS Program, as specified in § 648.85(b)(6), and in the Eastern U.S./Canada Area, as specified in § 648.85(a), DAS counting will begin and end according to the DAS rules specified in § 648.10(e)(5)(iv).

* * * * *

§ 648.85 [Amended]

■ 5. Amend § 648.85 by:

■ a. Remove paragraph (b)(7); and

■ b. Redesignate paragraph (b)(8) as (b)(7).

[FR Doc. 2020–07070 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 85, No. 66

Monday, April 6, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 1, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by May 6, 2020 will be considered. 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.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Interstate Movement of Certain Land Tortoises.

OMB Control Number: 0579–0156.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to prevent, control, and eliminate domestic diseases such as tuberculosis, as well as to take actions to prevent and to manage exotic diseases such as heartwater disease. The regulations in 9 CFR part 93 prohibit the importation of the leopard tortoise, the African spurred tortoise, and the Bell's hingeback tortoise to prevent the introduction and spread of exotic ticks known to be vectors of heartwater disease, an acute, infectious disease of cattle and other ruminants. The regulations in 9 CFR part 74 prohibit the interstate movement of those tortoises that are already in the United States unless the tortoises are accompanied by a health certificate or certificate of veterinary inspection.

Need and Use of the Information: APHIS will collect information to ensure that the interstate movement of these leopard, African spurred, and Bell's hingeback tortoises poses no risk of spreading exotic ticks within the United States. Owners and veterinarians are required to provide the following information to Federal or accredited veterinarians for completion of the health certificate: Name, address, and telephone number of the owner; information identifying the animal such as collar or tattoo number; breed; age; sex; color; distinctive marks; vaccination history; and certifications from both the owner and the veterinarian that all information is true and accurate. The collected information is used for the purposes of identifying each specific tortoise and documenting the State of its health so that the animals can be transported across State and national boundaries.

If the information is not collected APHIS would be forced to ban the interstate movement of all leopard, African spurred, and Bell's hingeback tortoises. This would economically harm U.S. tortoise breeders.

Description of Respondents: Private and Commercial Animal Breeders, and Veterinarians.

Number of Respondents: 50.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 375.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–07158 Filed 4–3–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0002]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Beef and Ovine Meat From Uruguay and Beef From Argentina and Brazil

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with regulations for the importation of beef and ovine meat from Uruguay and beef from Argentina and Brazil.

DATES: We will consider all comments that we receive on or before June 5, 2020.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0002.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0002* 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: For information on the regulations for the importation of beef and ovine meat from Uruguay and beef from Argentina and Brazil, contact Dr. Lynette Williams, Senior Staff Veterinarian, Animal Product Imports, Strategy and Policy, VS, APHIS, 4700 River Road, Unit 40, Riverdale, MD 20737–1236; (301) 851–3300 option 1. For more detailed information on the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Beef and Ovine Meat From Uruguay and Beef From Argentina and Brazil.

OMB Control Number: 0579–0372.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: The Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), authorizes the Secretary of Agriculture to, among other things, prohibit or restrict the importation and interstate movement of animals and animal products into the United States to prevent the introduction of animal diseases and pests. The regulations for the importation of animals and animal products are contained in 9 CFR parts 92 through 98.

The regulations in part 94 provide the requirements for the importation of specified animals and animal products to prevent the introduction into the United States of various animal diseases, including foot-and-mouth disease (FMD). Among other things, the regulations in § 94.1 place certain restrictions on beef and ovine meat exported to the United States in accordance with § 94.29, when the beef or ovine meat enters a port or otherwise transits a region where FMD exists during shipment to the United States. An authorized official of the exporting region must provide the Animal and Plant Health Inspection Service (APHIS) with certification that specific conditions for importation listed in § 94.1 have been met.

Section 94.29 places certain restrictions on the importation of beef and ovine meat from Uruguay and fresh (chilled or frozen) beef from certain regions in Argentina and Brazil into the United States to prevent the introduction of FMD. These conditions involve information collection activities such as the requirement that APHIS collect, for each shipment, certification from an authorized veterinary official of the country of export that the conditions in § 94.29 have been met. For some of these conditions to be met, the facility in which the bovines and sheep are slaughtered must allow periodic on-site evaluation and subsequent inspection of its facilities. In addition, this collection includes animal identification and testing of select lambs.

We are asking the Office of Management and Budget to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.5 hours per response.

Respondents: Authorized veterinary officials employed by the governments of Argentina, Brazil, and Uruguay and managers of foreign facilities that process meat and meat products.

Estimated annual number of respondents: 6,019.

Estimated annual number of responses per respondent: 3.2.

Estimated annual number of responses: 19,458.

Estimated total annual burden on respondents: 10,045 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.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 1st day of April 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–07146 Filed 4–3–20; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Virginia Advisory Committee to the U.S. Commission on Civil Rights.

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement 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 Virginia Advisory Committee (Committee) will hold a meeting on Friday May 1, 2020 at 3:00 p.m. Eastern time. The Committee will discuss civil rights concerns in the state.

DATES: The meeting will take place on Friday May 1, 2020 at 3:00 p.m. Eastern time.

Public Call Information: Dial: 888–204–4368, Conference ID: 6333096.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 312–353–8311.

SUPPLEMENTARY INFORMATION: Members of the public can listen to these discussions. Committee meetings are available to the public through the above call in number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. 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 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments;

the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit, U.S. Commission on Civil Rights, 230 S. Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Corrine Sanders at *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit 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, Virginia 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 at the above email or street address.

Agenda

Welcome and Roll Call
Civil Rights in Virginia
Future Plans and Actions
Public Comment
Adjournment

Dated: March 31, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–07072 Filed 4–3–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Five-Year Records Retention Requirement for Export Transactions and Boycott Actions

AGENCY: Bureau of Industry and Security, Department of 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: To ensure consideration, written comments must be submitted on or before June 5, 2020.

ADDRESSES: Direct all written comments to Mark Crace, IC Liaison, Bureau of Industry and Security, 1401 Constitution Avenue, Suite 2099B, Washington, DC 20233 (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. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is necessary under Sections 760 and 762.6(a) of the Export Administration Regulations (EAR). The five-year retention requirement corresponds with the statute of limitations for violations and is necessary to preserve potential evidence for investigations. All parties involved in the export, reexport, transshipment or diversion of items subject to the EAR and the U.S. party involved in the export transaction involving a reportable boycott request are required to maintain records of these activities for a period of five years. The frequency depends upon how often each entity is involved in an export transaction or one involving a reportable boycott request.

II. Method of Collection

Submitted on paper or electronically.

III. Data

OMB Control Number: 0694–0096.
Form Number(s): N/A.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 100,000.
Estimated Time per Response: 1 second to 1 minute.
Estimated Total Annual Burden Hours: 258.
Estimated Total Annual Cost to Public: $0.
Respondent's Obligation: Voluntary.
Legal Authority: Export Control Reform Act 4812(b) and 4814(b)(1)(B).

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 23, 2020.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–07136 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on small diameter graphite electrodes (SDGEs) from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order.

DATES: Applicable April 6, 2020.

FOR FURTHER INFORMATION: Jinny Ahn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0339.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2019, Commerce initiated a five-year sunset review of the AD order on SDGEs from China, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[1] As a result of its

[1] *See Initiation of Five-Year (Sunset) Review,* 84 FR 18477 (May 1, 2019).

review, Commerce determined that revocation of the AD order on SDGEs from China would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the order be revoked.[2] On March 27, 2020, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the AD order on SDGEs from China would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

Scope of the Order

The merchandise covered by the order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrodes. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8545.11.0010,[4] 3801.10,[5] and 8545.11.0020.[6] The HTSUS numbers are provided for convenience and customs purposes, but the written description of the scope is dispositive.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the AD order would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the AD order on SDGEs from China. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Notification to Interested Parties

This five-year sunset review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: March 31, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–07150 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See Small Diameter Graphite Electrodes From the People's Republic of China: Final Results of Expedited Second Sunset Review of the Antidumping Duty Order,* 84 FR 44852 (August 27, 2019).

[3] *See Small Diameter Graphite Electrodes from China: Determination,* 85 FR 17363 (March 27, 2020); *see also Small Diameter Graphite Electrodes* from China: Investigation No. 731–TA–1143 (Second Review), USITC Publication 5035 (March 2020).

[4] The scope described in the order refers to the HTSUS subheading 8545.11.0000. We note that, starting in 2010, imports of small diameter graphite electrodes are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020.

[5] HTSUS subheading 3801.10 was added to the scope of the graphite electrodes order based on a determination in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 77 FR 47596 (August 9, 2012) (first circumvention determination). The products covered by the first circumvention determination are graphite electrodes (or graphite pin joining systems) that were 1) produced by UK Carbon and Graphite Co., Ltd. (UKCG) from China-manufactured artificial/synthetic graphite forms, of a size and shape (*e.g.,* blanks, rods, cylinders, billets, blocks, *etc.*), 2) which required additional machining processes (*i.e.,* tooling and shaping) that UKCG performed in the United Kingdom (UK), and 3) were re-exported to the United States as UK-origin merchandise.

[6] HTSUS subheading 8545.11.0020 was added to the scope of the graphite electrodes order based on a determination in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order and Rescission of Later-Developed Merchandise Anticircumvention Inquiry,* 78 FR 56864 (September 16, 2013) (second circumvention determination). The products covered by the second circumvention determination are graphite electrodes produced and/or exported by Jilin Carbon Import and Export Company with an actual or nominal diameter of 17 inches.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–921]

Lightweight Thermal Paper From the People's Republic of China: Rescission of Countervailing Duty Administrative Review: 2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the countervailing duty (CVD) order on certain lightweight thermal paper (thermal paper) from the People's Republic of China (China) for the period of review (POR) January 1, 2018 through December 31, 2018, based on the timely withdrawal of the requests for review.

DATES: Applicable April 6, 2020.

FOR FURTHER INFORMATION CONTACT: Dusten Hom, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5075.

SUPPLMENTARY INFORMATION:

Background

On November 1, 2019, Commerce published a notice of opportunity to request an administrative review of the CVD order on thermal paper from China for the POR of January 1, 2018, through December 31, 2018.[1] Commerce received a timely-filed request from Appvion, Inc. (Appvion) for an administrative review of Sailing International Limited, Shenzhen Formers Printing Co., Ltd., Suzhou Xiandai Paper Production Co., Dong Nam Pack, Gold Shengpu Paper Products (Suzhou), Xiamen ATP Technology Co., Ltd., Gold Huasheng Paper (Suzhou IP) Co., Henan Jianghe Paper Co. Ltd., Wuxi Honglinxin International Trade, Shenzhen HDB Network Technology, Jinan Fuzhi Paper Co., Ltd., Avery Dennison (China) Co., Ltd., Pax Technology Limited, Shenzhen Speedy Import & Export Co., Ltd., SYCDA Company Limited, and Prosper (HK) Co., Ltd., in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b).[2]

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 84 FR 58690 (November 1, 2019).

[2] *See* letter from Appvion, ''Lightweight Thermal Paper from the People's Republic of China; Request

Continued

On February 6, 2020, pursuant to these requests and in accordance with 19 CFR 351.221(c)(1)(i), Commerce published a notice initiating an administrative review of the countervailing duty order on thermal paper from China with respect to all of the companies for which Appvion had requested the review.[3] On March 26, 2020, Appvion withdrew its request for an administrative review with respect to all of the companies for which Commerce had initiated the review.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party or parties that requested a review withdraws the request within 90 days of the publication date of the notice of initiation of the requested review. Appvion withdrew its request for review of all companies that were subject to the review within the requisite 90 days. No other parties requested an administrative review of the order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review in its entirety.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries of thermal paper from China. Countervailing duties shall be assessed at rates equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to all parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[5]

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: March 31, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

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for Administrative Review,'' dated December 2, 2019.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 6896 (February 6, 2020).

[4] *See* letter from Appvion, ''Lightweight Thermal Paper from the People's Republic of China/ Withdrawal for Request for Administrative Review,'' dated March 26, 2020.

[5] *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–570–012]

Carbon and Certain Alloy Steel Wire Rod From the People's Republic of China: Final Results of the Expedited First Five-Year Sunset Review of the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this sunset review, the Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on carbon and certain alloy steel wire rod (wire rod) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Applicable April 6, 2020.

FOR FURTHER INFORMATION CONTACT: Ian Hamilton, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4798.

SUPPLEMENTARY INFORMATION:

Background

On January 8, 2015, Commerce published its AD order on wire rod from China in the **Federal Register**.[1] On December 2, 2019, Commerce published the notice of initiation of the first sunset review of the AD order on wire rod from China,[2] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[3] Commerce received notices of intent to participate from Charter Steel, Commercial Metals Company, EVRAZ Rocky Mountain Steel, Liberty Steel USA, Nucor Corporation, and Optimus Steel LLC (collectively, domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i).[4] Each claimed interested party status under section 771(9)(C) of the Act, as domestic producers of wire rod in the United States.

Commerce received a substantive response from the domestic interested parties [5] within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). We received no substantive response from any other domestic or interested parties in this proceeding, nor was a hearing requested.

On January 22, 2020, Commerce notified the U.S. International Trade Commission (ITC) that it did not receive an adequate substantive response from respondent interested parties.[6] As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of this AD order.

Scope of the Order

The merchandise covered by this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately circular cross section, less than 19.00 mm in actual solid cross-sectional diameter. Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; or (e) concrete reinforcing bars and rods. Also excluded are free cutting steel (also known as free machining steel) products (*i.e.,* products that contain by weight one or more of

[1] *See Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Antidumping Duty Order,* 80 FR 1015 (January 8, 2015) (*Order*).

[2] *See Order.* We applied the weighted-average dumping margins of 106.19 percent to Rizhao Steel Wire Co., Ltd., Hunan Valin Xiangtan Iron & Steel Co., Ltd., and Jiangsu Shagang International Trade Co., Ltd., and 110.25 percent as the China-wide rate. *Id.* at 1017.

[3] *See Initiation of Five-Year (Sunset) Review,* 84 FR 65968 (December 2, 2019).

[4] *See* Domestic Interested Parties' Letter, ''Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Notice of Intent to Participate,'' dated December 17, 2019.

[5] *See* Domestic Interested Parties' Letter, ''Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China—Domestic Interested Parties' Substantive,'' dated January 2, 2020.

[6] *See* Commerce's Letter, ''Sunset Review Initiated on December 2, 2019,'' dated January 22, 2020.

the following elements: 0.1 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium). All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093; 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035 of the HTSUS. Products entered under subheadings 7213.99.0090 and 7227.90.6090 of the HTSUS also may be included in this scope if they meet the physical description of subject merchandise above. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive. For a complete description of the scope of the *Order, see* the accompanying Issues and Decision Memorandum.[7]

Analysis of Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum. The issues discussed in the Issues and Decision Memorandum are the likelihood of continuation or recurrence of dumping, and the magnitude of the margins of dumping likely to prevail if this order were revoked. The Issues and Decision Memorandum is a public document and is on file electronically via the Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Commerce building. A list of topics discussed in the Issues and Decision Memorandum is included as the appendix to this notice. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, we determine that revocation of the AD order on wire rod from China would be likely to lead to continuation or recurrence of dumping at weighted-average margins up to 110.25 percent.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and this notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[8]

Dated: March 31, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. History of the Order
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of Dumping
  2. Magnitude of the Dumping Margins Likely to Prevail
VII. Final Results of Sunset Review
VIII. Recommendation

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[7] *See* Memorandum, ''Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[8] *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–580–883]

Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Partial Rescission of the Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is partially rescinding the administrative review of the antidumping duty order on certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Korea (Korea) for the period October 1, 2018 through September 30, 2019.

DATES: Applicable April 6, 2020.

FOR FURTHER INFORMATION CONTACT: Genevieve Coen, 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) 482–3251.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2019, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on hot-rolled steel from Korea.[1] Pursuant to requests from interested parties, Commerce initiated an administrative review with respect to ten companies, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[2] Subsequent to the initiation of the administrative review, the petitioners[3] timely withdrew their request for an administrative review of nine companies for which a review had been requested, as discussed below. No other party requested an administrative review of these companies.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 52068 (October 1, 2019).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 84 FR 67712 (December 11, 2019) (Initiation Notice); see also Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 3014 (January 17, 2020) at footnote 6, clarifying initiation as to two of these companies.

[3] The petitioners are AK Steel Corporation; ArcelorMittal USA LLC; Nucor Corporation; SSAB Enterprises, LLC; Steel Dynamics, Inc.; and United States Steel Corporation.

administrative review, in whole or in part, if the party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation. The request for an administrative review of the following companies was withdrawn within 90 days of the date of publication of the *Initiation Notice:* POSCO; POSCO Daewoo Corporation; Dongbu Steel Co., Ltd.; Dongkuk Industries Co., Ltd.; Dongkuk Steel Mill Co., Ltd.; Marubeni-Itochu Steel Korea Ltd.; Soon Hong Trading Co.; Snp Ltd.; and Sungjin Co., Ltd.[4] As a result, Commerce is rescinding this review with respect to these nine companies, in accordance with 19 CFR 351.213(d)(1). The review will continue with respect to Hyundai Steel Company.[5]

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the companies for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse for consumption, in accordance with 19 CFR 351.212(c)(l)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(l) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 1, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

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[4] *See* Petitioners' Letter, ''Hot-Rolled Steel Flat Products from the Republic of Korea—Petitioners' Partial Withdrawal of Request for Review,'' dated March 10, 2020.

[5] *See Initiation Notice,* 84 FR at 67715.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–854]

Certain Steel Nails From Taiwan: 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 determines that certain steel nails from Taiwan were sold in the United States at less than normal value during the period of review (POR), July 1, 2018 to June 30, 2019. Interested parties are invited to comment on these preliminary results.

DATES: Applicable April 6, 2020.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

Background

These preliminary results of review are issued in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). On September 9, 2019, in accordance with section 751(a) of the Act and 19 CFR 351.221(c)(1)(i), Commerce published the notice of initiation for the administrative review, covering 84 companies.[1] On October 22, 2019, Commerce selected as mandatory respondents, Bonuts Hardware Logistics Co., LLC (Bonuts) and Create Trading Co., Ltd., (Create Trading), the two companies accounting for the largest volume of exports in the U.S. Customer and Border Protection (CBP) data.[2] As Bonuts did not respond to Commerce's questionnaire, or request any extensions to file its responses, and Commerce excused Create Trading from responding to the questionnaire, Commerce selected an additional respondent to individually examine. Subsequently, on January 17, 2020, Commerce selected the next largest exporter, by volume, PT Enterprise, Inc. (PT Enterprise) and its affiliated producer Pro-Team Coil Nail Enterprise, Inc. (Pro-Team) (collectively, PT),[3] as a replacement respondent for individual examination.[4]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[5] The Preliminary Decision Memorandum is a public document and is on file electronically via the Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 47242 (September 9, 2019).

[2] *See* Memorandum, ''Administrative Review of Certain Steel Nails from Taiwan: Respondent Selection,'' dated October 22, 2019.

[3] In a prior segment of the proceeding, Commerce determined that Pro-Team and PT Enterprise comprise a single entity, and we find no new information in this segment of the proceeding that contradicts that finding. *See Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015–2016,* 82 FR 36744 (August 7, 2017) and accompanying Preliminary Decision Memorandum, unchanged in *Certain Steel Nails from Taiwan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015–2016,* 83 FR 6163 (February 13, 2018). Accordingly, we have preliminarily continued to treat PT Enterprise and Pro-Team as a single entity.

[4] *See* Memorandum, ''Administrative Review of Certain Steel Nails from Taiwan: Selection of Additional Mandatory Respondent,'' dated January 17, 2020.

[5] *See* Memorandum, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Steel Nails from Taiwan; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Scope of the Order [6]

The merchandise covered by this order is certain steel nails from Taiwan. The certain steel nails subject to the order are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Certain steel nails subject to this order also may be classified under HTSUS subheadings 7907.00.60.00, 8206.00.00.00 or other HTSUS subheadings. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description, available in the Preliminary Decision Memorandum, remains dispositive.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. For a full description of the methodology underlying the preliminary results, *see* the Preliminary Decision Memorandum.

Preliminary Determination of No Shipments

Commerce received no shipment certifications from five companies: Astrotech Steels Private Limited, Jinhai Hardware Co., Ltd., Region International Co., Ltd., Region Industries, and Region System Sdn Bhd.[7] To confirm these companies' no-shipment claims, Commerce issued a no-shipment inquiry to CBP and received no contradictory information.[8] Therefore, we preliminarily determine that these five companies did not have any shipments of subject merchandise during the POR. Consistent with Commerce's practice, we will not rescind the review with respect to these companies, but, rather, will complete the review and issue instructions based on the final results.[9]

Preliminary Determination of No Reviewable Entries

As noted above, Commerce selected Create Trading as a mandatory respondent. Create Trading reported that it had no reviewable sales because its unaffiliated producers had knowledge of the final destination of the subject merchandise that they produced and sold to Create Trading, and which Create Trading resold to U.S. customers during the POR. Create Trading provided sales documentation from its unaffiliated producers as evidence in support of its claim.[10] Because the evidence on the record demonstrates that Create Trading's unaffiliated suppliers had knowledge that the final destination of the subject merchandise was to customers in the United States, we find that Create Trading had no reviewable sales of subject merchandise during the POR. We intend to instruct CBP at the final results to liquidate any existing entries of merchandise produced by Create Trading's unaffiliated producers and exported by Create Trading at the rate applicable to the unaffiliated producers, *i.e.,* the all-others rate.[11]

Facts Available

Pursuant to section 776(a) of the Act, Commerce is preliminarily relying upon facts otherwise available to assign estimated dumping margins to Bonuts and PT because both respondents withheld necessary information that was requested by Commerce, thereby significantly impeding the conduct of the review. Further, Commerce preliminarily determines that both Bonuts and PT failed to cooperate by not acting to the best of their abilities to comply with requests for information and, thus, Commerce is applying an adverse inference in selecting among the facts available, in accordance with section 776(b) of the Act. For a full description of the methodology underlying our conclusions regarding the application of adverse facts available (AFA), *see* the Preliminary Decision Memorandum.

Rate for Non-Selected Companies

In accordance with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle,*[12] we are applying a rate based on the simple average of the individual rates preliminarily applied to Bonuts and PT in this administrative review (*i.e.,* 78.17 percent) to the companies not selected for individual examination. For a detailed discussion, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminarily determine that, for the period July 1, 2018 through June 30, 2019, the following estimated dumping margins exist:

Exporter/producer	Dumping margin (percent)
Bonuts Hardware Logistics Co	78.17
PT Enterprise, Inc./Pro-Team Coil Nail Enterprise, Inc	78.17
Review-Specific Average Rate Applicable to Companies Under Review Not Selected for Individual Examination	
See Appendix II for the 75 companies under review subject to the review-specific average rate	78.17

[6] *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 80 FR 39994 (July 13, 2015) (*Order*).

[7] *See* certifications of no shipments filed by: (1) Astrotech Steels Private Limited, dated October 1, 2019; (2) Jinhai Hardware Co., Ltd., dated October 9, 2019; and (3) Region System Sdn Bhd; (4) Region Industries Co., Ltd.; and (5) Region International Co., Ltd., dated October 9, 2019.

[8] *See* No Shipment Inquiry, Message 9289301 (ACCESS Barcode 3900308–01).

[9] *See, e.g., Certain Frozen Warmwater Shrimp from Thailand; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, Preliminary Determination of No Shipments; 2012–2013,* 79 FR 15951, 15952 (March 24, 2014), unchanged in *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission of Review; 2012–2013,* 79 FR 51306, 51307 (August 28, 2014).

[10] *See* Create Trading's Letter, ''Statement of No Sales to the United States,'' dated November 12, 2019, at Exhibits 1 and 2.

[11] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954, 23954 (May 6, 2003) (*Assessment of Antidumping Duties*); *see also Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 23974, 23977 (April 29, 2011), unchanged in *Pasta From Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review,* 76 FR 68399 (November 4, 2011).

[12] *See Albemarle Corp.* v. *United States,* 821 F. 3d 1345 (Fed. Cir. 2016) (*Albemarle*).

Assessment Rates

Upon completion of the administrative review, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[13] If the preliminary results are unchanged for the final results, we will instruct CBP to apply an *ad valorem* assessment rate of 78.17 percent to all entries of subject merchandise during the POR which were produced and/or exported by Bonuts and PT, and the companies which were not selected for individual examination. We intend to issue liquidation instructions to CBP 15 days after the date of publication of the final results of this review.

With respect to the five companies that certified they had no shipments, if we continue to find that they had no shipments of subject merchandise in the final results, we will instruct CBP to liquidate any existing entries of subject merchandise produced by the five companies, but exported by other parties, at the rate for the intermediate reseller, if available, or at the all-others rate.[14]

We determined that Create Trading was not the first party in the transaction chain to have knowledge that the merchandise was destined for the United States, and thus Create Trading is not considered the exporter of subject merchandise during the POR for purposes of this review. In our May 6, 2003, ''automatic assessment'' clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding.[15] Here, Commerce finds that Create Trading had no shipments of subject merchandise to the United States during the POR for which it was the first party with knowledge of U.S. destination. Because ''as entered'' liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by Create Trading's unaffiliated producers and exported by Create Trading at the rate applicable to the producer(s).[16] However, because none of the producers have their own rates, we will instruct CBP to liquidate entries at the all-others rate from the investigation, as revised, of 2.16 percent,[17] in accordance with the reseller policy.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Bonuts, PT, and the other companies listed in Appendix II will be equal to the dumping margin established in the final results of this administrative review; (2) for previously reviewed or investigated companies not listed above, 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, a prior review, or in the 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; and the cash deposit rate for all other manufacturers or exporters will continue to be 2.16 percent, the all-others rate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Normally, Commerce discloses the calculations performed in connection with preliminary results to interested parties within five days after the date of publication of this notice.[18] Because Commerce preliminarily applied a rate based on total AFA to each of the mandatory respondents in this review, in accordance with section 776 of the Act, there are no calculations to disclose.

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[19] Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs.[20] Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[21] Case and rebuttal briefs should be filed via ACCESS.[22] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[23]

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 by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[24] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a date and time to be determined.[25] Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

Final Results of Review

Unless extended, Commerce intends to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case and rebuttal briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

Notification to Importers

This notice also serves as a preliminary reminder to importers of

[13] *See* 19 CFR 351.212(b).

[14] *See, e.g., Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989 (September 17, 2010).

[15] *See Assessment of Antidumping Duties.*

[16] *See, e.g., Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 77610, 77612 (December 19, 2008); *see also Certain Pasta From Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review,* 76 FR 68399, 68400 (November 4, 2011).

[17] The all-others rate from the underlying investigation was revised in *Certain Steel Nails from Taiwan: Notice of Court Decision Not in Harmony with Final Determination in Less than Fair Value Investigation and Notice of Amended Final Determination,* 82 FR 55090, 55091 (November 20, 2017).

[18] *See* 19 CFR 351.224(b).

[19] *See* 19 CFR 351.309(c)(1)(ii).

[20] *See* 19 CFR 351.309(d)(1) and (2).

[21] *See* 19 CFR 351.309(c)(2) and (d)(2).

[22] *See,* generally, 19 CFR 351.303.

[23] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020).

[24] *See* 19 CFR 351.310(c).

[25] *See* 19 CFR 351.310(d).

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 this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and sections 19 CFR 351.213(h)(1) and 351.221(b)(4).

Dated: March 31, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Recommendation

Appendix II

List of Companies Under Review Not Selected for Individual Examination

1. All Precision Co., Ltd.
2. Aplus Pneumatic Corp.
3. Basso Industry Corporation
4. Challenge Industrial Co., Ltd.
5. Cheng Ch International Co. Ltd.
6. Chia Pao Metal Co. Ltd.
7. China Staple Enterprise Corporation
8. Chite Enterprises Co., Ltd.
9. Crown Run Industrial Corp.
10. Da Yong Enterprise Co., Ltd.
11. Daejin Steel Company Ltd.
12. De Fasteners Inc.
13. Dragon Iron Factory Co., Ltd.
14. Easylink Industrial Co., Ltd.
15. ECI Taiwan Co., Ltd.
16. Encore Green Co., Ltd.
17. Faithful Engineering Products Co. Ltd.
18. Fastenal Asia Pacific Ltd.
19. Four Winds Corporation
20. Gaun Ting Technology Co., Ltd.
21. General Merchandise Consolidators
22. Ginfa World Co. Ltd.
23. Gloex Inc.
24. Home Value Co., Ltd.
25. Hor Liang Industrial Corp.
26. Hoyi Plus Co., Ltd.
27. Integral Building Products Inc.
28. Interactive Corp.
29. J C Grand Corporation
30. Jade Shuttle Enterprise Co., Ltd.
31. Jau Yeou Industry Co., Ltd.
32. Jen Ju Enterprise Co., Ltd.
33. Jet Crown International Co., Ltd.
34. Jiajue Industrial Co. Ltd.
35. Jinsco International Corp.
36. Ko's Nail Inc.
37. Korea Wire Co., Ltd.
38. Liang Chyuan Industrial Co., Ltd.
39. Linkwell Industry Co., Ltd.
40. Locksure Inc.
41. Long Ngyuen Trading & Service Co.
42. Lu Kang Hand Tools Industrial Co., Ltd. (Prommer)
43. Master United Corp.
44. Maytrans International Corp.
45. Ming Cheng Hardware Co., Ltd.
46. Nailermate Enterprise Corporation
47. Nailtech Co., Ltd.
48. Newrex Screw Corporation
49. NS International Ltd.
50. Panther T&H Industry Co.
51. Patek Tool Co., Ltd.
52. Point Edge Corp.
53. President Industrial Inc.
54. Quick Advance Inc.
55. Romp Coil Nail Industries Inc.
56. Shinn Chuen Corp.
57. Six-2 Fastener Imports Inc.
58. Taiwan Shan Yin Int'l Co. Ltd.
59. Taiwan Wakisangyo Co. Ltd.
60. Techart Mechanical Corporation
61. Test-Rite Int'l Co., Ltd.
62. Theps Co., Ltd.
63. Trans-Top Enterprise Co., Ltd.
64. Trim International Inc.
65. U-Can-Do Hardware Corp.
66. UJL Industries Co., Ltd.
67. Unicatch Industrial Co. Ltd.
68. VIM International Enterprise Co., Ltd.
69. Wattson Fastener Group Inc.
70. Wictory Co. Ltd.
71. Yeh Fong Hsin
72. Yehdyi Enterprise Co., Ltd.
73. Yu Chi Hardware Co., Ltd.
74. Zhishan Xing Enterprise Co., Ltd.
75. Zon Mon Co. Ltd.

[FR Doc. 2020–07151 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA105

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold meetings of its Archipelagic Plan Team (APT) and the Data Collection Subpanel (DCSP) of the Fishery Data Collection and Research Committee—Technical Committee (FDCRC–TC) by web conference to discuss fishery management issues and develop recommendations for future management of fisheries in the Western Pacific Region.

DATES: The APT will be held on April 20–22, 2020. The DCSP will be held on April 23–24, 2020. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meetings will be held by web conference. Audio and visual portions of the web conference can be accessed at: *https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov.* Web conference access information will also be posted on the Council's website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 522–8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522–8220 (voice) or (808) 522–8226 (fax).

SUPPLEMENTARY INFORMATION: The APT meeting will be held on April 20–22, 2020, from 1 p.m. to 5 p.m. Hawaii Standard Time (HST) (noon to 4 p.m. Samoa Standard Time (SST); 9 a.m. to 1 p.m. on April 21- 23, 2020, Chamorro Standard Time (ChST)). The FDCRC–TC DCSP meeting will be held on April 23–24, 2020, from 1 p.m. to 5 p.m. HST (noon to 4 p.m. SST; 9 a.m. to 1 p.m. on April 24–25, 2020 ChST). Opportunities to present oral public comment will be provided throughout the agendas. The order of the agenda may change, and will be announced in advance at the meetings. The meetings may run past the scheduled times noted above to complete scheduled business.

Agenda for the Archipelagic Plan Team Meeting

Monday, April 20, 2020, 1 p.m. to 5 p.m. HST (noon–4 p.m. SST; Tuesday, April 21, 2020, 9 a.m.–1 p.m. ChST)

1. Welcome and introductions
2. Approval of draft agenda
3. Report on previous Plan Team recommendations and Council actions
4. Plan Team 101: Who Are We, What We Do, and Role in the Process?
5. 2019 Annual Stock Assessment and Fishery Evaluation (SAFE) Report
   A. Fishery Performance
   1. Archipelagic fisheries modules
   a. American Samoa
   1. Bottomfish fishery
   2. Ecosystem component fisheries
   b. Guam
   1. Bottomfish fishery
   2. Ecosystem component fisheries
   c. Commonwealth of the Northern Mariana Islands (CNMI)
   1. Bottomfish fishery
   2. Ecosystem component fisheries
   d. Hawaii
   1. Bottomfish fishery
   2. Crustacean fishery
   3. Precious coral fishery
   4. Ecosystem component fisheries

5. Non-commercial fisheries
2. Discussions
3. Public Comment

Tuesday, April 21, 2020, 1 p.m. to 5 p.m. HST (noon–4 p.m. SST; Wednesday, April 22, 2020, 9 a.m.–1 p.m. ChST)

B. Ecosystem Considerations
1. Protected species section
2. Climate, ecosystems and biological section
a. Environmental & climate variables
b. Life history and length-derived variables
c. Biomass estimates for Coral Reef Ecosystem Components
3. Habitat section
4. Socioeconomics section
5. Marine Planning section
6. Discussions
7. Public Comment
C. Administrative Reports
1. Number of federal permits
2. Regulatory actions in 2019
3. Discussions
4. Public Comment

Wednesday, April 22, 2020, 1 p.m. to 5 p.m. HST (noon–4 p.m. SST; Thursday, April 23, 2020, 9 a.m.–1 p.m. ChST)

6. Action agenda items
A. American Samoa Bottomfish Fishery
1. P* Working Group Report
2. Social, Economic, Ecological and Management Uncertainty (SEEM) Working Group Report
3. Alternatives for Annual Catch Limits (ACLs)
B. Options for the Hawaii Small-Boat Fishery Management
C. Discussions
D. Public Comment
7. Standardized Bycatch Reporting Methodology
8. Report on Consultation on the Revision of the Bottomfish Management Unit Species (BMUS) Complex
9. Implementing Electronic Self-Reporting for the Small Boat Fisheries
A. Small Boat Reporting Application
B. Coordination on Implementing the Reporting Apps in the Territories
C. Discussions
D. Public Comment
13. General Discussions
14. Fishery Ecosystem Plan Team Recommendations
15. Other Business

Agenda for the Fishery Data Collection and Research Committee—Technical Committee: Data Collection Subpanel

Thursday, April 23, 2020, 1 p.m. to 5 p.m. HST (noon–4 p.m. SST; Friday, April 24, 2020, 9 a.m.–1 p.m. ChST)

1. Welcome and introductions
2. Approval of draft agenda
3. Report on previous TC recommendations and Council actions
4. Status of the fishery dependent data collection improvement efforts
A. American Samoa
B. Guam
C. CNMI
D. Hawaii
E. Small Boat E-Reporting App
F. Western Pacific Fishery Information Network (WPacFIN) Initiatives
5. Marine Recreational Information Program (MRIP) Certification of Non-Commercial Fisheries Surveys
A. Hawaii Marine Recreational Fishing Surveys
B. Territory Shore-Based Creel Surveys
6. Discussions
7. Public Comment

Friday, April 24, 2020, 1 p.m.–5 p.m. HST (noon–4 p.m. SST; Saturday, April 25, 2020, 9 a.m.–1 p.m. ChST)

8. Finalizing the Implementation Plan for the Small-Boat E-Reporting App
9. Developing a Framework for Calibration and Transition
10. MRIP Related Agenda Items
A. Review of the State Partnership Plan
B. National Salt Water Angler Registry Memorandum of Agreement Review Plan
11. Discussions
12. Other Business
13. Public Comment
14. FDCRC–TC–DSP Recommendations

Special Accommodations

These meetings are accessible to people with disabilities. Please direct requests for sign language interpretation or other auxiliary aids to Kitty M. Simonds (see **FOR FURTHER INFORMATION CONTACT** section above) at least 5 days prior to the meeting date.

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

Dated: April 1, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–07134 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA104

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public online meeting.

SUMMARY: The Groundfish and Coastal Pelagic Species (CPS) Subcommittees of the Pacific Fishery Management Council's (Pacific Council's) Scientific and Statistical Committee (SSC) will hold a meeting to review proposed revisions to the Terms of Reference for the Groundfish and Coastal Pelagic Species Stock Assessment Review Process for 2021 and 2022. The meeting is open to the public.

DATES: The SSC Groundfish and CPS Subcommittees' online meeting will be held Tuesday, April 21, 2020 beginning at 1 p.m. and continuing until 4 p.m. Pacific Daylight Time or until business for the day has been completed.

ADDRESSES: The SSC's Groundfish and CPS Subcommittees' meeting will be an online meeting.

Instructions to attend the online meeting:

Join from PC, Mac, Linux, iOS or Android: *https://meetings.ringcentral.com/j/1489984146.*

Or iPhone one-tap: US: +1(623)4049000, 1489984146# (U.S. West), +1(720)9027700, 1489984146# (U.S. Central), +1(773)2319226, 1489984146# (U.S. North), +1(469)4450100, 1489984146# (U.S. South), +1(470)8692200, 1489984146# (U.S. East).

Or Telephone: Dial (for higher quality, dial a number based on your current location): US: +1(623) 404–9000 (U.S. West), +1(720) 902–7700 (U.S. Central), +1 (773) 231–9226 (U.S. North), +1 (469) 445–0100 (U.S. South), +1 (470) 869–2200 (U.S. East).

Meeting ID: 148 998 4146.

International numbers available: https://meetings.ringcentral.com/teleconference.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Mr. John DeVore, Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2413.

SUPPLEMENTARY INFORMATION: The purpose of the SSC Groundfish and CPS Subcommittees' meeting is to review proposed changes to the Terms of Reference for the Groundfish and Coastal Pelagic Species Stock Assessment Review Process for 2021 and 2022 that will inform the process for conducting and reviewing groundfish and CPS assessments in 2021 and 2022. Members of the Pacific

Council's groundfish and CPS advisory bodies are encouraged to attend to prepare their recommendations to the Council. Proposed changes to the Terms of Reference were first considered in an online webinar on December 13, 2019. A report from that webinar was discussed by the SSC at their March meeting and their recommended changes to the ToR were adopted by the Pacific Council for public review. The Pacific Council is scheduled to adopt a final Terms of Reference at their June meeting in San Diego, California.

No management actions will be decided by the SSC's Groundfish and CPS Subcommittees. The SSC Groundfish and CPS Subcommittees' members' role will be development of recommendations and reports for consideration by the SSC and Pacific Council at the June meeting in San Diego, CA.

Although nonemergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent of the SSC Groundfish Subcommittee to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2411, at least 10 days prior to the meeting date.

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

Dated: April 1, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–07133 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request; Surveys To Collect Data on Use of the NOAA National Weather Service Cone of Uncertainty

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: Surveys to Collect Data on Use of the NOAA National Weather Service Cone of Uncertainty.

OMB Control Number: 0648–NEW.

Form Number(s): None.

Type of Request: Regular submission (request for new information collection).

Number of Respondents: 1,406.

Average Hours per Response: 20 minutes per response.

Burden Hours: 468.5 hours (1,406 × 20 = 28,120/60 = 468.5).

Needs and Uses: The NOAA National Weather Service (NWS) National Hurricane Center (NHC) produces tropical cyclone text and graphical products to provide critical information about meteorological parameters of tropical storms and hurricanes that could threaten the United States and other countries. While NOAA has a good understanding of how many of its core partners (*i.e.,* emergency management personnel and broadcast meteorologists/members of the media) use these graphics, it is interested in how other professionals within key sectors (*i.e.,* transportation, marine, tourism, energy) and international users perceive these products and use them in decision-making. In particular, NOAA is interested in input on the NHC Track Forecast Cone (often referred to as the Cone of Uncertainty). In addition to appearing on NHC's website, the Cone is widely disseminated on social media, online (*e.g.,* local and national news websites), and on television—with broadcast meteorologists and private weather industry often making their own version of the graphic.

This request is for a web-based survey to collect data about the interpretation and use of the Cone of Uncertainty in the decision-making of key sectors that are at significant risk during a hurricane: energy/utilities, tourism, transportation, and marine. NOAA will use the data from the survey to determine how embedded the Cone of Uncertainty is in these key stakeholders' decision-making, as well as to determine what those decisions and implications look like (life and safety, loss reduction, other). It is vitally important for the NHC to understand this information before making any changes to the Cone graphic (*e.g.,* visualization changes with the intent of improving understanding).

Affected Public: Business or other for-profit organizations.

Frequency: Once.

Respondent's Obligation: Voluntary.

Legal Authority:

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 the title of the collection.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–07060 Filed 4–3–20; 8:45 am]

BILLING CODE 3510–KE–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Military Family Readiness Council; Notice of Federal Advisory Committee meeting; Cancellation

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting; cancellation.

SUMMARY: On March 6, 2020, the DoD published a notice that announced the next meeting of the Department of Defense Military Family Readiness Council, which was to take place on Tuesday, March 24, 2020 from 10:00 a.m. to 12:00 p.m. DoD is publishing this notice to announce that this federal advisory committee meeting has been cancelled and will be re-scheduled at a later date.

FOR FURTHER INFORMATION CONTACT: William Story, (571) 372–5345 (Voice), (571) 372–0884 (Facsimile), OSD Pentagon OUSD P–R Mailbox Family Readiness Council, *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil* (Email). Mailing address is: Office of the Deputy Assistant Secretary of Defense (Military Community & Family Policy), Office of Military Family Readiness Policy, 4800 Mark Center Drive, Alexandria, VA 22350–2300, Room 3G15. Website: *https://www.militaryonesource.mil/leaders-service-providers/military-family-readiness-council.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the Department of Defense Military Family Readiness Council, the Department of Defense Military Family Readiness Council was unable to provide public notification required by 41 CFR 102–3.150(a) concerning the cancellation of the previously noticed meeting for March 24, 2020. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

On March 6, 2020 (85 FR 13149–13150), the DoD published a notice that announced a March 24, 2020 meeting of the Department of Defense Military Family Readiness Council. DoD is publishing this notice to announce that this federal advisory committee meeting has been cancelled and will be re-scheduled at a later date. The re-scheduled meeting will be announced in the **Federal Register**.

Dated: April 1, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–07176 Filed 4–3–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

State Energy Advisory Board

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a Virtual Meeting of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, May 6, 2020, from 12:00 p.m. to 4:00 p.m. (ET).

To receive the Virtual Meeting information, please contact the Board's Designated Federal Officer at the address or phone number listed below.

FOR FURTHER INFORMATION CONTACT: Jay Nathwani, Designated Federal Officer, Office of Energy Efficiency and Renewable Energy, US Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585. Phone number 202–586–9410, and email *jay.nathwani@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: During this Virtual Meeting Assistant Secretary of EERE will provide the charges to STEAB, Deputy Assistant Secretary of Energy Efficiency will discuss opportunities and engagement with-in Energy Efficiency Sector, and EERE Technology Offices will discuss various funding opportunities and ways the State Energy Office can access DOE resources.

Public Participation: The Virtual Meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Jay Nathwani at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 60 days on the STEAB website at: *http://www.energy.gov/eere/steab/state-energy-advisory-board.*

Signed in Washington, DC, on April 1, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–07155 Filed 4–3–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed fiscal year 2021 Boulder Canyon Project base charge and rates for electric service.

SUMMARY: Western Area Power Administration (WAPA) is proposing an adjustment to the base charge and rates for fiscal year (FY) 2021 Boulder Canyon Project (BCP) electric service under Rate Schedule BCP–F10. The proposal would reduce the base charge 1.2 percent from $66.4 million in FY 2020 to $65.6 million for FY 2021. The reduction is primarily the result of an increase in prior year carryover funds and non-power revenue projections for the Hoover Dam visitor center. The proposed base charge and rates would go into effect on October 1, 2020, and remain in effect through September 30, 2021. Publication of this **Federal Register** notice will initiate the public process.

DATES: The consultation and comment period begins today and will end July 6, 2020. WAPA will present a detailed explanation of the proposed FY 2021 base charge and rates at a public information forum that will be held on May 6, 2020, from 10:30 a.m. to 12:30 p.m. Mountain Standard Time. WAPA will also host a public comment forum that will be held on June 5, 2020, from 10:30 a.m. to 12:30 p.m. Mountain Standard Time. WAPA will conduct both the public information forum and the public comment forum via WebEx. Instructions for participating in the forums via WebEx will be posted on WAPA's website at least 14 days prior to the public information and comment forums at *https://www.wapa.gov/regions/DSW/Rates/Pages/boulder-canyon-rates.aspx.* WAPA will accept written comments any time during the consultation and comment period.

ADDRESSES: Send written comments to Ms. Tracey A. LeBeau, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, Arizona 85005–6457, or email *dswpwrmrk@wapa.gov.* WAPA will post information concerning the rate process and written comments received on its website at *https://www.wapa.gov/regions/DSW/Rates/Pages/boulder-canyon-rates.aspx.*

FOR FURTHER INFORMATION CONTACT: Ms. Tina Ramsey, Rates Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, Arizona 85005–6457, (602) 605–2565, or *dswpwrmrk@wapa.gov.*

SUPPLEMENTARY INFORMATION: Hoover Dam,[1] authorized by the Boulder Canyon Project Act of 1928, as amended (43 U.S.C 617 *et seq.*), sits on the Colorado River along the Arizona-Nevada border. The Hoover Dam power plant has 19 generating units (two for plant use) and an installed capacity of 2,078.8 megawatts (4,800 kilowatts for plant use). In collaboration with the Bureau of Reclamation (Reclamation), WAPA markets and delivers

[1] Hoover Dam was known as Boulder Dam from 1933 to 1947, but was renamed Hoover Dam by an April 30, 1947 joint resolution of Congress. *See* Act of April 30, 1947, H.J. Res. 140, ch. 46, 61 Stat. 56–57.

hydropower from the Hoover Dam power plant through high voltage transmission lines and substations to Arizona, Southern California, and Southern Nevada.

The rate-setting methodology for BCP calculates an annual base charge rather than a unit rate for Hoover Dam hydropower. The base charge recovers an annual revenue requirement that includes projected costs of investment repayment, interest, operations, maintenance, replacements, payments to States, and Hoover Dam visitor services. Non-power revenue projections such as water sales, Hoover Dam visitor revenue, ancillary services, and late fees help offset these projected costs. Hoover power customers are billed a percentage of the base charge in proportion to their power allocation. A unit rate is calculated for comparative purposes but is not used to determine the charge for service.

On June 6, 2018, the Federal Energy Regulatory Commission (FERC) confirmed and approved Rate Schedule BCP–F10 for a five-year period ending September 30, 2022.[2] Rate Schedule BCP–F10 and the BCP Electric Service Contract require WAPA to determine the annual base charge and rates for the next fiscal year before October 1 of each year. The FY 2020 BCP base charge and rates expire on September 30, 2020.

COMPARISON OF BASE CHARGE AND RATES

	FY 2020	FY 2021	Amount change	Percent change
Base Charge ($)	$66,419,402	$65,606,080	− $813,322	− 1.2
Composite Rate (mills/kWh)	18.08	18.83	0.75	4.1
Energy Rate (mills/kWh)	9.04	9.42	0.38	4.2
Capacity Rate ($/kW-Mo)	$1.75	$1.73	− $0.02	− 1.1

Reclamation's FY 2021 budget is increasing $4.5 million to $80.2 million, a 5.9 percent increase from FY 2020. Higher operations and maintenance expenses ($2.6 million) and replacement costs ($1.7 million) account for most of this increase. The rate impact of these increases to Reclamation's budget are more than offset, however, by an increase in prior year carryover ($2.8 million) and non-power revenue projections ($2 million) following completion of the Hoover Dam visitor center renovations.

WAPA's FY 2021 budget is decreasing $400,000 to $8.4 million, a 4.2 percent reduction from FY 2020. Lower operations and maintenance expenses ($300,000) and the elimination of WAPA's contingency fund ($100,000) account for this decrease.

While there is a 1.2 percent reduction to the FY 2021 base charge, the composite and energy rates are increasing 4.1 and 4.2 percent respectively from FY 2020. The composite and energy rates use a forecasted energy value, which decreased due to the long-term drought in the Lower Colorado River Basin. The capacity rate is a 1.1 percent reduction from FY 2020 due to the decrease in the base charge. Forecasted energy and capacity values may be updated when determining the final base charge due to changing hydrological conditions.

This proposal, to be effective October 1, 2020, is preliminary and subject to change based on modifications to forecasts before publication of the final base charge and rates. In particular, the forecast of non-power revenue projections associated with the Hoover Dam visitor center may require modification due to social distancing requirements resulting from COVID–19.

Legal Authority

This action constitutes a major rate adjustment as defined by 10 CFR 903.2(e). Pursuant to 10 CFR 903.15 and 10 CFR 903.16, WAPA will hold public information and public comment forums for this rate adjustment. WAPA will review and consider all timely public comments and adjust the proposal, as appropriate, at the conclusion of the consultation and comment period.

WAPA is establishing rates for BCP electric service in accordance with section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This provision transferred to, and vested in, the Secretary of Energy certain functions of the Secretary of the Interior, along with the power marketing functions of Reclamation. Those functions include actions that specifically apply to the BCP.

The BCP Electric Service Contract states that in years other than the first and fifth years of a rate schedule approved by the FERC on a final basis, adjustments to the base charge shall be effective upon approval by the Deputy Secretary of Energy. Under the DOE Organization Act, the Secretary of Energy holds plenary authority over DOE affairs with respect to the Power Marketing Administrations. By Delegation Order No. 00–002.00S, effective January 15, 2020, the Secretary of Energy delegated to the Under Secretary of Energy the authority vested in the Secretary with respect to WAPA. By Redelegation Order No. 00–002.10E, effective February 14, 2020, the Under Secretary of Energy delegated to the Assistant Secretary for Electricity the same authority with respect to WAPA.[3] This rate action is issued under the Redelegation Order and DOE's procedures for public participation in rate adjustments set forth at 10 CFR parts 903 and 904.[4]

Availability of Information

All studies, comments, letters, memoranda, and other documents WAPA initiates or uses to develop the proposed base charge and rates are available for inspection and copying at the Desert Southwest Customer Service Regional Office, Western Area Power Administration located at 615 South 43rd Avenue, Phoenix, Arizona 85009. Many of these documents and supporting information are also available on WAPA's website at *https://www.wapa.gov/regions/DSW/Rates/Pages/boulder-canyon-rates.aspx.*

Ratemaking Procedure Requirements

Environmental Compliance

WAPA is in the process of determining whether an environmental assessment or an environmental impact statement should be prepared or if this

[2] Order Confirming and Approving Rate Schedule on a Final Basis, FERC Docket No. EF18–1–000, 163 FERC ¶ 62,154 (2018).

[3] Delegation Orders No. 00–002–00S and 00–002.10E both clarify that this delegation of authority is ''in addition'' to the authority to approve and place into effect on an interim basis WAPA's power and transmission rates.

[4] 50 FR 37,835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

action can be categorically excluded from those requirements.[5]

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Dated: March 25, 2020.

Mark A. Gabriel,

Administrator.

[FR Doc. 2020–07154 Filed 4–3–20; 8:45 am]

BILLING CODE 6450–01–P

[5] In compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2014–0125; FRL–10004–81]

Pesticide Reregistration Performance Measures and Goals; Annual Progress Report; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's progress report in meeting its performance measures and goals for pesticide reregistration during fiscal year 2017. This progress report also presents the total number of products registered under the ''fast-track'' provisions of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA).

DATES: Submit comments on or before June 5, 2020.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2014–0125, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Ramé Cromwell, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 308–9068; email address: *cromwell.rame@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the integration of tolerance reassessment with the reregistration process, and the status of various regulatory activities associated with reregistration and tolerances reassessment. Given the broad interest, the Agency has not attempted to identify all the specific entities that may be interested in this action.

II. What action is the Agency taking?

This document announces the availability of EPA's progress reports in meeting its performance measures and goals for pesticide reregistration during fiscal year 2017.

III. What is the Agency's authority for taking this action?

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.,* requires EPA to publish information about EPA's annual achievements in meeting its performance measures and goals for pesticide reregistration. The report for fiscal year 2017 discusses the completion of tolerance reassessment and describes the status of various regulatory activities associated with reregistration. The 2017 report also provides the total number of products reregistered and products registered under the ''fast-track'' provisions of FIFRA.

IV. How can I get a copy of the report?

1. *Docket.* The 2017 report is available at *http://www.regulations.gov,* under docket ID number EPA–HQ–OPP–2014–0125.

2. *EPA website.* The 2017 report is also available on EPA's website at *https://www.epa.gov/pesticide-reevaluation/reregistration-and-other-review-programs-predating-pesticide-registration.*

V. Can I comment on this report?

EPA welcomes input from stakeholders and the general public. Any written comments received will be taken into consideration in the event that EPA determines that further action is warranted. EPA does not expect this report to lead to any particular action, and therefore is not seeking particular public comment.

VI. What should I consider as I prepare my comments for EPA

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you email to EPA, mark the outside of the disk or CD–ROM as CBI then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing you comments, see the commenting tips at *http://www.epa.gov//dockets/comments.html.*

Authority: 7 U.S.C. 136a–1(l).

Dated: March 31, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–07135 Filed 4–3–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

[Fact Finding No. 29]

International Ocean Transportation Supply Chain Engagement; Order

Pursuant to the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.* (Shipping Act), the Federal Maritime Commission (Commission) is charged with regulating the U.S. international ocean transportation system that supports the transportation of goods by water in the foreign commerce of the United States (''liner service''). The purposes of the Shipping Act include the requirements to ''provide an efficient and economic transportation system in the ocean commerce of the United States that is,

insofar as possible, in harmony with, and responsive to, international shipping practices,'' and also ''to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.'' 46 U.S.C. 40101.

Maintaining the effectiveness and reliability of the global freight delivery system is critically important to the Nation's continued economic vitality. Unfortunately, congestion and bottlenecks at ports and other points in the Nation's supply chain have become a serious risk to the growth of the U.S. economy, job growth, and to our Nation's competitive position in the world.

In 2016, in response to challenges created by unresolved supply chain issues, the Commission convened teams of industry leaders to develop process innovations that would enhance supply chain reliability and resilience. Each of the teams was composed of members representative of the supply chain, including public port authorities, marine terminal operators, beneficial cargo owners, ocean transportation intermediaries, liner shipping companies, drayage trucking companies, longshore labor representatives, rail officials and chassis providers. The conclusions of these meetings were summarized and developed into a final report issued in December 2017.

Recent global events have only highlighted the economic urgency of responsive port and terminal operations to the effectiveness of the United States international freight delivery system. Given the Commission's mandate to ensure an efficient and economic transportation system for ocean commerce, the Commission has a clear and compelling responsibility to actively respond to current challenges impacting the global supply chain and the American economy. Accordingly, the Commission has determined there is a compelling need to convene new supply chain innovation teams to address these challenges.

Therefore it is ordered, That, pursuant to 46 U.S.C. 41302, 40302, 41101 to 41109, 41301 to 41309, and 40104, and 46 CFR 502.281 *et seq.,* Commissioner Rebecca F. Dye engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international supply chain;

It is further ordered, That, the Commissioner form one or more supply chain innovation teams, composed of leaders from all commercial sectors of the U.S. international supply chain, to develop commercial solutions to port congestion and related supply chain challenges;

It is further ordered, That, the Commissioner provide periodic updates to the Commission on the results of efforts undertaken by this Order;

It is further ordered, That, the Commissioner have full authority under 46 CFR 502.281 to 502.291, to perform such duties as may be necessary in accordance with U.S. law and Commission regulations. The Commissioner will be assisted by staff members as may be assigned by the Chairman;

It is further ordered, That, this Proceeding be discontinued as ordered by the Commission; and

It is finally ordered, That, notice of this Order be published in the **Federal Register**.

By the Commission.

Rachel Dickon,

Secretary.

[FR Doc. 2020–07096 Filed 4–3–20; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than April 21, 2020.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Julie A. Bartlett, Spring Green, Wisconsin; Constance S. Maloney, Wauwatosa, Wisconsin; James P. Maloney, Wauwatosa, Wisconsin; Michael N. Schneider, Milwaukee, Wisconsin; Joshua M. Bartlett, Waukesha, Wisconsin; Kathleen M. Bartlett, Geneva, Illinois; Mary F. Maloney, Wauwatosa, Wisconsin; Patrick J. Maloney, Asheville, North Carolina; James R. Maloney, Shorewood, Wisconsin; and Kathleen A. Maloney, Whitefish Bay, Wisconsin;* as members of a group acting in concert to retain voting shares of Mitchell Bank Holding Corporation and thereby indirectly retain voting shares of Mitchell Bank, both of Milwaukee, Wisconsin.

2. *Julie A. Bartlett, Spring Green, Wisconsin, individually, and acting in concert with Constance S. Maloney, Wauwatosa, Wisconsin; James P. Maloney, Wauwatosa, Wisconsin; Michael N. Schneider, Milwaukee, Wisconsin; Joshua M. Bartlett, Waukesha, Wisconsin; Kathleen M. Bartlett, Geneva, Illinois; Mary F. Maloney, Wauwatosa, Wisconsin; Patrick J. Maloney, Asheville, North Carolina; James R. Maloney, Shorewood, Wisconsin; Kathleen A. Maloney, Whitefish Bay, Wisconsin; Lauren L. Schneider, Madison, Wisconsin; and Leigh N. Schneider, Greenfield, Wisconsin;* to retain voting shares of M.S. Investment Co., New Berlin, Wisconsin and thereby indirectly retain voting shares of Mitchell Bank, Milwaukee, Wisconsin.

Board of Governors of the Federal Reserve System, April 1, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–07169 Filed 4–3–20; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

[File No. 172 3102]

Federal-Mogul Motorparts LLC; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 6, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Federal-Mogul Motorparts LLC; File No. 172 3102'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Sydney Knight (202–326–2162), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website (for March 25, 2020), at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before May 6, 2020. Write ''Federal-Mogul Motorparts LLC; File No. 172 3102'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to the public health emergency in response to the COVID–19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Federal-Mogul Motorparts LLC; File No. 172 3102'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 6, 2020. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (''FTC'' or ''Commission'') has accepted, subject to final approval, an agreement containing a consent order with Federal-Mogul Motorparts LLC (''respondent'').

The proposed consent order (''order'') has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the order and the comments received, and will decide whether it should withdraw the order or make it final.

This matter involves the respondent's advertising for Wagner OE^{X} brake pads. The proposed complaint alleges that Federal-Mogul violated Section 5(a) of the FTC Act by disseminating a series of false and unsubstantiated advertisements claiming that: (1) In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OE^{X} brake pads will stop a pickup truck, SUV, or crossover up to 50 feet sooner than competing brake pads; and (2) In an emergency, when a driver is trying to stop in the shortest distance possible, Wagner OE^{X} brake pads installed on a pickup truck, SUV, or crossover significantly reduce the risk of collisions compared to competing brake pads.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct. The product coverage would apply to any Federal-Mogul-branded or marketed aftermarket brake pads, including Wagner OE^{X} aftermarket brake pads, as well as any third-party-branded aftermarket brake pads for which the respondent provides marketing materials.

Part I prohibits the respondent from making any representation about the braking benefits, performance, or efficacy of any covered product, including that such product: (1) Will stop a vehicle significantly sooner than competing brake pads; and (2) reduces the risk of collisions compared to competing brake pads, unless the representation is non-misleading, and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted by experts in the field of automotive braking, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

Part II requires the respondent to submit a signed acknowledgment that respondent received the order.

Part III requires the respondent to file compliance reports with the Commission, and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations. Part IV contains recordkeeping requirements for accounting records, personnel records, consumer correspondence, advertising and marketing materials, and claim substantiation, as well as all records necessary to demonstrate compliance or non-compliance with the order. Part V contains other requirements related to the Commission's monitoring of the respondent's order compliance. Part VI provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–07170 Filed 4–3–20; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0989]

Assessing the Resource Needs of the Prescription Drug User Fee Act and Biosimilar User Fee Act; Publication of Report; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the publication of a report providing options and recommendations for a new methodology to accurately assess changes in the resource and capacity needs of the human drug and biosimilar biologic review programs. FDA, in both the Prescription Drug User Fee Amendments of 2017 (PDUFA VI) and Biosimilar User Fee Amendments of 2017 (BsUFA II) committed to obtaining this report through a contract with an independent accounting or consulting firm and publishing it before September 30, 2020. This was also codified in the respective authorizing statutory language. FDA is announcing publication of this report and the opening of a docket to receive public comment on this report. Per the respective statutory sections, after review of this report and receipt and review of public comment thereon, FDA will establish a capacity planning methodology for adjusting the annual fee revenue amounts for the PDUFA and BsUFA programs.

DATES: Submit either electronic or written comments on the report by May 6, 2020, to ensure that the Agency considers your comment on this report before it implements the capacity planning adjustment methodology.

ADDRESSES: You may submit comments on this report at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–0989 for ''Assessing the Resource Needs of the Prescription Drug User Fee Act, Biosimilar User Fee Act, Report Publication; Request for Comments.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not

in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Graham Thompson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1146, Silver Spring, MD 20993–0002, 301–796–5003, Fax: 301–847–8443, *Graham.Thompson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is announcing the publication of a report providing options and recommendations for a new methodology to accurately assess changes in the resource and capacity needs of the human drug and biosimilar biologic review programs. FDA, in both the PDUFA VI and BsUFA II commitment letters, committed to obtaining this report and publishing it before September 30, 2020. These commitments were also codified in the statute authorizing these programs (sections 736(c)(2)(C) and 744H(c)(2)(B) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379h(c)(2)(C) and 379j–52(c)(2)(B)).

PDUFA and BsUFA, (referred to collectively here as ''UFA(s)'') each establish fee amounts for each fiscal year. Although the specifics for each UFA are different, the process for each generally involves the following: Taking an annual base revenue amount and adjusting that base revenue amount for inflation and other UFA-specific adjustments to establish a target revenue amount for the fiscal year for the UFA. The target revenue amount sets the total amount of fee revenue for the UFA that FDA expects to collect for that fiscal year. The target revenue amount is then divided up based on UFA-specific processes to set the individual fee amounts for the fiscal year.

While this process creates a relatively predictable source of UFA fee revenue for FDA, it also requires a method for adjustment to account for changes in workload. For example, without an adjustment for workload, during a period of growth in regulatory submissions the target revenue will remain fixed and a higher number of submissions results in the same total revenue collected; in other words, the Agency would have more work while fee revenue remains fixed and would not be able to afford hiring the additional staff required to maintain review timeline performance.

This issue was recognized by PDUFA-program stakeholders, and in 2003, the first year of PDUFA III, a Workload Adjustment was introduced. This adjustment created a means to adjust the annual PDUFA target revenue to account for long-term changes in the volume of certain regulatory submissions. Although an important mechanism to help ensure that the PDUFA target revenue keeps pace with regulatory submissions, the Workload Adjustment has been a topic in each PDUFA reauthorization negotiation since its inception. As such, it has undergone a number of changes, notably the addition and later removal of a factor to adjust revenue based on the complexity of submissions. It has also been the subject of a number of studies. A theme emerging from these studies identified the Workload Adjuster methodology as suboptimal, but the best method reasonably possible based on the data available to FDA at that time.

In PDUFA VI (fiscal years 2018 to 2022), FDA made commitments to help improve the available data and in turn the adjuster methodology. These commitments included establishing a Resource Capacity Planning capability and modernizing FDA's activity-based time reporting to provide better data to inform current and likely future resource needs. PDUFA VI changed the name of the adjustment to the *Capacity Planning Adjustment,* established an interim methodology for the early years of PDUFA VI, and outlined a process to implement a new fee adjustment methodology.

The process calls for FDA to obtain, through a contract with an independent accounting or consulting firm, an evaluation of options and recommendations for a new methodology to accurately assess changes in the resource and capacity needs of the human drug review program. Booz Allen Hamilton was commissioned to produce this report. The report is publicly available on FDA's website at: *https://www.fda.gov/industry/fda-user-fee-programs/resource-capacity-planning-and-modernized-time-reporting,* and FDA will review public comments on the report. After review of the public comments, FDA can then implement a new robust methodology for assessing the resource needs of the program that results from sustained increases in PDUFA workload, as appropriate and warranted in light of comments we receive.

Within BsUFA II (fiscal years 2018 to 2022), FDA made a commitment to use this same study to also assess options and recommendations for a new methodology to assess changes in the resource and capacity needs of the biosimilar biological product review program. Whereas PDUFA has an interim Capacity Planning Adjustment in place now, BsUFA does not have and has not had an adjustment designed to accomplish similar goals for the BsUFA program. Like with the process outlined with PDUFA, FDA can also implement an adjustment methodology following the publication of the report and review of any public comments, as appropriate and warranted in light of comments we receive.

Dated: April 1, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–07175 Filed 4–3–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Council on Graduate Medical Education

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice; correction.

SUMMARY: The Council on Graduate Medical Education (COGME) meeting previously announced as in-person and webinar/conference call on Tuesday, April 28, 2020, and Wednesday, April 29, 2020, has changed its format, date, and time. The meeting will now be a one-day webinar and conference call only on Wednesday, April 29, 2020, from 12:00 p.m.–5:00 p.m. Eastern Time. The webinar link, conference dial-in number, meeting materials, and agenda will be available on the COGME website: *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/meetings/index.html.*

FOR FURTHER INFORMATION CONTACT: Kennita Carter, MD, Senior Advisor and Designated Federal Official, Division of Medicine and Dentistry, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301–945–9505; or *BHWCOGME@hrsa.gov.*

Correction: Meeting will be a one-day webinar and conference call only rather than two-days and in-person as previously announced.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–07147 Filed 4–3–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on Nurse Education and Practice

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the National Advisory Council on Nurse Education and Practice (NACNEP) has scheduled a writing subcommittee public meeting. Information about NACNEP, the agenda, and materials for this meeting can be found on the NACNEP website at *https://www.hrsa.gov/advisory-committees/nursing/index.html.*

DATES: April 20, 2020, 10:00 a.m.–2:00 p.m. Eastern Time (ET).

ADDRESSES: This meeting will be held by teleconference, and/or Adobe Connect webinar.

- *Webinar link. https://www.hrsa.gov/advisory-committees/nursing/meetings.html.*
- *Conference call-in number:* 1–888–455–4141; Passcode: FACA Meeting.

FOR FURTHER INFORMATION CONTACT: Camillus Ezeike, Ph.D., LL.M. J.D., RN, PMP, Designated Federal Official, NACNEP, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301–443–2886; or *BHWNACNEP@hrsa.gov.*

SUPPLEMENTARY INFORMATION: NACNEP provides advice and recommendations to the Secretary of HHS and the U.S. Congress on policy issues related to the activities carried out under Title VIII of the Public Health Service (PHS) Act, including the range of issues relating to the nurse workforce, education, and practice improvement. NACNEP also prepares and submits an annual report to the Secretary of HHS and Congress describing its activities, including NACNEP's findings and recommendations concerning activities under Title VIII of the PHS Act.

During the April 20, 2020, meeting, the writing sub-committee of NACNEP will review recent literature and hear from an expert speaker on the topic of its 17th Report to Congress, *Preparing Nurse Faculty, and Addressing the Shortage of Nurse Faculty and Clinical Preceptors.* Agenda items are subject to change as priorities dictate. Refer to the NACNEP website for updated information concerning the meeting. The final agenda will be posted at least 14 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to NACNEP should be sent to Camillus Ezeike using the contact information above at least 3 business days before the meeting.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–07115 Filed 4–3–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

This notice amends Part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 84 FR 49535–49540 dated September 20, 2019).

HRSA is making changes within the Federal Office of Rural Health Policy (FORHP) in order to realign the functions for the management of emerging rural health program initiatives, including rural substance abuse programs.

This reorganization updates the organization, functions, and delegation of authority of FORHP (RH). Specifically this reorganization (1) establishes the Rural Strategic Initiatives Division; and (2) updates the functional statement for the Federal Office of Rural Health Policy (RH).

Chapter RH—Federal Office of Rural Health Policy

Section RH.10 Organization

Delete the organization for FORHP (RH) in its entirety and replace with the following:

The Federal Office of Rural Health Policy is headed by the Associate Administrator, who reports directly to the Administrator, HRSA. FORHP includes the following components:

(1) Office of the Associate Administrator (RH)
(2) Hospital State Division (RH1);
(3) Community-Based Division (RH2);
(4) Office for the Advancement of Telehealth (RH4);
(5) Policy Research Division (RH5);
(6) Administrative Operations Division (RH6); and
(7) Rural Strategic Initiatives Division (RH7).

Section RH.20 Function

Delete the functional statement for FORHP (RH) and in its entirety and replace with the following:

Federal Office of Rural Health Policy (RH)

Office of the Associate Administrator (RH)

The Federal Office of Rural Health Policy (FORHP) is responsible for the overall leadership and management of the Office. FORHP serves as a focal point within HHS for rural health-related issues and as a principal source of advice to the Secretary for coordinating efforts to strengthen and improve the delivery of health services to populations in the nation's rural areas. FORHP provides leadership within HHS and with stakeholders in providing information and counsel related to access to, and financing and quality of, health care to rural populations. Specifically, the Office of the Associate Administrator (1) provides staff support to the National Advisory Committee on Rural Health and Human Services; (2) stimulates and coordinates interaction on rural health activities and programs in the agency, Department and with other federal agencies; (3) establishes and maintains a resource center for the collection and dissemination of the latest information and research findings related to the delivery of health services in rural areas; (4) ensures successful dissemination of appropriate information technology advances, such as telehealth or electronic health records systems; (5) monitors the health information

technology policy and activities of other HHS components for useful application in rural areas; (6) provides overall direction and leadership over the management of nationwide community-based rural health grants programs; (7) provides overall direction and leadership over the management of a program of state grants which supports collaboration within state offices of rural health; (8) provides overall direction and leadership over the management of programs to advance the use of telehealth and coordination of health information technology; (9) provides overall direction and leadership over the Office's administrative and management functions; and (10) provides overall direction and leadership over the Office's new rural health program initiatives created as a result of agency, Department and/or administrative priorities.

Hospital State Division (RH1)

The Hospital State Division serves as the focal point within FORHP to support rural hospital and state grant programs focused on rural populations. Specifically, the Hospital State Division is organized around the following primary issue areas: (1) Plans and manages a program of state grants which support collaboration within state offices of rural health; (2) works with states, state hospital associations, private associations, foundations, and other organizations to focus attention on, and promote solutions to, problems related to the delivery of health services in rural communities; and (3) provides coordinated technical assistance to grantees and rural communities.

Community-Based Division (RH2)

The Community-Based Division serves as the focal point within FORHP to support rural community grant programs. Specifically, the Community-Based Division is organized around the following primary issue areas: (1) Plans and manages several nationwide rural health grants programs; (2) supports programs on rural health, public health, and health status improvement; (3) funds public and private non-profit entities for the operation of clinics that provide diagnosis, treatment, and rehabilitation of active and retired coal miners and others with respiratory ailments (black lung) and other occupational related respiratory disease impairments; (4) funds radiation exposure screening and education programs that screen eligible individuals adversely affected by the mining, transport, and processing of uranium and the testing of nuclear weapons for cancer and other diseases; and (5) provides technical assistance to grantees and rural communities.

Office for the Advancement of Telehealth (RH4)

The Office for the Advancement of Telehealth serves as the operational focal point for coordinating and advancing the use of telehealth technologies across all of HRSA's programs including, but not limited to, the provision of health care at a distance (telemedicine); distance-based learning to improve the knowledge of agency grantees, and others; and improved information dissemination to both consumers and providers about the latest developments in telemedicine. The Office for the Advancement of Telehealth carries out the following functions, specifically the Office (1) develops and coordinates telehealth network and telehealth resource centers grant programs; (2) provides professional assistance and support in developing telehealth initiatives; and (3) administers grant programs to promulgate and evaluate the use of appropriate telehealth technologies among HRSA grantees and others.

Policy Research Division (RH5)

The Policy Research Division serves as the focal point within FORHP to support health policy and research focused on rural populations. Specifically, the Policy Research Division (1) supports rural health research centers and keeps informed of research and demonstration projects funded by states and foundations in the field of rural health care delivery; (2) establishes and maintains a resource center for the collection and dissemination of the latest information and research findings related to the delivery of health services in rural areas; (3) maintains data and analytic capabilities to support office functions; (4) advises the agency, Administrator, and Department on the effects of current policies and proposed statutory, regulatory, administrative, and budgetary changes in the programs established under titles XVIII and XIX of the Social Security Act, on the financial viability of small rural hospitals and the ability of rural areas to attract and retain physicians and other health professionals; and (5) monitors rural hospital impact analyses developed by the Centers for Medicare & Medicaid Services whenever proposed regulations might have a significant impact on a substantial number of small rural hospitals.

Administrative Operations Division (RH6)

The Administrative Operations Division collaborates with FORHP leadership to plan, coordinate, and direct FORHP-wide administrative management activities. Specifically, the Administrative Operations Division (1) develops, executes, and monitors FORHP's budget; (2) provides guidance and coordination of human resources; (3) plans, coordinates, and manages FORHP's grant activities; (4) plans, coordinates, and manages FORHP's procurement activities; (5) coordinates the review and clearance of correspondence and official documents to and from FORHP; and (6) provides additional management support services including, but not limited to, timekeeping, supplies, equipment, space, records, and training.

Rural Strategic Initiatives Division (RH7)

The Rural Strategic Initiatives Division serves as the focal point within FORHP to plan and coordinate new rural program initiatives created as a result of agency, Department, and/or Administration priorities. Specifically, the Rural Strategic Initiatives Division (1) plans and manages rural health substance-abuse grant programs; (2) leads and manages new rural health program initiatives that emerge as a result of agency, Department, or Administration priorities; (3) provides technical assistance to grantees and rural communities; and (4) evaluates new rural programs to determine the impact of the resources invested in rural communities.

Section RH.30 Delegation of Authority

All delegations of authority and re-delegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegation, if allowed, provided they are consistent with this reorganization.

Alex M Azar II,

Secretary.

[FR Doc. 2020–07153 Filed 4–3–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Ryan White HIV/AIDS Program Part F; AIDS Education and Training Centers National Coordinating Resource Center

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of Supplemental Award.

SUMMARY: HRSA's HIV/AIDS Bureau will award $200,000 in supplemental funding to Rutgers, the State University of New Jersey, Biomedical and Health Sciences (Rutgers), to support the Ryan White HIV/AIDS Program Part F AIDS Education and Training Centers' (AETC) National Coordinating Resource Center (NCRC) project in Fiscal Year (FY) 2020. Pending the availability of funds and satisfactory performance, HRSA will award up to $200,000 in each succeeding fiscal year of their period of performance. The NCRC is responsible for facilitating and coordinating AETC training and technical assistance activities, disseminating, and promoting the work of AETC programs. This supplemental funding will enable the recipient to scale up their program efforts to ensure that HIV care and treatment professionals have the tools and information needed to achieve the goals of the *Ending the HIV Epidemic: A Plan for America* (EHE).

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: Rutgers, the State University of New Jersey, Biomedical and Health Sciences, the AETC NCRC.

Amount of Award: $200,000 available in FY 2020.

Project Period: March 1, 2020–June 30, 2024.

CFDA Number: 93.145.

Authority: 42 U.S.C. 300ff–111(a) (section 2692(a) of the Public Health Service (PHS) Act), 42 U.S.C. 300ff–121 (section 2693 of the PHS Act), and Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94).

Justification: Rutgers, the State University of New Jersey, Biomedical and Health Sciences (Rutgers) currently operates the NCRC and provides coordination and management services for AETC HIV healthcare training and technical assistance activities and the dissemination of AETC program information. This supplemental funding will enable the recipient to build on their existing framework within AETC network, to respond to the training and technical assistance needs in the targeted EHE jurisdictions. The recipient will use supplemental funds to scale up their concentration on EHE jurisdictions by conducting targeted outreach to ensure their awareness of, and ability to access the breadth of services, technical assistance and curated materials available from the AETC NCRC. The AETC NCRC's current geographic coverage offers a strategic opportunity to leverage this existing infrastructure to provide access to critical, time sensitive training and technical assistance and evidence-informed interventions to providers in EHE targeted jurisdictions. Expanding the availability of state-of-the-art HIV care and treatment training resources will help prepare for the projected increase in demand for well-trained HIV care professionals as a result of the EHE rollout. This award recipient has the demonstrated expertise and scalable experience required to address these time-sensitive training and technical assistance needs.

FOR FURTHER INFORMATION CONTACT: Sherrillyn Crooks, Chief, HIV Education Branch, Office of Training and Capacity Development, HRSA, 5600 Fishers Lane, Room 9N110, Rockville, MD 20857, by email at *scrooks@hrsa.gov* or by phone at (301) 443–7662.

Thomas J. Engels,

Administrator.

[FR Doc. 2020–07093 Filed 4–3–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS 4040–0018]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before June 5, 2020.

ADDRESSES: Submit your comments to *Ed.Calimag@hhs.gov* or (202) 690–7569.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 4040–0018–60D and project title for reference to *Ed.Calimag@hhs.gov,* or call (202) 690–7569, the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: SF–428 Tangible Personal Property Report.

Type of Collection: Reinstatement without change.

OMB No. 4040–0018

Abstract: Reporting on the status of Federally-owned property, including disposition, is necessitated in 2 CFR part 215, the ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations'', and the ''Uniform Administrative Requirements for Grants and Agreements with State and Local Governments''. Additionally, Public Law 106–107, the Federal Financial Assistance Management Improvement Act requires that agencies ''simplify Federal financial assistance application and reporting requirements.'' 31 U.S.C. 6101, Section 3.

Agencies are currently using a variety of forms to account for both Federally-owned and grantee owned equipment and property. During the public consultation process mandated by Public Law 106–107, grant recipients requested a standard form to help them submit appropriate property information when required. The Public Law 106–107 Post Awards Subgroup developed a new standard form, the Tangible Personal Property Report, for submission of the required data. The form consists of the cover sheet (SF–428), three attachments to be used as required: Annual Report, SF–428–A; Final Report, SF–428–B; Disposition Request/Report, SF–428–C and a Supplemental Sheet, SF–428S to provide detailed individual item information when required. We are requesting a three-year clearance of this collection and that it be designated as a Common Form.

ANNUALIZED BURDEN HOUR TABLE

Forms	Respondents (if necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
SF–428 Tangible Personal Property Report	Grant applicants	2,000	1	1	2,000
Total		2,000	1	1	2,000

Dated: March: 31, 2020.

Sherrette Funn,

OS Report Clearance Officer.

[FR Doc. 2020–07056 Filed 4–3–20; 8:45 am]

BILLING CODE 4150–AE–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, April 14, 2020, 09:00 a.m. to April 14, 2020, 02:00 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Dr., Bethesda, MD 20892, which was published in the **Federal Register** on March 20, 2020, 85 FR 16105.

This notice is being amended to change the meeting format and time from a teleconference call, 11:00 a.m. to 2:00 p.m. to a virtual meeting, 9:00 a.m. to 2:00 p.m. The meeting is closed to the public.

Dated: March 31, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07066 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Function, Integration, and Rehabilitation Sciences Subcommittee.

Date: June 24–25, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Child Health and Human Development 6710B Rockledge Drive Bethesda, MD 20892.

Contact Person: Helen Huang, Ph.D. Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, Bethesda, MD 20817, 301–435–8380, *helen.huang@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: March 31, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07067 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Biological Aging Review Committee.

Date: June 4–5, 2020.

Time: 1:00 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Clinical Aging Review Committee.

Date: June 4–5, 2020.

Time: 1:30 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Isis S. Mikhail, MD, MPH, DrPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402–7704, *mikhaili@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 1, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07129 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Biomedical Library, Informatics and Data Science Review Committee, June 18–19, 2020, 8:00 a.m. to 5:00 p.m. at the Bethesda Hyatt, 1 Metro Center, Bethesda, MD 20814

which was published in the **Federal Register** on February 4, 2020, 85 FR 23, Page 6208.

This notice is being amended to change the meeting location from the Bethesda Hyatt, 1 Metro Center, Bethesda, MD 20814 to a video assisted meeting and to change the start time on June 18 to 9:30 a.m. The meeting is closed to the public.

Dated: March 31, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07068 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; PAR19–319: NIDDK Biorepository Non-Renewable Sample Access (X01).

Date: May 28, 2020.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma S. Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7349, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; PAR17–123: Biomarkers for Diabetes, Digestive, Kidney and Urologic Diseases Using Biosamples from the NIDDK Repository (R01).

Date: June 3, 2020.

Time: 11:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma S. Begum, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7349, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: April 1, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07132 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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: Center for Scientific Review Special Emphasis Panel; PAR Panel: Fogarty Global Brain Disorders II.

Date: April 16, 2020.

Time: 10:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Suzan Nadi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217B, MSC 7846, Bethesda, MD 20892, 301–435–1259, *nadis@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 31, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07065 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Regeneration and Aging.

Date: May 6, 2020.

Time: 9:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Anita H. Undale, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827–7428, *anita.undale@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 1, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07131 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Clinical and Translational Research of Aging Review Committee.

Date: June 3–4, 2020.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 402–1622, *bissonettegb@mail.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Behavior and Social Science of Aging Review Committee.

Date: June 3–4, 2020.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Carmen Moten, Ph.D., MPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 402–7703, *cmoten@mail.nih.gov.*

Name of Committee: National Institute on Aging, Initial Review Group; Basic Neuroscience of Aging, Review Committee.

Date: June 3–4, 2020.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maurizio Grimaldi, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 496–9374, *grimaldim2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 1, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07130 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NIAMS.

The meeting will be closed to the public as indicated below 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 INSTITUTE OF ARTHRITIS AND MUSCULOSKELETAL AND SKIN DISEASES, 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: Board of Scientific Counselors, NIAMS.

Date: April 21–22, 2020.

Time: 3:00 p.m. to 10:30 a.m.

Agenda: To review and evaluate program performance and investigators.

Place: National Institutes of Health, Clinical Center, 10 Center Drive, Bethesda, MB 20892 (Teleconference Call).

Contact Person: John J. O'Shea, MD, Ph.D., Scientific Director National Institute of Arthritis & Musculoskeletal and Skin Diseases, Building 10, Room 9N228, MSC, 1820 Bethesda, MD 20892, (301) 496–2612, *osheaj@arb.niams.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: April 1, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07128 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Special Emphasis Panel Scholarly Works (G13), June 4, 2020, 10:00 a.m. to 3:00 p.m. This notice was published in the **Federal Register** on February 4, 2020, 85 FR 23, Page 6208.

This notice is being amended to change the time to 10:00 a.m. to 4:30 p.m. The meeting is closed to the public.

Dated: March 31, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–07069 Filed 4–3–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–12; OMB Control No. 2506–0210]

30-Day Notice of Proposed Information Collection: Youth Homelessness Demonstration Application

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* May 6, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/StartPrinted Page 15501PRAMain.* Find this particular information collection by

selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 28, 2020 at 85 FR 5013.

A. Overview of Information Collection

Title of Information Collection: Youth Homelessness Demonstration Program.

OMB Approval Number: 2506–0210.

Type of Request: Revision of currently approved collection.

Form Number: Youth Homelessness Demonstration Application (all parts), SF 424, HUD–2991, HUD–2993, HUD–2880, SF–LLL.

Description of the need for the information and proposed use: The information to be collected will be used to rate applications, to determine eligibility for the Youth Homelessness Demonstration Program and establish grant amounts. Applicants, which must be state or local governments, or nonprofit organizations will respond to narrative prompts to demonstrate their experience and expertise in providing housing and services to youth experiencing homelessness and to describe their intended program design, that will address the needs for housing and services that will result in housing placement and sufficient income to ensure housing is maintained once assistance discontinues.

Submission documents information collection	Number of respondents	Responses frequency (average)	Total annual responses	Burden hours per response	Total Hours	Hourly rate	Burden cost per instrument
Component 1. Site Selection							
YHDP Site Selection Narratives	150.00	1.00	150.00	24.00	3,600.00	47.52	$171,072.00
SF–424—Application for Federal Assistance	150.00	1.00	150.00	.50	75.00	47.52	3,564.00
OMB–SF–LLL—Disclosure of Lobbying Activities (where applicable)	10.00	1.00	10.00	.17	1.70	47.52	80.78
Nonprofit Certification	150.00	1.00	150.00	0.00	0.00	47.52	0.00
Organizations Code of Conduct	150.00	1.00	150.00	0.00	0.00	47.52	0.00
Youth Advisory Board Participation Letter	150.00	1.00	150.00	.50	75.00	47.52	3,564.00
Public Child Welfare Agency Commitment Letter	150.00	1.00	150.00	0.50	75.00	47.52	3,564.00
Acknowledgement of Application Receipt (HUD–2993) (only applicants granted waiver to submit a paper application)	10.00	1.00	10.00	0.17	1.70	47.52	80.78
Subtotal	150.00		150.00		3,828.40		181,925.57
Component 2. Project Application							
YHDP Project Application Questions	25.00	5.00	125.00	8.00	1,000.00	47.52	47,520.00
SF–424—Application for Federal Assistance	25.00	5.00	125.00	.08	10.00	47.52	475.20
HUD–2880—Applicant/Recipient Disclosure/Update Report (2510–0011)	25.00	5.00	125.00	.17	21.25	47.52	1,009.80
OMB–SF–LLL—Disclosure of Lobbying Activities (where applicable)	1.00	5.00	5.00	.17	.85	47.52	40.39
Subtotal	25.00		125.00		1,032.10		49,045.39

Submission documents information collection	Number of respondents	Responses frequency (average)	Total annual responses	Burden hours per response	Total Hours	Hourly rate	Burden cost per instrument
Component 3. Coordinated Community Plan							
YHDP Plan Narrative	25.00	1.00	25.00	240.00	6,000.00	47.52	285,120.00
Logic Model	25.00	1.00	25.00	8.00	200.00	47.52	9,504.00
Certification of Consistency with the Consolidated Plan (HUD–2991)	25.00	1.00	25.00	.17	4.25	47.52	201.96
Subtotal	25.00	1.00	25.00	248.17	6,204.25		294,825.96
Total Application Collection	150.00				11,064.75		525,796.92

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(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 collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: March 31, 2020.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–07059 Filed 4–3–20; 8:45 am]

BILLING CODE 4210–67–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1195]

Certain Electronic Candle Products and Components Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 2, 2020, under section 337 of the Tariff Act of 1930, as amended, on behalf of L&L Candle Company LLC of Brea, California, and Sotera Tschetter, Inc. of St. Paul, Minnesota. Supplements to the complaint were filed on March 18 and 20, 2020. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic candle products and components thereof by reason of infringement of certain claims of United States Patent Nos. 8,550,660 (''the '660 patent''), 9,366,402 (''the '402 patent''), 9,512,971 (''the '971 patent''), 9,523,471 (''the '471 patent''), and 10,533,718 (''the '718 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained 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 at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on March 30, 2020, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–6, 10, 12–15, 17–19, and 28 of the '660 patent; claims 1–15 of the '402 patent; claims 1–4, 6–12, 14–18, 20–25, 27, and 28 of the '971 patent; claims 1–7, 10–14, 17, 18, 22, 24, 25, 27, and 29

of the '471 patent; and claims 1–5, 7, 8, 10–12, 15, 17, 21, and 22 of the '718 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''artificial candles that simulate a flame effect using electronic components'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

L&L Candle Company LLC, 621 Lunar Avenue, Brea, CA 92821

Sotera Tschetter, Inc., 755 Prior Avenue N, St. Paul, MN 55104

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

The Gerson Company, 1450 S Lone Elm Road, Olathe, KS 66061

Gerson International (H.K.) Ltd., (CR No. 0880157), Unit 1310, Harbour Center, Tower 1, 1 Hok Cheung Street, Hung Hom, Kowloon, Hong Kong

Sterno Home Inc., 1 Burbidge Street, Suite 101, Coquitlam, BC V3K 7B2, Canada

Ningbo Huamao International Trading Co., Ltd., (ID NO. 91330212058264439W), 17th Floor Heng Fu Building 1, No. 828 Fuming Road, Jiangdong District, Ningbo City, Zhejiang Province 315041, China

Ningbo Yinzhou Langsheng Artware Co., Ltd., No. 3 Langsheng Road, Yinzhou District, Ningbo City, Zhejiang Province 315158, China

Lifetime Brands, Inc., 1000 Stewart Avenue, Garden City, NY 11530

Scott Brothers Entertainment, Inc., 8022 S Rainbow Blvd., Suite 421, Las Vegas, NV 89139

Nantong Ya Tai Candle Arts & Crafts Co., Ltd., 1835 South Del Mar Avenue, #203, San Gabriel, CA 91776

NapaStyle, Inc., 2650 Napa Valley Corporate Drive, Suite B, Napa, CA 94588

Veraflame International, Inc., 1383 8th Ave. W, Vancouver, BC V6H 3W4, Canada

MerchSource, LLC, 7755 Irvine Center Drive, Irvine, CA 92618

Ningbo Mascube Import Export Company, (ID No. 913302067133149827), No. 58 Dagang Middle Road, Beilun District, Ningbo City, Zhejiang Province 315826, China

Decorware International Inc. dba Decorware Inc., 10220 4th Street, Rancho Cucamonga, CA 91730

Shenzhen Goldenwell Smart Technology Co., Ltd., Room 56, 10F, West Building 2, Saige Technology Industrial Park, Huaqiang North Road, Futian District, Shenzhen City, Guangdong Province 518023, China

Shenzhen Ksperway Technology Co., Ltd., Room 58, 1–7R, 10F, Building 2, Saige Technology Industrial Park, Huaqiang North Road, Futian District, Shenzhen City, Guangdong Province 518023, China

Ningbo Shanhuang Electric Appliance Co., No. 115 Xinggongyi Road, Xinxing Industrial Area, Ninghai County, Ningbo City, Zhejiang Province 315600, China

Yiwu Shengda Art Co., Ltd., (ID No. 913307827429106799), No. 16, Tianji Road, Yinan Industrial Zone, Fotang Town, Yiwu City, Zhejiang Province 322002, China

Shenzhen Tongfang Optoelectronic Technology Co., Ltd., No. 1191 Guanguang Road, Longhua District, Shenzhen City, Guangdong Province 518110, China

TFL Candles, No. 1191 Guanguang Road, Longhua District, Shenzhen City, Guangdong Province 518110, China

Guangdong Tongfang Lighting Co., Ltd., Unit 3312, 33/F, Shui On Center, 6–8 Harbour Road, Wan Chai, Hong Kong, Hong Kong

Tongfang Optoelectric Company, 388 Kwun Tong Road, 7F Standard Chartered Tower, Kwun Tong, Hong Kong, Hong Kong

Virtual Candles Limited, Church Farm, Ulcombe, Maidstone, Kent ME17 IDN, United Kingdom

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: March 31, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–07074 Filed 4–3–20; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Evidence Rules; Meeting of the Judicial Conference

AGENCY: Judicial Conference of the United States, Advisory Committee on Evidence Rules.

ACTION: Notice of cancellation of open meeting.

SUMMARY: The following open meeting has been canceled: Advisory Committee on Evidence Rules on May 8, 2020, in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

SUPPLEMENTARY INFORMATION: An announcement for this meeting was previously published in 85 FR 13923.

Dated: March 31, 2020.

Rebecca A. Womeldorf,

Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

[FR Doc. 2020–07088 Filed 4–3–20; 8:45 am]

BILLING CODE 2210–55–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Criminal Rules; Meeting of the Judicial Conference

AGENCY: Judicial Conference of the United States, Advisory Committee on Criminal Rules.

ACTION: Revised notice of open meeting.

SUMMARY: The Advisory Committee on Criminal Rules will hold a remote meeting on May 5, 2020. The meeting will be open to public via telephonic conference for listening but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.* The announcement for this meeting was previously published in 85 FR 13924.

DATES: May 5, 2020.

Time: 10:00 a.m.–5:00 p.m.

ADDRESSES: N/A.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

Authority: 28 U.S.C. 2073.

Dated: March 31, 2020.

Rebecca A. Womeldorf,

Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

[FR Doc. 2020–07087 Filed 4–3–20; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0105]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Request for ATF Background Investigation Information—ATF Form 8620.65

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until May 6, 2020.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *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.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension with change of a currently approved collection.

(2) *The Title of the Form/Collection:* Request for ATF Background Investigation Information.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 8620.65.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: State, Local or Tribal Government.

Other: Federal Government.

Abstract: Other Federal, state and local agency representatives requesting ATF background investigation information, must complete the Request for ATF Background Investigation Information—ATF Form 8620.65, as an official request for the information. ATF will make an authorized disclosure determination based on the type of agency requesting the information and the reason for the request. ATF will maintain the completed form as an official record of the request for information from the other agency.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 300 respondents will utilize the form once annually, and it will take each respondent approximately 5 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 25 hours, which is equal to 300 (# of respondents) * 1 (# of responses per respondent) * .083333 (5 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: April 1, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–07160 Filed 4–3–20; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0104]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application for Alternate Means of Identification of Firearm(s) (Marking Variance)—ATF Form 3311.4

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will

submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until May 6, 2020.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *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.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, without change, of a currently approved collection.

(2) *The Title of the Form/Collection:* Application for Alternate Means of Identification of Firearm(s) (Marking Variance).

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 3311.4.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Federal Government.

Abstract: The Application for Alternate Means of Identification of Firearm(s) (Marking Variance)—ATF Form 3311.4 provides a uniform mean for industry members with a valid Federal importer or manufacturer license, to request firearms marking variance.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 2,064 respondents will utilize the form annually, and it will take each respondent approximately 30 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 1,032 hours, which is equal to 2,064 (# of respondents) * 1 (# of responses per respondent) * .5 (30 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: April 1, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–07161 Filed 4–3–20; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Initial Suitability Request—ATF 3252.4

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for an additional 30 days until May 6, 2020.

FOR FURTHER INFORMATION CONTACT: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *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.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *The Title of the Form/Collection:* Initial Suitability Request.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 3252.4.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other: None.

Abstract: The Initial Suitability Request—ATF Form 3252.4 will be used by ATF's Confidential Informant (CI) handlers to collect personally

identifiable information (PII), criminal history and other background information, in order to determine an individual's suitability to serve as an ATF CI.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 300 respondents will utilize the form annually, and it will take each respondent approximately 120 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 600 hours, which is equal to 300 (# of respondents annually) * 1 (# of responses per respondent) * 2 hours (120 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: April 1, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–07162 Filed 4–3–20; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of three petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below.

DATES: All comments on the petitions must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 6, 2020.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452, Attention: Roslyn B. Fontaine, Deputy Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Roslyn B. Fontaine, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *fontaine.roslyn@dol.gov* (email), or 202–693–9441 (facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements for filing petitions for modification.

II. Petitions for Modification

Three petitions for modifications are summarized below.

Docket Number: M–2020–002–C.

Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.

Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to allow the use of battery-powered nonpermissible surveying equipment including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers, in or inby the last open crosscut.

The petitioner states that:

(1) The operator is seeking a modification of this standard, which relates to battery powered, non-permissible surveying equipment, including battery operated mine transits, total station surveying equipment, distance meters and data loggers.

(2) The operator seeks a petition for modification relating to battery-powered, non-permissible surveying equipment.

(3) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372 and 75.1200, use of the most practical and accurate surveying equipment is necessary.

(4) Application of the existing standard would result in a diminution of safety to miners. Underground mining by its nature, size, and complexity of mine plans requires that accurate and precise measurements be completed in a prompt and efficient manner.

(5) The alternative method will at all times guarantee no less than the same measure of protection afforded by this standard.

As an alternative to the existing standard, the petitioner proposes the following:

(a) The operator may use the following total stations and theodolites and similar low-voltage battery-operated total stations and theodolites if they have an ingress protection (IP) rating of 66 or greater in or inby the last open crosscut, subject to this petition:

—Sokkia CX–105LN

(b) The nonpermissible electronic surveying equipment is low-voltage or battery-powered nonpermissible total stations and theodolites. All nonpermissible electronic total stations and theodolites will have an IP 66 or greater rating.

(c) The operator will maintain a logbook for electronic surveying equipment with the equipment, or in the location where mine record books are kept, or in the location where the surveying record books are kept. The logbook will contain the date of manufacture and/or purchase of each particular piece of electronic surveying equipment. The logbook will be made available to MSHA on request.

(d) All nonpermissible electronic surveying equipment to be used in or

inby the last open crosscut will be examined by the person who operates the equipment prior to taking the equipment underground to ensure the equipment is being maintained in a safe operating condition. The result of these examinations will be recorded in the logbook and will include:

(i) Checking the instrument for any physical damage and the integrity of the case;

(ii) Removing the battery and inspecting for corrosion;

(iii) Inspecting the contact points to ensure a secure connection to the battery;

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections; and

(v) Checking the battery compartment cover or battery attachment to ensure that it is securely fastened.

(e) The equipment will be examined at least weekly by a qualified person, as defined in 30 CFR 75.153. The examination results will be recorded weekly in the equipment logbook and will be maintained for at least 1 year.

(f) The operator will ensure that all nonpermissible electronic surveying equipment is serviced according to the manufacturer's recommendations. Dates of service will be recorded in the equipment's logbook and will include a description of the work performed.

(g) The nonpermissible electronic surveying equipment used in or inby the last open crosscut will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions of this petition.

(h) Nonpermissible electronic surveying equipment will not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while such equipment is being used, the equipment will be de-energized immediately and withdrawn outby the last open crosscut. All requirements of 30 CFR 75.323 will be complied with prior to entering in or inby the last open crosscut.

(i) Prior to setting up and energizing nonpermissible electronic surveying equipment within in or inby the last open crosscut, the surveyor(s) will conduct a visual examination of the immediate area for evidence that the area appears to be sufficiently rock-dusted and for the presence of accumulated float coal dust. If the rock-dusting appears insufficient or the presence of accumulated float coal dust is observed, the equipment will not be energized until sufficient rock-dust has been applied and/or the accumulations of float coal dust have been cleaned up. If nonpermissible electronic surveying equipment is to be used in an area not rock-dusted within 40 feet of a working face where a continuous mining machine is used, the area will be rocked-dusted prior to energizing the nonpermissible electronic surveying equipment.

(j) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition, as defined in 30 CFR 75.320. All methane detectors will provide visual and audible warnings when methane is detected at or above 1.0 percent.

(k) Prior to energizing nonpermissible electronic surveying equipment in or inby the last open crosscut, methane tests will be made in accordance with 30 CFR 75.323(a). Nonpermissible electronic surveying equipment will not be used in or inby the last open crosscut when production is occurring.

(l) Prior to surveying, the area will be examined according to 30 CFR 75.360. If the area has not been examined, a supplemental examination according to 30 CFR 75.361 will be performed before any non-certified person enters the area.

(m) A qualified person, as defined in 30 CFR 75.151, will continuously monitor for methane immediately before and during the use of nonpermissible electronic surveying equipment in or inby the last open crosscut. If there are two people in the surveying crew, both persons will continuously monitor for methane. The other person will either be a qualified person, as defined in 30 CFR 75.151, or be in the process of being trained to be a qualified person but has yet to make such tests for a period of 6 months, as required in 30 CFR 75.150. Upon completion of the 6-month training period, the second person on the surveying crew must become qualified, as defined in 30 CFR 75.151, in order to continue on the surveying crew. If the surveying crew consists of one person, that person will monitor for methane with two separate devices.

(n) Batteries contained in the nonpermissible electronic surveying equipment will be changed out or charged in fresh air outby the last open crosscut. Replacement batteries will be carried only in the compartment provided for a spare battery in the nonpermissible electronic surveying equipment carrying case. Before each shift of surveying, all batteries for the nonpermissible electronic surveying equipment will be charged sufficiently so that they are not expected to be replaced on that shift.

(o) When using nonpermissible electronic surveying equipment in or inby the last open crosscut, the surveyor will confirm by measurement or by inquiry of the person in charge of the section, that the air quantity on the section, on that shift, in or inby the last open crosscut is at least the minimum quantity that is required by the mine's ventilation plan.

(p) Personnel engaged in the use of nonpermissible electronic surveying equipment will be properly trained to recognize the hazards and limitations associated with the use of such equipment in areas where methane could be present.

(q) All members of the surveying crew will receive specific training on the terms and conditions of the petition before using nonpermissible electronic surveying equipment in or inby the last open crosscut. A record of the training will be kept with the other training records.

(r) If the petition is granted, the operator will submit within 60 days after the petition is final, proposed revisions for its approved 30 CFR part 48 training plans to the District Manager. These revisions will specify initial and refresher training regarding the terms and conditions of the petition. When training is conducted on the terms and conditions in the petition, an MSHA Certificate of Training (Form 5000–23) will be completed and will indicate that it was surveyor training.

(s) The operator will replace or retire from service any electronic surveying instrument that was acquired prior to December 31, 2004 within 1 year of the petition becoming final. Within 3 years of the date that the petition becomes final, the operator will replace or retire from service any theodolite that was acquired more than 5 years prior to the date that the petition becomes final or any total station or other electronic surveying equipment identified in this petition and acquired more than 10 years prior to the date that the petition becomes final. After 5 years, the operator will maintain a cycle of purchasing new electronic surveying equipment whereby theodolites will be no older than 5 years from the date of manufacture and total stations and other electronic surveying equipment will be no older than 10 years from the date of manufacture.

(t) The operator will ensure that all surveying contractors hired by the operator are using nonpermissible electronic surveying equipment in accordance with the terms and conditions of this petition. The conditions of use in the petition will apply to all nonpermissible electronic surveying equipment used in or inby the last open crosscut, regardless of whether

the equipment is used by the operator or by an independent contractor.

(u) The petitioner states that it may use nonpermissible electronic surveying equipment when production is occurring, subject to the following conditions:

—On a mechanized mining unit (MMU) where production is occurring, nonpermissible electronic surveying equipment will not be used downwind of the discharge point of any face ventilation controls, such as tubing (including controls such as ''baloney skins'') or curtains.

—Production may continue while nonpermissible electronic surveying equipment is used, if such equipment is used in a separate split of air from where production is occurring.

—Nonpermissible electronic surveying equipment will not be used in a split of air ventilating an MMU if any ventilation controls will be disrupted during such surveying. Disruption of ventilation controls means any change to the mine's ventilation system that causes the ventilation system not to function in accordance with the mine's approved ventilation plan.

—If, while surveying, a surveyor must disrupt ventilation, the surveyor will cease surveying and communicate to the section foreman that ventilation must be disrupted. Production will stop while ventilation is disrupted. Ventilation controls will be reestablished immediately after the disruption is no longer necessary. Production will only resume after all ventilation controls are reestablished and are in compliance with approved ventilation or other plans, and other applicable laws, standards, or regulations.

—Any disruption in ventilation will be recorded in the logbook required by the petition. The logbook will include a description of the nature of the disruption, the location of the disruption, the date and time of the disruption and the date and time the surveyor communicated the disruption to the section foreman, the date and time production ceased, the date and time ventilation was reestablished, and the date and time production resumed.

—All surveyors, section foremen, section crew members, and other personnel who will be involved with or affected by surveying operations will receive training in accordance with 30 CFR 48.7 on the requirements of the petition within 60 days of the date the petition becomes final. The training will be completed before any nonpermissible electronic surveying equipment can be used while production is occurring. The operator will keep a record of the training and provide the record to MSHA on request.

—The operator will provide annual retraining to all personnel who will be involved with or affected by surveying operations in accordance with 30 CFR 48.8. The operator will train new miners on the requirements of the petition in accordance with 30 CFR 48.5, and will train experienced miners, as defined in 30 CFR 48.6, on the requirements of the petition in accordance with 30 CFR 48.6. The operator will keep a record of the training and provide the record to MSHA on request.

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2020–003–C.

Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.

Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.

Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to allow the use of battery-powered nonpermissible surveying equipment including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers, in return airways.

The petitioner states that:

(1) The operator is seeking a modification of this standard, which relates to battery powered, non-permissible surveying equipment, including battery operated mine transits, total station surveying equipment, distance meters and data loggers.

(2) The operator seeks a petition for modification relating to battery-powered, non-permissible surveying equipment.

(3) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372 and 75.1200, use of the most practical and accurate surveying equipment is necessary.

(4) Application of the existing standard would result in a diminution of safety to miners. Underground mining by its nature, size, and complexity of mine plans requires that accurate and precise measurements be completed in a prompt and efficient manner.

(5) The alternative method will at all times guarantee no less than the same measure of protection afforded by this standard.

As an alternative to the existing standard, the petitioner proposes the following:

(a) The operator may use the following total stations and theodolites and similar low-voltage battery-operated total stations and theodolites if they have an ingress protection (IP) rating of 66 or greater in return airways, subject to this petition:

—Sokkia CX–105LN

(b) The nonpermissible electronic surveying equipment is low-voltage or battery-powered nonpermissible total stations and theodolites. All nonpermissible electronic total stations and theodolites will have an IP 66 or greater rating.

(c) The operator will maintain a logbook for electronic surveying equipment with the equipment, or in the location where mine record books are kept, or in the location where the surveying record books are kept. The logbook will contain the date of manufacture and/or purchase of each particular piece of electronic surveying equipment. The logbook will be made available to MSHA on request.

(d) All nonpermissible electronic surveying equipment to be used in return airways will be examined by the person who operates the equipment prior to taking the equipment underground to ensure the equipment is being maintained in a safe operating condition. The result of these examinations will be recorded in the logbook and will include:

(i) Checking the instrument for any physical damage and the integrity of the case;

(ii) Removing the battery and inspecting for corrosion;

(iii) Inspecting the contact points to ensure a secure connection to the battery;

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections; and

(v) Checking the battery compartment cover or battery attachment to ensure that it is securely fastened.

(e) The equipment will be examined at least weekly by a qualified person, as defined in 30 CFR 75.153. The examination results will be recorded weekly in the equipment logbook and will be maintained for at least 1 year.

(f) The operator will ensure that all nonpermissible electronic surveying equipment is serviced according to the manufacturer's recommendations. Dates of service will be recorded in the equipment's logbook and will include a description of the work performed.

(g) The nonpermissible electronic surveying equipment used in return airways will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions of this petition.

(h) Nonpermissible electronic surveying equipment will not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while such equipment is being used, the equipment will be de-energized immediately and withdrawn out of return airways. All requirements of 30 CFR 75.323 will be complied with prior to entering in return airways.

(i) Prior to setting up and energizing nonpermissible electronic surveying equipment in return airways, the surveyor(s) will conduct a visual examination of the immediate area for evidence that the area appears to be sufficiently rock-dusted and for the presence of accumulated float coal dust. If the rock-dusting appears insufficient or the presence of accumulated float coal dust is observed, the equipment will not be energized until sufficient rock-dust has been applied and/or the accumulations of float coal dust have been cleaned up. If nonpermissible electronic surveying equipment is to be used in an area not rock-dusted within 40 feet of a working face where a continuous mining machine is used, the area will be rocked-dusted prior to energizing the nonpermissible electronic surveying equipment.

(j) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition, as defined in 30 CFR 75.320. All methane detectors will provide visual and audible warnings when methane is detected at or above 1.0 percent.

(k) Prior to energizing nonpermissible electronic surveying equipment in return airways, methane tests will be made in accordance with 30 CFR 75.323(a). Nonpermissible electronic surveying equipment will not be used in return airways when production is occurring.

(l) Prior to surveying, the area will be examined according to 30 CFR 75.360. If the area has not been examined, a supplemental examination according to 30 CFR 75.361 will be performed before any non-certified person enters the area.

(m) A qualified person, as defined in 30 CFR 75.151, will continuously monitor for methane immediately before and during the use of nonpermissible electronic surveying equipment in return airways. If there are two people in the surveying crew, both persons will continuously monitor for methane. The other person will either be a qualified person, as defined in 30 CFR 75.151, or be in the process of being trained to be a qualified person but has yet to make such tests for a period of 6 months, as required in 30 CFR 75.150. Upon completion of the 6-month training period, the second person on the surveying crew must become qualified, as defined in 30 CFR 75.151, in order to continue on the surveying crew. If the surveying crew consists of one person, that person will monitor for methane with two separate devices.

(n) Batteries contained in the nonpermissible electronic surveying equipment will be changed out or charged in fresh air out of return airways. Replacement batteries will be carried only in the compartment provided for a spare battery in the nonpermissible electronic surveying equipment carrying case. Before each shift of surveying, all batteries for the nonpermissible electronic surveying equipment will be charged sufficiently so that they are not expected to be replaced on that shift.

(o) When using nonpermissible electronic surveying equipment in return airways, the surveyor will confirm by measurement or by inquiry of the person in charge of the section, that the air quantity on the section, on that shift, in return airways is at least the minimum quantity that is required by the mine's ventilation plan.

(p) Personnel engaged in the use of nonpermissible electronic surveying equipment will be properly trained to recognize the hazards and limitations associated with the use of such equipment in areas where methane could be present.

(q) All members of the surveying crew will receive specific training on the terms and conditions of the petition before using nonpermissible electronic surveying equipment in return airways. A record of the training will be kept with the other training records.

(r) If the petition is granted, the operator will submit within 60 days after the petition is final, proposed revisions for its approved 30 CFR part 48 training plans to the District Manager. These revisions will specify initial and refresher training regarding the terms and conditions of the petition. When training is conducted on the terms and conditions in the petition, an MSHA Certificate of Training (Form 5000–23) will be completed and will indicate that it was surveyor training.

(s) The operator will replace or retire from service any electronic surveying instrument that was acquired prior to December 31, 2004 within 1 year of the petition becoming final. Within 3 years of the date that the petition becomes final, the operator will replace or retire from service any theodolite that was acquired more than 5 years prior to the date that the petition becomes final or any total station or other electronic surveying equipment identified in this petition and acquired more than 10 years prior to the date that the petition becomes final. After 5 years, the operator will maintain a cycle of purchasing new electronic surveying equipment whereby theodolites will be no older than 5 years from the date of manufacture and total stations and other electronic surveying equipment will be no older than 10 years from the date of manufacture.

(t) The operator will ensure that all surveying contractors hired by the operator are using nonpermissible electronic surveying equipment in accordance with the terms and conditions of this petition. The conditions of use in the petition will apply to all nonpermissible electronic surveying equipment used in return airways, regardless of whether the equipment is used by the operator or by an independent contractor.

(u) The petitioner states that it may use nonpermissible electronic surveying equipment when production is occurring, subject to the following conditions:

—On a mechanized mining unit (MMU) where production is occurring, nonpermissible electronic surveying equipment will not be used downwind of the discharge point of any face ventilation controls, such as tubing (including controls such as ''baloney skins'') or curtains.

—Production may continue while nonpermissible electronic surveying equipment is used, if such equipment is used in a separate split of air from where production is occurring.

—Nonpermissible electronic surveying equipment will not be used in a split of air ventilating an MMU if any ventilation controls will be disrupted during such surveying. Disruption of ventilation controls means any change to the mine's ventilation system that causes the ventilation system not to function in accordance with the mine's approved ventilation plan.

—If, while surveying, a surveyor must disrupt ventilation, the surveyor will

cease surveying and communicate to the section foreman that ventilation must be disrupted. Production will stop while ventilation is disrupted. Ventilation controls will be reestablished immediately after the disruption is no longer necessary. Production will only resume after all ventilation controls are reestablished and are in compliance with approved ventilation or other plans, and other applicable laws, standards, or regulations.

—Any disruption in ventilation will be recorded in the logbook required by the petition. The logbook will include a description of the nature of the disruption, the location of the disruption, the date and time of the disruption and the date and time the surveyor communicated the disruption to the section foreman, the date and time production ceased, the date and time ventilation was reestablished, and the date and time production resumed.

—All surveyors, section foremen, section crew members, and other personnel who will be involved with or affected by surveying operations will receive training in accordance with 30 CFR 48.7 on the requirements of the petition within 60 days of the date the petition becomes final. The training will be completed before any nonpermissible electronic surveying equipment can be used while production is occurring. The operator will keep a record of the training and provide the record to MSHA on request.

—The operator will provide annual retraining to all personnel who will be involved with or affected by surveying operations in accordance with 30 CFR 48.8. The operator will train new miners on the requirements of the petition in accordance with 30 CFR 48.5, and will train experienced miners, as defined in 30 CFR 48.6, on the requirements of the petition in accordance with 30 CFR 48.6. The operator will keep a record of the training and provide the record to MSHA on request.

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2020–004–C.

Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.

Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.

Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to allow the use of battery-powered nonpermissible surveying equipment including, but not limited to, portable battery-operated mine transits, total station surveying equipment, distance meters, and data loggers, within 150 feet of pillar workings and longwall faces.

The petitioner states that:

(1) The operator is seeking a modification of this standard, which relates to battery powered, non-permissible surveying equipment, including battery operated mine transits, total station surveying equipment, distance meters and data loggers.

(2) The operator seeks a petition for modification relating to battery-powered, non-permissible surveying equipment.

(3) To comply with requirements for mine ventilation maps and mine maps in 30 CFR 75.372 and 75.1200, use of the most practical and accurate surveying equipment is necessary.

(4) Application of the existing standard would result in a diminution of safety to miners. Underground mining by its nature, size, and complexity of mine plans requires that accurate and precise measurements be completed in a prompt and efficient manner.

(5) The alternative method will at all times guarantee no less than the same measure of protection afforded by this standard.

As an alternative to the existing standard, the petitioner proposes the following:

(a) The operator may use the following total stations and theodolites and similar low-voltage battery-operated total stations and theodolites if they have an ingress protection (IP) rating of 66 or greater within 150 feet of pillar workings or longwall faces subject to this petition:

—Sokkia CX–105LN

(b) The nonpermissible electronic surveying equipment is low-voltage or battery-powered nonpermissible total stations and theodolites. All nonpermissible electronic total stations and theodolites will have an IP 66 or greater rating.

(c) The operator will maintain a logbook for electronic surveying equipment with the equipment, or in the location where mine record books are kept, or in the location where the surveying record books are kept. The logbook will contain the date of manufacture and/or purchase of each particular piece of electronic surveying equipment. The logbook will be made available to MSHA on request.

(d) All nonpermissible electronic surveying equipment to be used within 150 feet of pillar workings or longwall faces will be examined by the person who operates the equipment prior to taking the equipment underground to ensure the equipment is being maintained in a safe operating condition. The result of these examinations will be recorded in the logbook and will include:

(i) Checking the instrument for any physical damage and the integrity of the case;

(ii) Removing the battery and inspecting for corrosion;

(iii) Inspecting the contact points to ensure a secure connection to the battery;

(iv) Reinserting the battery and powering up and shutting down to ensure proper connections; and

(v) Checking the battery compartment cover or battery attachment to ensure that it is securely fastened.

(e) The equipment will be examined at least weekly by a qualified person, as defined in 30 CFR 75.153. The examination results will be recorded weekly in the equipment logbook and will be maintained for at least 1 year.

(f) The operator will ensure that all nonpermissible electronic surveying equipment is serviced according to the manufacturer's recommendations. Dates of service will be recorded in the equipment's logbook and will include a description of the work performed.

(g) The nonpermissible electronic surveying equipment used within 150 feet of pillar workings or longwall faces will not be put into service until MSHA has initially inspected the equipment and determined that it is in compliance with all the terms and conditions of this petition.

(h) Nonpermissible electronic surveying equipment will not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while such equipment is being used, the equipment will be de-energized immediately and withdrawn further than 150 feet from pillar workings and longwall faces. All requirements of 30 CFR 75.323 will be complied with prior to entering within 150 feet of pillar workings or longwall faces.

(i) Prior to setting up and energizing nonpermissible electronic surveying equipment within 150 feet of pillar

workings or longwall faces, the surveyor(s) will conduct a visual examination of the immediate area for evidence that the area appears to be sufficiently rock-dusted and for the presence of accumulated float coal dust. If the rock-dusting appears insufficient or the presence of accumulated float coal dust is observed, the equipment will not be energized until sufficient rock-dust has been applied and/or the accumulations of float coal dust have been cleaned up. If nonpermissible electronic surveying equipment is to be used in an area not rock-dusted within 40 feet of a working face where a continuous mining machine is used, the area will be rocked-dusted prior to energizing the nonpermissible electronic surveying equipment.

(j) All hand-held methane detectors will be MSHA-approved and maintained in permissible and proper operating condition, as defined in 30 CFR 75.320. All methane detectors will provide visual and audible warnings when methane is detected at or above 1.0 percent.

(k) Prior to energizing nonpermissible electronic surveying equipment within 150 feet of pillar workings and longwall faces, methane tests will be made in accordance with 30 CFR 75.323(a). Nonpermissible electronic surveying equipment will not be used within 150 feet of pillar workings or longwall faces when production is occurring.

(l) Prior to surveying, the area will be examined according to 30 CFR 75.360. If the area has not been examined, a supplemental examination according to 30 CFR 75.361 will be performed before any non-certified person enters the area.

(m) A qualified person, as defined in 30 CFR 75.151, will continuously monitor for methane immediately before and during the use of nonpermissible electronic surveying equipment within 150 feet of pillar workings and longwall faces. If there are two people in the surveying crew, both persons will continuously monitor for methane. The other person will either be a qualified person, as defined in 30 CFR 75.151, or be in the process of being trained to be a qualified person but has yet to make such tests for a period of 6 months, as required in 30 CFR 75.150. Upon completion of the 6-month training period, the second person on the surveying crew must become qualified, as defined in 30 CFR 75.151, in order to continue on the surveying crew. If the surveying crew consists of one person, that person will monitor for methane with two separate devices.

(n) Batteries contained in the nonpermissible electronic surveying equipment will be changed out or charged in fresh air more than 150 feet from pillar workings or longwall faces. Replacement batteries will be carried only in the compartment provided for a spare battery in the nonpermissible electronic surveying equipment carrying case. Before each shift of surveying, all batteries for the nonpermissible electronic surveying equipment will be charged sufficiently so that they are not expected to be replaced on that shift.

(o) When using nonpermissible electronic surveying equipment within 150 feet of pillar workings or longwall faces, the surveyor will confirm by measurement or by inquiry of the person in charge of the section, that the air quantity on the section, on that shift, within 150 feet of pillar workings or longwall faces is at least the minimum quantity that is required by the mine's ventilation plan.

(p) Personnel engaged in the use of nonpermissible electronic surveying equipment will be properly trained to recognize the hazards and limitations associated with the use of such equipment in areas where methane could be present.

(q) All members of the surveying crew will receive specific training on the terms and conditions of the petition before using nonpermissible electronic surveying equipment within 150 feet of pillar workings or longwall faces. A record of the training will be kept with the other training records.

(r) If the petition is granted, the operator will submit within 60 days after the petition is final, proposed revisions for its approved 30 CFR part 48 training plans to the District Manager. These revisions will specify initial and refresher training regarding the terms and conditions of the petition. When training is conducted on the terms and conditions in the petition, an MSHA Certificate of Training (Form 5000–23) will be completed and will indicate that it was surveyor training.

(s) The operator will replace or retire from service any electronic surveying instrument that was acquired prior to December 31, 2004 within 1 year of the petition becoming final. Within 3 years of the date that the petition becomes final, the operator will replace or retire from service any theodolite that was acquired more than 5 years prior to the date that the petition becomes final or any total station or other electronic surveying equipment identified in this petition and acquired more than 10 years prior to the date that the petition becomes final. After 5 years, the operator will maintain a cycle of purchasing new electronic surveying equipment whereby theodolites will be no older than 5 years from the date of manufacture and total stations and other electronic surveying equipment will be no older than 10 years from the date of manufacture.

(t) The operator will ensure that all surveying contractors hired by the operator are using nonpermissible electronic surveying equipment in accordance with the terms and conditions of this petition. The conditions of use in the petition will apply to all nonpermissible electronic surveying equipment used within 150 feet of pillar workings or longwall faces, regardless of whether the equipment is used by the operator or by an independent contractor.

(u) The petitioner states that it may use nonpermissible electronic surveying equipment when production is occurring, subject to the following conditions:

—On a mechanized mining unit (MMU) where production is occurring, nonpermissible electronic surveying equipment will not be used downwind of the discharge point of any face ventilation controls, such as tubing (including controls such as ''baloney skins'') or curtains.

—Production may continue while nonpermissible electronic surveying equipment is used, if such equipment is used in a separate split of air from where production is occurring.

—Nonpermissible electronic surveying equipment will not be used in a split of air ventilating an MMU if any ventilation controls will be disrupted during such surveying. Disruption of ventilation controls means any change to the mine's ventilation system that causes the ventilation system not to function in accordance with the mine's approved ventilation plan.

—If, while surveying, a surveyor must disrupt ventilation, the surveyor will cease surveying and communicate to the section foreman that ventilation must be disrupted. Production will stop while ventilation is disrupted. Ventilation controls will be reestablished immediately after the disruption is no longer necessary. Production will only resume after all ventilation controls are reestablished and are in compliance with approved ventilation or other plans, and other applicable laws, standards, or regulations.

—Any disruption in ventilation will be recorded in the logbook required by the petition. The logbook will include a description of the nature of the disruption, the location of the disruption, the date and time of the disruption and the date and time the surveyor communicated the

disruption to the section foreman, the date and time production ceased, the date and time ventilation was reestablished, and the date and time production resumed.

—All surveyors, section foremen, section crew members, and other personnel who will be involved with or affected by surveying operations will receive training in accordance with 30 CFR 48.7 on the requirements of the petition within 60 days of the date the petition becomes final. The training will be completed before any nonpermissible electronic surveying equipment can be used while production is occurring. The operator will keep a record of the training and provide the record to MSHA on request.

—The operator will provide annual retraining to all personnel who will be involved with or affected by surveying operations in accordance with 30 CFR 48.8. The operator will train new miners on the requirements of the petition in accordance with 30 CFR 48.5, and will train experienced miners, as defined in 30 CFR 48.6, on the requirements of the petition in accordance with 30 CFR 48.6. The operator will keep a record of the training and provide the record to MSHA on request.

The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the existing standard.

Sheila McConnell,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2020–07063 Filed 4–3–20; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0143]

Proposed Extension of Information Collection; Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN).

DATES: All comments must be received on or before June 5, 2020.

ADDRESSES: You may submit comment as follows. Please note that late, untimely filed comments will not be considered.

Electronic Submissions: Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for docket number MSHA–2020–0009. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket, with no changes. Because your comment will be made public, you are 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 your or anyone else's Social Security number or confidential business information.

• 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.

Written/Paper Submissions: Submit written/paper submissions in the following way:

• *Mail/Hand Delivery:* Mail or visit DOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452.

• MSHA will post your comment as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Sheila McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and metal and nonmetal mines.

MSHA issues certifications, qualifications, and approvals to the nation's miners to conduct specific work within the mines. Miners requiring qualification or certification from MSHA will register for an MIIN. MSHA uses this unique number in place of individual Social Security numbers (SSNs) for all MSHA collections. The MIIN identifier fulfills Executive Order 13402, Strengthening Federal Efforts Against Identity Theft, which requires Federal agencies to better secure government held data.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN). MSHA is particularly interested in comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;

• Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Suggest methods to 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.

Background documents related to this information collection request are available at *https://regulations.gov* and in DOL–MSHA located at 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION** section of

this notice from the previous collection of information.

III. Current Actions

This information collection request concerns provisions for Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN). MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0143.

Affected Public: Business or other for-profit.

Number of Respondents: 7,500.

Frequency: On occasion.

Number of Responses: 7,500.

Annual Burden Hours: 625 hours.

Annual Respondent or Recordkeeper Cost: $75.

MSHA Forms: MSHA Form 5000–46, Request for MSHA Individual Identification Number (MIIN).

Comments submitted in response to this notice will be summarized in the request for Office of Management and Budget approval of the proposed information collection request; they will become a matter of public record and will be available at *https://www.reginfo.gov.*

Sheila McConnell,

Certifying Officer.

[FR Doc. 2020–07062 Filed 4–3–20; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Survey of Graduate Students and Postdoctorates in Science and Engineering

AGENCY: National Center for Science and Engineering Statistics, National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Center for Science and Engineering Statistics (NCSES) within the National Science Foundation (NSF) is announcing plans to request renewal of the Survey of Graduate Students and Postdoctorates in Science and Engineering (OMB Control Number 3145–0062). In accordance with the requirements of the Paperwork Reduction Act of 1995, NSF is providing opportunity for public comment on this action. After obtaining and considering public comments, NSF will prepare the submission requesting that OMB approve clearance of this collection for three years.

DATES: Written comments on this notice must be received by June 5, 2020 to be assured of consideration. Comments received after that date will be considered to the extent practicable. Send comments to the address below.

FOR ADDITIONAL INFORMATION OR COMMENTS: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite 18200, Alexandria, VA 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays). You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Survey of Graduate Students and Postdoctorates in Science and Engineering.

OMB Control Number: 3145–0062.

Expiration Date of Current Approval: October 31, 2020.

Type of Request: Intent to seek approval to extend an information collection for three years.

Abstract: Established within NSF by the America COMPETES Reauthorization Act of 2010 § 505, codified in the National Science Foundation Act of 1950, as amended, the National Center for Science and Engineering Statistics (NCSES) serves as a central Federal clearinghouse for the collection, interpretation, analysis, and dissemination of objective data on science, engineering, technology, and research and development for use by practitioners, researchers, policymakers, and the public.

The Survey of Graduate Students and Postdoctorates in Science and Engineering (GSS), sponsored by the NCSES within NSF and the National Institutes of Health, is designed to comply with legislative mandates by providing information on the characteristics of academic graduate enrollments in science, engineering and health fields. The GSS, which originated in 1966 and has been conducted annually since 1972, is a census of all departments in science, engineering and health (SEH) fields within academic institutions with graduate programs in the United States. This request to extend the information collection for three years is to cover the 2020, 2021, and 2022 GSS survey cycles. The information collected by the GSS is solicited under the authority of the National Science Foundation Act of 1950, as amended and the America COMPETES Reauthorization Act of 2010. Data collection starts each fall in October and data are obtained primarily through a Web survey. All information will be used for statistical purposes only. Participation in the survey is voluntary.

The total number of respondents surveyed in the 2020 survey cycle is estimated to be 911 School Coordinators. The GSS is the only national survey that collects information on the characteristics of graduate enrollment and postdoctoral appointees (postdocs) for specific SEH disciplines at the department level. It collects information on:

(1) Master's and doctoral students' ethnicity and race, citizenship, gender, source and mechanism of financial support (*e.g.,* fellowships, traineeships, assistantships) and enrollment status.

(2) Postdocs' ethnicity and race, citizenship, gender, source and mechanism of financial support, type of doctoral degree, and degree origin (U.S. or foreign); and

(3) Other doctorate-holding non-faculty researchers' gender and type of doctoral degree.

To improve coverage of postdocs, the GSS periodically collects information on postdocs employed in Federally Funded Research and Development Centers (FFRDCs) by ethnicity and race, gender, citizenship, source and mechanism of financial support, and field of research. This survey of postdocs at FFRDCs will be conducted as part of the 2021 GSS survey cycle.

The initial GSS data request is sent to the designated respondent (School Coordinator) at each academic institution in the fall. The School Coordinator may upload a file with the requested data on the GSS website, which will automatically aggregate the data and populate the cells of the Web survey instrument for each reporting unit (departments, programs, research centers, and health care facilities). This method of data provision is called Electronic Data Interchange (EDI). The School Coordinator will be also able to upload partial data (*e.g.,* student enrollment information) and delegate the provision of other data (*e.g.,* financial support information) to appropriate reporting units at their institution (unit respondents).

Institutions that do not want to use EDI will be able to complete the survey through manual entry of data in the Web survey instrument as in the past.

Data are disseminated annually on the NCSES website *https://www.nsf.gov/statistics/srvygradpostdoc* in the form of 73 data tables, a 3 to 5 page InfoBrief, and public use files (*https://www.nsf.gov/statistics/srvygradpostdoc/pub_data.cfm).* In addition, current and historical data are available via the NCSES Integrated Data Tool (*https://ncsesdata.nsf.gov/ids/?utm_source=Main&utm_medium=Main&utm_campaign=Main*).The Data Tool combines GSS data with academic sector data from both NCSES and the National Center of Education Statistics and allows for custom querying.

Use of the Information: The GSS data are routinely provided to Congress and other Federal agencies. The GSS institutions themselves are major users of the GSS data. Professional societies such as the American Association of Universities, the Association of American Medical Colleges, and the Carnegie Foundation are also major users. Graduate enrollment and postdoc data are often used in reports by the national media. With the help of the aforementioned NCSES Data Tool, NSF reviews changing enrollment levels to: Assess the effects of NSF initiatives, track graduate student support patterns, and analyze participation in science and engineering fields for targeted groups by discipline and for selected groups of institutions. GSS data are also used in two congressionally mandated NCSES publications: *Women, Minorities, and Persons with Disabilities in Science and Engineering* (*https://ncses.nsf.gov/wmpd/*) and the National Science Board's *Science and Engineering Indicators* (*https://ncses.nsf.gov/indicators*). In addition, the National Institutes of Health (NIH) publish GSS data annually in the NIH Data Book *https://report.nih.gov/nihdatabook/*.

Expected Respondents: The GSS is an annual census of all eligible academic institutions in the U.S. with graduate programs in science, engineering and health fields. The response rate is calculated based on the number of reporting units (departments, programs, research centers, and health care facilities) that respond to the survey. For reference, in 2018, the GSS population was 19,592 units at 715 academic institutions. Based on recent cycles NCSES expects the annual response rate to be around 99 percent.

Estimate of Burden: For each GSS survey cycle, both School Coordinators and unit respondents are asked to report how long it took them to complete the data collection. Coordinators at FFRDCs are also asked about the hours required complete the Web instrument immediately after they submit the data. In the past three GSS cycles (2016–2018 data collections), the average burden per coordinator reported each cycle was 17.8 hours. However, burden varies considerably across respondents. The amount of time it takes to complete the GSS data depends to a large degree on the extent to which the school's records are centrally stored and computerized. It also depends on whether the institution uses manual data entry or EDI to provide the GSS data, the number of SEH reporting units that need to be reported by the institution, and the degree to which unit respondents within the institution are used to collect and report data.

To estimate burden for the next three GSS data collection survey cycles (2020, 2021, and 2022), the GSS frame is split by response method (EDI or manual entry) and the number of reporting units reported by the institution (more than 15 units are large reporters and 15 or fewer units are small reporters). Table 1 presents burden estimates based on observed institution reporting size and burden reports collected from the 2018 GSS survey cycle.

TABLE 1—COMPOSITION AND REPORTED BURDEN OF THE 2018 GSS

Institution type	Respondents (# of school coordinators)	Percent of all school coordinators	Average burden (hours)	Total burden (hours)
More than 15 units, EDI	318	35.3	37.7	11,989
More than 15 units, Manual data entry	42	4.7	41.2	1,730
15 or fewer units, EDI	363	40.3	8.3	3,013
15 or fewer units, Manual data entry	178	19.8	9.0	1,602
Totals	901	100.0	20.3	18,334

The frame for the 2019 GSS includes 720 institutions comprising 822 schools with 906 total School Coordinators (some institutions utilize multiple School Coordinators based on how they are organized). To estimate the burden for the 2020–2022 GSS survey cycles, we assume a steady state in terms of the use of EDI but based on recent cycles we expect the number of School Coordinators to increase by five each cycle. New schools tend to have small numbers of eligible units and students, so the five coordinators are added to the small school manual data entry category. Thus, we expect to have 911 coordinators in 2020, 916 in 2021 and 921 in 2022. The estimated burden per respondent is approximately 20 hours per School Coordinator; the exact number is based on the distributions shown in Table 1, adjusted for the additional coordinators. Given the historically high levels of participation, a 100 percent school response rate is used in these estimates. Since the FFRDC postdoc data collection will take place in 2021, the estimated burden for that year will increase by 73 hours from 43 FFRDCs (based on 100 percent response rate in 2017 survey with the average burden of 1.7 hours per FFRDC).

TABLE 2—GSS ESTIMATED RESPONSE BURDEN

Category	Respondents (# of School Coordinators)	Total burden (hours)
Total burden for 2020	911	18,424
Total burden for 2021	959	18,542
GSS institutions	*916*	*18,469*

TABLE 2—GSS ESTIMATED RESPONSE BURDEN—Continued

Category	Respondents (# of School Coordinators)	Total burden (hours)
FFRDCs	*43*	*73*
Total burden for 2022	921	18,514
Potential future methodological studies (across all 3 survey cycles)		1,000
Total estimated burden	2,791	56,480
Estimated average annual burden	930	18,827

The total estimated respondent burden of the GSS, including 1,000 hours for potential methodological studies to improve the survey procedures, will be 56,480 hours over the three-cycle survey clearance period. NCSES may review and revise this burden estimate based on completion time data collected during the 2019 GSS survey cycle, which is ongoing.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of NSF, including whether the information shall have practical utility; (b) the accuracy of NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) 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.

Dated: April 1, 2020.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2020–07156 Filed 4–3–20; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

Civil Service Retirement System; Present Value Factors

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: The Office of Personnel Management (OPM) is providing notice of adjusted present value factors applicable to retirees under the Civil Service Retirement System (CSRS) who elect to provide survivor annuity benefits to a spouse based on post-retirement marriage; to retiring employees who elect the alternative form of annuity, owe certain redeposits based on refunds of contributions for service ending before March 1, 1991, or elect to credit certain service with nonappropriated fund instrumentalities; or, for individuals with certain types of retirement coverage errors who can elect to receive credit for service by taking an actuarial reduction under the provisions of the Federal Erroneous Retirement Coverage Correction Act. This notice is necessary to conform the present value factors to changes in the economic and demographic assumptions adopted by the Board of Actuaries of the Civil Service Retirement System.

DATES: The revised present value factors apply to survivor reductions or employee annuities that commence on or after October 1, 2020.

ADDRESSES: Send requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Karla Yeakle, (202) 606–0299.

SUPPLEMENTARY INFORMATION: Several provisions of CSRS require reduction of annuities on an actuarial basis. Under each of these provisions, OPM is required to issue regulations on the method of determining the reduction to ensure that the present value of the reduced annuity plus a lump-sum equals, to the extent practicable, the present value of the unreduced benefit. The regulations for each of these benefits provide that OPM will publish a notice in the **Federal Register** whenever it changes the factors used to compute the present values of these benefits.

Section 831.2205(a) of title 5, Code of Federal Regulations, prescribes the method for computing the reduction in the beginning rate of annuity payable to a retiree who elects an alternative form of annuity under 5 U.S.C. 8343a. That reduction is required to produce an annuity that is the actuarial equivalent of the annuity of a retiree who does not elect an alternative form of annuity. The present value factors listed below are used to compute the annuity reduction under section 831.2205(a) of title 5, Code of Federal Regulations.

Section 831.303(c) of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction to complete payment of certain redeposits of refunded deductions based on periods of service that ended before March 1, 1991, under section 8334(d)(2) of title 5, United States Code; section 1902 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111–84.

Section 831.663 of Title 5, Code of Federal Regulations, prescribes the use of similar factors for computing the reduction required for certain elections to provide survivor annuity benefits based on a post-retirement marriage under section 8339(j)(5)(C) or (k)(2) of title 5, United States Code. Under section 11004 of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, effective October 1, 1993, OPM ceased collection of these survivor election deposits by means of either a lump-sum payment or installments. Instead, OPM is required to establish a permanent actuarial reduction in the annuity of the retiree. This means that OPM must take the amount of the deposit computed under the old law and translate it into a lifetime reduction in the retiree's benefit.

Subpart F of part 847 of title 5, Code of Federal Regulations, prescribes the use of similar factors for computing the deficiency the retiree must pay to receive credit for certain service with nonappropriated fund instrumentalities made creditable by an election under section 1043 of Public Law 104–106. Subpart I of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for employees that elect to credit nonappropriated fund instrumentality service to qualify for immediate retirement under section 1132 of Public Law 107–107.

Sections 839.1114–1121 of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction required for certain service credit deposits, Government Thrift Savings Plan contributions, or for previous payment of the FERS Basic Employee Death Benefit in annuities subject to the Federal Erroneous Retirement Coverage Corrections Act (FERCCA) under the provisions of Public Law 106–265. Retirees and survivors who owe a larger deposit because of a retirement coverage error can choose to pay the additional deposit amount or their annuity will be actuarially reduced to account for the deposit amount that remains unpaid. Additionally, retirees and survivors of deceased employees who received Government contributions to their Thrift Savings Plan account after being corrected to FERS and who later elect CSRS Offset under FERCCA keep the Government contributions and associated earnings in their Thrift Savings Plan account. Instead of adjusting the Thrift Savings Plan account, FERCCA requires that the CSRS-Offset annuity be actuarially reduced. Also, survivors that received the FERS Basic Employee Death Benefit and elect CSRS Offset under FERCCA do not have to pay back the Basic Employee Death Benefit. Instead, OPM actuarially reduces the survivor annuity payable. These reductions under FERCCA allow the annuity to be actuarially reduced in a way that, on average, allows the Fund to recover the amount of the missing lump sum over the recipient's lifetime.

The present value factors currently in effect were published by OPM (84 FR 22525) on May 17, 2019. On April 6, 2020, OPM published a notice to revise the normal cost percentage under the Federal Employees' Retirement System (FERS) Act of 1986, Public Law 99–335, based on changed assumptions adopted by the Board of Actuaries of the CSRS. Those changes require corresponding changes in present value factors used to produce actuarially equivalent benefits when required by the Civil Service Retirement Act. The revised factors will become effective on October 1, 2020. For alternative forms of annuity and redeposits of employee contributions, the new factors will apply to annuities that commence on or after October 1, 2020. See 5 CFR 831.2205 and 831.303(c). For survivor election deposits, the new factors will apply to survivor reductions that commence on or after October 1, 2020. See 5 CFR 831.663(c) and (d). For obtaining credit for service with certain nonappropriated fund instrumentalities, the new factors will apply to cases in which the date of computation under sections 847.603 or 847.809 of title 5, Code of Federal Regulations, is on or after October 1, 2020. See 5 CFR 842.602, 842.616, 847.603, and 847.809. For retirement coverage corrections under FERCCA, the new factors will apply to annuities that commence on or after October 1, 2020, or in the case of previous payment of the Basic Employee Death Benefit, the new factors will apply to deaths occurring on or after October 1, 2020. See 5 CFR 839.1114–1121 and 5 CFR 831.303(d).

OPM is, therefore, revising the tables of present value factors to read as follows:

CSRS Present Value Factors Applicable to Annuity Payable Following an Election Under Section 8339(j) or (k) or Section 8343a of Title 5, United States Code, or Under Section 1043 of Public Law 104–106 or Under Section 1132 of Public Law 107–107 or Under FERCCA or Following a Redeposit Under Section 8334(d)(2) of Title 5, United States Code

Age	Present value factor
40	378.1
41	372.3
42	366.4
43	360.4
44	354.4
45	348.3
46	342.2
47	336.1
48	329.9
49	323.6
50	317.3
51	311.0
52	304.5
53	298.0
54	291.4
55	284.7
56	277.9
57	270.8
58	263.8
59	256.6
60	249.4
61	242.2
62	234.8
63	227.4
64	220.0
65	212.5
66	205.1
67	197.6
68	190.2
69	182.8
70	175.4

CSRS PRESENT VALUE FACTORS APPLICABLE TO ANNUITY PAYABLE FOLLOWING AN ELECTION UNDER SECTION 8339(j) OR (k) OR SECTION 8343a OF TITLE 5, UNITED STATES CODE, OR UNDER SECTION 1043 OF PUBLIC LAW 104–106 OR UNDER SECTION 1132 OF PUBLIC LAW 107–107 OR UNDER FERCCA OR FOLLOWING A REDEPOSIT UNDER SECTION 8334(d)(2) OF TITLE 5, UNITED STATES CODE—Continued

Age	Present value factor
71	168.0
72	160.7
73	153.4
74	146.2
75	139.1
76	132.1
77	125.2
78	118.4
79	111.8
80	105.2
81	98.9
82	92.7
83	86.8
84	81.1
85	75.6
86	70.3
87	65.4
88	60.7
89	56.3
90	52.2
91	48.5
92	45.0
93	41.8
94	38.9
95	36.2
96	33.8
97	31.6
98	29.7
99	27.9
100	26.2
101	24.7
102	23.3
103	22.0
104	20.6
105	19.0
106	17.1
107	14.2
108	9.5
109	6.4

CSRS PRESENT VALUE FACTORS APPLICABLE TO ANNUITY PAYABLE FOLLOWING AN ELECTION UNDER SECTION 1043 OF PUBLIC LAW 104–106 OR UNDER SECTION 1132 OF PUBLIC LAW 107–107 OR UNDER FERCCA

[For Ages at Calculation Below 40]

Age at calculation	Present value of a monthly annuity
17	486.1
18	482.3
19	478.4
20	474.5
21	470.4
22	466.4
23	462.2
24	457.9
25	453.6
26	449.2
27	444.7
28	440.2
29	435.5
30	430.8

CSRS PRESENT VALUE FACTORS APPLICABLE TO ANNUITY PAYABLE FOLLOWING AN ELECTION UNDER SECTION 1043 OF PUBLIC LAW 104–106 OR UNDER SECTION 1132 OF PUBLIC LAW 107–107 OR UNDER FERCCA—Continued

[For Ages at Calculation Below 40]

Age at calculation	Present value of a monthly annuity
31	425.9
32	421.0
33	416.0
34	410.9
35	405.7
36	400.4
37	395.0
38	389.5
39	383.9

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–07103 Filed 4–3–20; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Employees' Retirement System; Normal Cost Percentages

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: The Office of Personnel Management (OPM) is providing notice of revised normal cost percentages for employees covered by the Federal Employees' Retirement System (FERS) Act of 1986.

DATES: The revised normal cost percentages are effective at the beginning of the first pay period commencing on or after October 1, 2020. Agency appeals of the normal cost percentages must be filed no later than October 6, 2020.

ADDRESSES: Send or deliver agency appeals of the normal cost percentages and requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Karla Yeakle, (202) 606–0299.

SUPPLEMENTARY INFORMATION: The FERS Act of 1986, Public Law 99–335, created a new retirement system intended to cover most Federal employees hired after 1983. Most Federal employees hired before 1984 are under the older Civil Service Retirement System (CSRS). Section 8423 of title 5, United States Code, as added by the FERS Act of 1986, provides for the payment of the Government's share of the cost of the retirement system under FERS. Employees' contributions are established by law and constitute only a portion of the cost of funding the retirement system; employing agencies are required to pay the remaining costs. The amount of funding required, known as ''normal cost,'' is the entry age normal cost of the provisions of FERS that relate to the Civil Service Retirement and Disability Fund (Fund). The normal cost must be computed by OPM in accordance with generally accepted actuarial practices and standards (using dynamic assumptions). The normal cost calculations depend on economic and demographic assumptions. Subpart D of part 841 of title 5, Code of Federal Regulations, regulates how normal costs are determined.

In its meeting on April 12, 2018, the Board of Actuaries of the Civil Service Retirement System (the Board) recommended revisions to the long term economic assumptions and recommended changes to the demographic assumptions used in the actuarial valuations of CSRS and FERS, based on revised regulations OPM published on October 25, 2017. The demographic assumptions include assumed rates of mortality, employee withdrawal, retirement, and merit and longevity pay increases. OPM has adopted the Board's recommendations.

The revised regulations that OPM published on October 25, 2017, related to the calculation of the FERS normal cost percentages and added a category of normal cost percentage for employees of the U.S. Postal Service based on assumptions specific to the expected experience of postal employees. As a result of the revised regulations requiring postal-specific rates, OPM first established separate normal cost percentages for the Postal Service when agency contribution rates were previously revised, effective October 1, 2019. Those normal cost percentages for Postal Service employees reflected the postal-specific demographic assumptions recommended at the Board's April 12, 2018 meeting, with the economic assumptions determined by the Board at its June 1, 2017 meeting. For all other categories of employees, the normal cost percentages effective October 1, 2019, were calculated using the demographic and economic assumptions determined by the Board at its June 1, 2017 meeting. The normal cost percentages effective October 1, 2020, for all categories of employees are based on the demographic and economic assumptions determined by the Board at it April 12, 2018 meeting.

With regard to the economic assumptions described under section 841.402 of title 5, Code of Federal Regulations, used in the actuarial valuations of FERS, the Board concluded that it would be appropriate to assume a rate of investment return of 4.25 percent, a reduction of 0.25 percent from the existing rate of 4.50 percent. In addition, the Board determined that the assumed inflation rate should remain at 2.50 percent, that the assumed rate of FERS annuitant Cost of Living Adjustments should remain at 80 percent of the assumed rate of inflation, and that the projected rate of General Schedule salary increases should remain at 2.75 percent. These salary increases are in addition to assumed within-grade increases. These assumptions are intended to reflect the long term expected future experience of the Systems.

The demographic assumptions are determined separately for each of a number of special groups, in cases where separate experience data is

available. Based on the demographic and economic assumptions described above, OPM has determined the normal cost percentage for each category of employees under section 841.403 of title 5, Code of Federal Regulations.

Section 5001 of Public Law 112–96, The Middle Class Tax Relief and Jobs Creation Act of 2012, established provisions for FERS Revised Annuity Employees (FERS–RAE). The law permanently increases the retirement contributions by 2.30 percent of pay for these employees. Subsequently, Section 401 of Public Law 113–67, the Bipartisan Budget Act of 2013, created another class of FERS coverage, FERS-Further Revised Annuity Employee (FERS–FRAE). Employees subject to FERS–FRAE must pay an increase of 1.30 percent of pay above the retirement contribution percentage set for FERS–RAE. Separate normal cost percentages apply for employees covered under FERS–RAE and for employees covered under FERS–FRAE.

Section 211 of Title II, Division E of Public Law 116–94, the Further Consolidated Appropriations Act of 2020, provides for separate normal cost percentages for certain members of the Capitol Police as distinct from other Congressional Employees. Prior rules provided for a combined normal cost percentage for members of the Capitol Police and other Congressional Employees.

The normal cost percentages for each category of employee, including the employee contributions, are as follows:

NORMAL COST PERCENTAGES FOR FERS, FERS-REVISED ANNUITY EMPLOYEE (RAE), AND FERS-FURTHER REVISED ANNUITY (FRAE) GROUPS

Group	FERS Normal cost (percent)	FERS-RAE normal cost (percent)	FERS-FRAE normal cost (percent)
Members	24.4	18.6	18.8
Capitol Police covered under 5 U.S.C. 8412(d) and 5 U.S.C. 8425(c)	37.1	37.6	37.8
Other Congressional employees	25.6	18.6	18.8
Law enforcement officers, members of the Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and employees under section 302 of the Central Intelligence Agency Retirement Act of 1964 for certain employees	37.1	37.6	37.8
Air traffic controllers	37.0	37.5	37.7
Military reserve technicians	20.9	21.3	21.6
Employees under section 303 of the Central Intelligence Agency Retirement Act of 1964 for certain employees (when serving abroad)	25.6	26.2	26.4
Other employees of the United States Postal Service	16.5	16.9	17.1
All other regular FERS employees	18.1	18.6	18.8

Under section 841.408 of title 5, Code of Federal Regulations, these normal cost percentages are effective at the beginning of the first pay period commencing on or after October 1, 2020.

The time limit and address for filing agency appeals under sections 841.409 through 841.412 of title 5, Code of Federal Regulations, are stated in the **DATES** and **ADDRESSES** sections of this notice.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–07105 Filed 4–3–20; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Employees' Retirement System; Present Value Factors

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: The Office of Personnel Management (OPM) is providing notice of adjusted present value factors applicable to retirees who elect to provide survivor annuity benefits to a spouse based on post-retirement marriage, and to retiring employees who elect the alternative form of annuity or elect to credit certain service with nonappropriated fund instrumentalities. This notice is necessary to conform the present value factors to changes in the economic and demographic assumptions adopted by the Board of Actuaries of the Civil Service Retirement System.

DATES: The revised present value factors apply to survivor reductions or employee annuities that commence on or after October 1, 2020.

ADDRESSES: Send requests for actuarial assumptions and data to the Board of Actuaries, care of Gregory Kissel, Senior Actuary, Office of Healthcare and Insurance, Office of Personnel Management, Room 4316, 1900 E Street NW, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Karla Yeakle, (202) 606–0299.

SUPPLEMENTARY INFORMATION: Several provisions of the Federal Employees' Retirement System (FERS) require reduction of annuities on an actuarial basis. Under each of these provisions, OPM is required to issue regulations on the method of determining the reduction to ensure that the present value of the reduced annuity plus a lump-sum equals, to the extent practicable, the present value of the unreduced benefit. The regulations for each of these benefits provide that OPM will publish a notice in the **Federal Register** whenever it changes the factors used to compute the present values of these benefits.

Section 842.706(a) of title 5, Code of Federal Regulations, prescribes the method for computing the reduction in the beginning rate of annuity payable to a retiree who elects an alternative form of annuity under 5 U.S.C. 8420a. That reduction is required to produce an annuity that is the actuarial equivalent of the annuity of a retiree who does not elect an alternative form of annuity. The present value factors listed below are used to compute the annuity reduction under 5 CFR 842.706(a).

Section 842.615 of title 5, Code of Federal Regulations, prescribes the use of these factors for computing the reduction required for certain elections to provide survivor annuity benefits based on a post-retirement marriage or divorce under 5 U.S.C. 8416(b), 8416(c), or 8417(b). Under section 11004 of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, effective October 1, 1993, OPM ceased collection of these survivor election deposits by means of either a lump-sum payment or installments. Instead, OPM is required

to establish a permanent actuarial reduction in the annuity of the retiree. This means that OPM must take the amount of the deposit computed under the old law and translate it into a lifetime reduction in the retiree's benefit.

Subpart F of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for computing the deficiency the retiree must pay to receive credit for certain service with nonappropriated fund instrumentalities made creditable by an election under section 1043 of Public Law 104–106. Subpart I of part 847 of title 5, Code of Federal Regulations, prescribes the use of present value factors for employees that elect to credit nonappropriated fund instrumentality service to qualify for immediate retirement under section 1132 of Public Law 107–107.

OPM published the present value factors currently in effect on May 17, 2019, at 84 FR 22527. On April 6, 2020, OPM published a notice to revise the normal cost percentage under the Federal Employees' Retirement System (FERS) Act of 1986, Public Law 99–335, based on changed assumptions adopted by the Board of Actuaries of the Civil Service Retirement System. Under 5 U.S.C. 8461(i), those changes require corresponding changes in the present value factors used to produce actuarially equivalent benefits when required by the FERS Act. The revised factors will become effective on October 1, 2020, to correspond with the changes in FERS normal cost percentages. For alternative forms of annuity, the new factors will apply to annuities that commence on or after October 1, 2020. See 5 CFR 842.706. For survivor election deposits, the new factors will apply to survivor reductions that commence on or after October 1, 2020. See 5 CFR 842.615(b). For obtaining credit for service with certain nonappropriated fund instrumentalities, the new factors will apply to cases in which the date of computation under 5 CFR 847.603 or 847.809 is on or after October 1, 2020. See 5 CFR 842.602, 842.616, 847.603, and 847.809.

OPM is, therefore, revising the tables of present value factors to read as follows:

TABLE I—FERS PRESENT VALUE FACTORS FOR AGES 62 AND OLDER

[Applicable to annuity payable following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

Age	Present value factor
62	220.4
63	213.9
64	207.4
65	200.9
66	194.3
67	187.6
68	181.0
69	174.2
70	167.5
71	160.8
72	154.1
73	147.4
74	140.8
75	134.3
76	127.8
77	121.4
78	115.1
79	108.9
80	102.8
81	96.8
82	91.0
83	85.4
84	80.0
85	74.7
86	69.7
87	64.8
88	60.3
89	56.0
90	52.0
91	48.3
92	44.8
93	41.6
94	38.7
95	36.0
96	33.6
97	31.4
98	29.4
99	27.7
100	26.1
101	24.6
102	23.1
103	21.7
104	20.3
105	18.8
106	16.9

TABLE I—FERS PRESENT VALUE FACTORS FOR AGES 62 AND OLDER—Continued

[Applicable to annuity payable following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

Age	Present value factor
107	14.1
108	9.4
109	6.4

TABLE II.A—FERS PRESENT VALUE FACTORS FOR AGES 40 THROUGH 61

[Applicable to annuity payable when annuity is not increased by cost-of-living adjustments before age 62 following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

Age	Present value factor
40	259.4
41	258.0
42	256.5
43	255.0
44	253.5
45	251.9
46	250.3
47	248.7
48	247.1
49	245.4
50	243.8
51	242.0
52	240.2
53	238.4
54	236.5
55	234.7
56	232.8
57	230.8
58	228.8
59	226.8
60	224.7
61	222.5

TABLE II.B—FERS PRESENT VALUE FACTORS FOR AGES 40 THROUGH 61

[Applicable to annuity payable when annuity is increased by cost-of-living adjustments before age 62 following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), or 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

Age	Present value factor
40	341.7
41	336.9
42	332.1
43	327.1
44	322.2
45	317.1
46	312.0
47	306.9
48	301.6
49	296.4
50	291.0
51	285.6
52	280.0
53	274.4
54	268.8
55	263.0
56	257.2
57	251.3
58	245.3
59	239.2

TABLE II.B—FERS PRESENT VALUE FACTORS FOR AGES 40 THROUGH 61—Continued

[Applicable to annuity payable when annuity is increased by cost-of-living adjustments before age 62 following an election under 5 U.S.C. 8416(b), 8416(c), 8417(b), or 8420a, under section 1043 of Public Law 104–106, or under section 1132 of Public Law 107–107]

Age	Present value factor
60	233.0
61	226.7

TABLE III—FERS PRESENT VALUE FACTORS FOR AGES AT CALCULATION BELOW 40

[Applicable to annuity payable following an election under section 1043 of Public Law 104–106 or under section 1132 of Public Law 107–107]

Age at calculation	Present value of a monthly annuity
17	425.0
18	422.3
19	419.5
20	416.6
21	413.7
22	410.6
23	407.5
24	404.4
25	401.1
26	397.8
27	394.4
28	390.9
29	387.4
30	383.7
31	380.0
32	376.1
33	372.2
34	368.1
35	364.0
36	359.7
37	355.4
38	350.9
39	346.4

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–07104 Filed 4–3–20; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–111 and CP2020–117; MC2020–112 and CP2020–118]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 8, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance

with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2020–111 and CP2020–117; *Filing Title:* USPS Request to Add Priority Mail Contract 602 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* March 31, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 8, 2020.

2. *Docket No(s).:* MC2020–112 and CP2020–118; *Filing Title:* USPS Request to Add Priority Mail Contract 603 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* March 31, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 8, 2020.

This Notice will be published in the Federal Register.

Erica A. Barker,

Secretary.

[FR Doc. 2020–07124 Filed 4–3–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88523; File No. SR–NYSEAMER–2020–23]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change for an Extension of the Temporary Waiver of the Co-Location "Hot Hands" Fee

March 31, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 27, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes an extension of the temporary waiver of the co-location ''Hot Hands'' fee. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes an extension of the temporary waiver of the co-location[4] ''Hot Hands'' fee through the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The waiver of the Hot Hands fee was originally through March 29, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Mahwah, New Jersey data center (''Data Center''), from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE originally announced that the Data Center would be closed to third parties for the period from March 16, 2020 through March 29, 2020 (the ''Initial Closure''), to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE American Rules 7.1E and 901NY to close the co-location facility of the Exchange to third parties.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80).

[5] *See* Securities Exchange Act Release No. 88403 (March 17, 2020), 85 FR 16400 (March 23, 2020) (SR–NYSEAMER–2020–19).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). As specified in the NYSE American Equities Price List and Fee Schedule and the NYSE American Options Fee Schedule (together, the ''Price List and Fee Schedule''), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Chicago, Inc. (''NYSE Chicago''), and NYSE National, Inc. (''NYSE National'' and together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–25, SR–NYSEArca–2020–26, SR–NYSECHX–2020–10, and SR–NYSENAT–2020–14.

[7] *See* Securities Exchange Act Release No. 72719 (July 30, 2014), 79 FR 45502 (August 5, 2014) (SR–NYSEMKT–2014–61).

ICE has now announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended to the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The date will be announced through a customer notice.

If a User's equipment requires work while a Rules 7.1E and 901NY closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[8] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List and Fee Schedule as follows (deletions bracketed, additions italicized):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [March 29, 2020]*the earlier of the reopening of the Mahwah, New Jersey data center or May 15, 2020.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rules 7.1E and 901NY closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rules 7.1E and 901NY closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rules 7.1E and 901NY closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

[8] *See* 85 FR 16400, *supra* note 5.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] 15 U.S.C. 78f(b)(8).

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [14] of the Act 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–NYSEAMER–2020–23 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–NYSEAMER–2020–23. 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–NYSEAMER–2020–23 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07079 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: To Be Published.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, April 8, 2020 at 3:00 p.m.

CHANGES IN THE MEETING: The Closed Meeting scheduled for Wednesday, April 8, 2020 at 3:00 p.m. has been changed to Wednesday, April 8, 2020 at 2:00 p.m.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: April 1, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–07259 Filed 4–2–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, the Securities and Exchange Commission will hold an Open Meeting on Wednesday, April 8, 2020 at 3:00 p.m.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will begin at 3:00 p.m. (ET) and will be open to the public via audio webcast only on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: The Commission will consider whether to adopt rule and form amendments that would improve access to capital and facilitate investor communications by business development companies, which primarily invest in small and developing companies, and registered closed-end investment companies. The Commission will consider these amendments, in part, to implement certain provisions of the Small Business Credit Availability Act and the Economic Growth, Regulatory Relief, and Consumer Protection Act. Specifically, the Commission will consider whether to modify the registration, communications, and offering processes for business development companies and other closed-end investment companies under the Securities Act of 1933, as well as related rule and form amendments under the Investment Company Act of 1940 to tailor the disclosure and regulatory framework to these investment companies. The Commission also will consider whether to adopt rule and form amendments to modernize securities registration fee payments for certain registrants.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Vanessa A. Countryman, Office of the Secretary, at (202) 551–5400.

Dated: April 1, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–07260 Filed 4–2–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88530; File No. SR–CBOE–2020–031]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Rule 5.24

March 31, 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 31, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 5.24.[3] 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 Exchange proposes to amend Rule 5.24 regarding the Exchange's business continuity and disaster recovery plans. Rule 5.24 describes which Trading Permit Holders (''TPHs'') are required to connect to the Exchange's backup systems as well as certain actions the Exchange may take as part of its business continuity plans so that it may maintain fair and orderly markets if unusual circumstances occurred that could impact the Exchange's ability to conduct business. This includes what actions the Exchange would take if its trading floor became inoperable. Specifically, Rule 5.24(e) states if the Exchange trading floor becomes inoperable, the Exchange will continue to operate in a screen-based only environment using a floorless configuration of the System that is operational while the trading floor facility is inoperable. The Exchange would operate using that configuration only until the Exchange's trading floor facility became operational. Open outcry trading would not be available in the event the trading floor becomes inoperable.[4] Rule 5.24(e)(1) also currently states in the event that the trading floor becomes inoperable, trading will be conducted pursuant to all applicable System Rules, except that open outcry Rules would not be in force, including but not limited to the Rules (or applicable portions) in Chapter 5, Section G,[5] and that all non-trading rules of the Exchange would continue to apply. The Exchange recently proposed additional exceptions to Rules that would not apply during a time in which the trading floor in inoperable.[6]

As of March 16, 2020, the Exchange suspended open outcry trading to help prevent the spread of the novel coronavirus and is currently operating in an all-electronic configuration. While the trading floor was open, the Exchange facilitated compression forums on the trading floor at the end of each calendar week, month, and quarter in which Trading Permit Holders reduce open positions in series of SPX options in order to mitigate the effects of capital constraints on market participants and help ensure continued depth of liquidity in the SPX options market.

The Exchange recently adopted Rule 5.24(e)(1)(E) to permit the Exchange to offer electronic compression forums while the trading floor is closed.[7] Pursuant to Rule 5.24(e)(1)(E), the Exchange will make available an electronic ''compression forum'' in the same manner as an open outcry ''compression forum'' as set forth in Rule 5.88, except as provided in subparagraph (E). In both electronic and open outcry compression forums, TPHs may submit lists of open positions to the Exchange that they wish to close against opposing (long/short) positions of other TPHs, which the Exchange would then aggregate into a single list that would allow TPHs to more easily identify those positions with counterparty interest on the Exchange. The list provided by the Exchange includes a complete list of all possible combinations of offsetting multi-leg positions to each TPH that submitted compression-list positions to the Exchange.[8]

Rule 5.88, Interpretation and Policy .01 provides that for purposes of Rule 5.88, multi-leg positions include vertical call spreads, vertical put spreads, and box spreads, which interpretation and policy applies to both electronic and open outcry compression forums. The proposed rule change would add Rule 5.24(e)(1)(E)(iv), which states that notwithstanding Interpretation and Policy .01 in Rule 5.88, for purposes of subparagraph (E) (and thus for purposes of electronic compression forums held while the trading floor is inoperable), multi-leg positions include vertical call spreads, vertical put spreads, combos (*i.e.,* purchase (sale) of a call and a sale (purchase) of a put with the same expiration date and strike price), and box spreads. Because a combo is essentially a ''synthetic future,'' it is a common multi-leg strategy among market participants. Market participants

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange originally submitted a substantially similar rule change on March 30, 2020 (SR–CBOE–2020–030). On March 31, 2020, the Exchange withdrew that filing and submitted this filing.

[4] Pursuant to Rule 5.26, the Exchange may enter into a back-up trading arrangement with another exchange, which could allow the Exchange to use the facilities of a back-up exchange to conduct trading of certain of its products. The Exchange currently has no back-up trading arrangement in place with another exchange.

[5] Chapter 5, Section G of the Exchange's rulebook sets forth the rules and procedures for manual order handling and open outcry trading on the Exchange.

[6] *See* Securities Exchange Act Release Nos. 88386 (March 13, 2020), 85 FR 15823 (March 19, 2020) (SR–CBOE–2020–019); and 88447 (March 20, 2020) (SR–CBOE–2020–023). The rule changes adopted in that filing are effective until May 15, 2020, unless extended. *See* Rule 5.24(e)(1).

[7] *See* Securities Exchange Act Release No. 88490 (March 26, 2020) (SR–CBOE–2020–026).

[8] *See* Rule 5.88(a)(4); *see also* Rule 5.24(e)(1)(E)(ii).

often establish market neural hedges by purchasing (selling) a number of combos with an offsetting SPX option position.[9] As a result, market participants maintain a significant number of combos in their portfolios. Additionally, when markets are volatile (as they have been recently), market participants often take on positions in a larger range of strikes, which positions can be put together as combos. The Exchange believes closing combo positions will be advantageous because such positions can be risk neutral, which means the closing of the entire combo has little or no impact on a TPH's risk profile. However, the current compression forum framework limits multi-leg positions to vertical call[10] and put[11] spreads and boxes. The Exchange notes that just as one put spread and one call spread combine to create a box spread, two combos similarly create a box spread.[12] For example, a box spread would be entered by purchasing 100 DEC 2040 calls and selling 100 DEC 2070 calls (*i.e.,* bull call spread) and selling 100 DEC 2040 puts and purchasing 100 DEC 2070 puts (*i.e.,* bear put spread). The purchase of 100 DEC 2040 calls and sale of 100 DEC 2040 puts comprises a combo (as does the sale of 100 DEC 2070 calls and purchase of 100 DEC 2070 puts). The Exchange believes that providing TPHs with this additional way to identify multi-leg positions with offsetting interest will enable more efficient closing of such common strategy positions.

Like the other multi-leg strategies currently covered by the rule, the Exchange will compile a list of all possible combos. The lists generated by the Exchange pursuant to Rule 5.24(e)(1)(E) are provided to TPHs for informational purposes only. Individual TPHs continue to determine whether to submit compression-list positions; whether to participate in the compression forum process; and whether to submit orders for execution in a compression forum. The Exchange's provision of the list does not constitute advice, guidance, a commitment to trade, an execution, or a recommendation to trade.

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.[13] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[14] 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)[15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest by adding a strategy for which the Exchange will make positions available during compression forums will benefit investors, which the Exchange believes will increase positions that market participants may close during compression forums. The Exchange believes the additional information that may be provided to TPHs in compression forums may encourage TPHs to close additional positions via the compression process. The Exchange believes this will enable TPHs to more efficiently and effectively close positions comprising a common multi-leg strategy in the SPX market via the compression forums, which, in general, helps to protect investors and the public interest because closing positions via the compression process serves to alleviate the adverse impact of bank capital requirements. As noted above, the information regarding combo positions is currently included in the compression position lists the Exchange provides to TPHs, as two combos create a box spread. The proposed rule change merely provides the Exchange with the ability to list combo positions separately, as it currently does for vertical call and put spreads (which also comprise box spreads).

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 proposed rule change has no impact on the trading process used in compression forums, but rather, adds to the information the Exchange may provide to TPHs as part of its efforts to facilitate market participants' reduction in open interest. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition, as compression forums will continue to be available to all market participants with SPX open interest. The Exchange will make available a list of all possible offsetting combos, which will be available to all TPHs that submit compression-list positions (similar to all other information in these lists). The Exchange does not believe the proposed rule change will impose any burden on intermarket competition, as it will apply only to SPX options, which are currently listed for trading only on the Exchange. The proposed rule change is intended to permit market participants to further reduce open SPX interest to free up additional capital that will permit those parties to continue to provide liquidity to the market, which the Exchange believes benefits the entire market.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[16] and Rule 19b–4(f)(6) thereunder.[17] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if

[9] *See, e.g.,* Rule 5.85(e).

[10] A vertical call spread involves the purchasing and selling of an equal number of call options with the same expiration date but different strike prices.

[11] A vertical put spread involves the purchasing and selling of an equal number of put options with the same expiration date but different strike prices.

[12] A box spread involves purchasing (selling) a bull call spread and purchasing (selling) a bear put spread. In other words, a box spread is composed of a long (short) call and short (long) put position at one strike price and a short (long) call and long (short) put position at another strike price.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *Id.*.

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6).

consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] the Commission may 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 operative immediately. As explained above, the Exchange believes that the proposed rule change has no impact on the trading process for compression forums. The Exchange believes that providing the additional information proposed herein with respect to combos, in addition to the other information the Exchange regularly provides, may increase the ability of firms to find other firms with offsetting positions and maximize the impact of the quarter-end compression forum. Furthermore, the Exchange believes providing TPHs with separate combo information, as it provides separate vertical spread information, will provide TPHs with additional flexibility to locate offsetting positions against which they may execute in compression forums, which will permit them to further reduce open SPX interest and free up additional capital, which benefits all investors in the SPX market. Accordingly, the Exchange asserts that waiver of the operative delay would permit the Exchange to provide TPHs with this information in time for them to engage in compression transactions in connection with the expected first quarter CTPH capital recalculation. 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.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–031 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–2020–031. 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 offices 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–2020–031, and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07090 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). Pursuant to Rule 19b–4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 3:00 p.m. on Wednesday, April 8, 2020.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topic: Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings; Resolution of litigation claims; and Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the

scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: April 1, 2020

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–07206 Filed 4–1–20; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88525; File No. SR–Phlx–2020–12]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Waive Certain Trading Floor Fees as Well as Adopt a Trading Floor Credit

March 31, 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 20, 2020, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx's Pricing Schedule. Specifically, the Exchange proposes to amend certain fees within Options 7, Section 8, ''Membership Fees'' and Options 7, Section 9, ''Other Member Fees'' as well as propose a credit.

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

In light of the recent closure of open outcry trading on the Phlx Trading Floor as of March 17, 2020,[3] Phlx proposes to waive certain floor-related fees within Options 7, Section 8, ''Membership Fees'' and Options 7, Section 9, ''Other Member Fees.'' Additionally, Phlx proposes to credit Phlx Trading Floor member organizations a fee for Clerks.[4] Each proposal is discussed below.

Options 7, Section 8, Membership Fees and Section 9, Other Member Fees

Today, the Exchange assesses certain fees related to the Phlx Trading Floor within Options 7, Section 8. Among those fees, the Exchange assesses a Permit Fee of $4,000 per month to Floor Brokers.[5] The Exchange also assesses a Clerk Fee[6] of $100 per month. Finally, the Exchange assesses Streaming Quote Trader (''SQT'')[7] Fees within Options 8, Section 8B. The SQT Fees are tiered fees. Phlx's 7 tier SQT Fees are as follows:

Number of option class assignments	SQT Fees
Tier 1: Up to 200 classes.	$0.00 per calendar month.
Tier 2: Up to 400 classes.	$2,200 per calendar month.
Tier 3: Up to 600 classes.	$3,200.00 per calendar month.
Tier 4: Up to 800 classes.	$4,200.00 per calendar month.
Tier 5: Up to 1,000 classes.	$5,200.00 per calendar month.
Tier 6: Up to 1,200 classes.	$6,200.00 per calendar month.
Tier 7: All equity issues.	$7,200 per calendar month.

In calculating the number of option class assignments for SQT Fees, equity options including ETFs and ETNs are counted. Currencies and indexes are not counted in the number of option class assignments.

The Exchange proposes to waive the Floor Broker Permit Fee, the Clerk Fee and the SQT Fees during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020. The Exchange is waiving these fees based on the recent closure of open outcry trading on the Phlx Trading Floor. The Exchange notes, with respect to SQTs, that these participants may only submit quotations while physically present on the Trading Floor, therefore the closure of open outcry trading prevents SQTS from quoting.

Today, the Exchange assesses certain fees related to the Phlx Trading Floor within Options 7, Section 9. Among those fees, the Exchange assesses a Floor Facility Fee of $330 per month, which is applicable Clerks (excluding Inactive Nominees pursuant to Options 8, Section 7), Floor Brokers, Market Makers (including SQTs) and individual Lead Market Makers). The Exchange proposes to waive the Floor Facility Fee within Options 7, Sections 8 and 9 due to the closure of open outcry trading on the Phlx Trading Floor.

Credits for Clerks

The Exchange proposes to pay a credit to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020. The Exchange proposes to pay each member organization a credit of $5,000 per Clerk that is registered as of April 1, 2020 for the month of April 2020. Phlx will also pay the aforementioned credit for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered as of May 1, 2020. The Exchange is proposing this credit for each registered Clerk to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Options Trader Alert #2020–7.

[4] The term ''Clerk'' means any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. An Inactive Nominee is deemed a Clerk. *See* Options 8, Section 12(a).

[5] *See* Phlx Rules at Options 7, Section 8A.

[6] The Clerk Fee is imposed on any registered on-floor person employed by or associated with a member or member organization pursuant to Options 3, Section 19, including Inactive Nominees pursuant to Options 8, Section 7. The Clerk Fee is not imposed on permit holders. *See* Phlx Rules at Options 7, Section 8A.

[7] The term ''Streaming Quote Trader'' is defined in Options 1, Section 1(b)(54) as a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. *See* Options 7, Section 1. Further, Options 1, Section 1(b)(54) provides that an SQT means a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned.

offer Phlx Trading Floor member organizations certain relief to continue to maintain its business operations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [11] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[12] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [13]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [14] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

Section 8, Membership Fees

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 is reasonable as open outcry on the Phlx Trading Floor is not available.[15] The Exchange's proposal to waive these fees, which apply to transacting an options business on the Trading Floor, is intended to alleviate costs for member organizations while these member organizations are unable to transact options in open outcry on the Phlx Trading Floor.

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 is equitable and not unfairly discriminatory as the Exchange will apply these proposed waivers uniformly to all member organizations on the Trading Floor. Phlx continues to permit electronic trading and therefore fees associated with electronic trading have not been waived.

Credits for Clerks

The Exchange's proposal to pay a credit in April 2020 (and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered as of May 1, 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) is reasonable. For the month of April 2020 (and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered as of May 1, 2020), Phlx proposes to pay each member organization a credit of $5,000 per Clerk, which the firm has registered as of April 1, 2020 (and potentially May 1, 2020), to provide relief to member organizations that are currently unable to transact options in open outcry on the Phlx Trading Floor. Phlx is proposing this credit to assist member organizations to continue to maintain their business operations during April 2020, and potentially May 2020 based on whether open outcry trading is available in May 2020.

The Exchange's proposal to pay a credit in April 2020 (and potentially May 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) is equitable and not unfairly discriminatory. The Exchange proposes to pay all member organizations a credit for each Clerk the firm has registered as of April 1, 2020 (and potentially May 1, 2020) in a uniform manner. The Exchange believes that paying a credit to member organizations for each Clerk would alleviate some of the financial burden for each member organization. A Clerk is any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. As such, Clerks are employees of Phlx Trading Floor member organizations that would not otherwise be able to transact an options business as a Lead Market Maker, Floor Market Maker, or Floor Broker. The Exchange believes that paying a credit to member organizations for each Clerk registered as of April 1, 2020 (and potentially May 1, 2020) will assist member organizations in continuing to employee Clerks during the closure of open outcry trading.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges that have been exempted

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[11] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[12] *See NetCoalition,* at 534–535.

[13] *Id.* at 537.

[14] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] The Exchange announced that as of March 17, 2020 open outcry trading was not available. *See* Options Trader Alert #2020–7.

from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-Market Competition

The proposed amendments do not impose an undue burden on intra-market competition.

Section 8, Membership Fees

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020, and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 does not impose an undue burden on competition as the Exchange will apply these proposed waivers uniformly to all member organizations on the Trading Floor. Phlx continues to permit electronic trading and therefore fees associated with electronic trading have not been waived.

Credits for Clerks

The Exchange's proposal to pay a credit in April 2020 (and potentially May 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) does not impose an undue burden on competition. The Exchange proposes to pay all member organizations a credit for each Clerk the firm has registered as of April 1, 2020 (and potentially May 1, 2020) in a uniform manner. The Exchange believes that paying a credit to member organizations for each Clerk would alleviate some of the financial burden for each member organization. Clerks are any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. As such, Clerks are employees of Phlx Trading Floor member organizations that would not otherwise be able to transact an options business as a Lead Market Maker, Floor Market Maker, or Floor Broker. The Exchange believes that paying a credit to member organizations for each Clerk registered as of April 1, 2020 (and potentially May 1, 2020) will assist member organizations in continuing to employee Clerks during the closure of open outcry trading.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16]

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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–2020–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2020–12. 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–2020–12 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07081 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88518; File No. SR–NYSE–2020–25]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for an Extension of the Temporary Waiver of the Co-Location "Hot Hands" Fee

March 31, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 27, 2020, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes an extension of the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes an extension of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The waiver of the Hot Hands fee was originally through March 29, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Mahwah, New Jersey data center (''Data Center''), from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE originally announced that the Data Center would be closed to third parties for the period from March 16, 2020 through March 29, 2020 (the ''Initial Closure''), to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Rule 7.1 to close the co-location facility of the Exchange to third parties.

ICE has now announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended to the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The date will be announced through a customer notice.

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[8] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List as follows (deletions bracketed, additions italicized):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [March 29, 2020]*the earlier of the reopening of the Mahwah, New Jersey data center or May 15, 2020.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56).

[5] *See* Securities Exchange Act Release No. 88397 (March 17, 2020), 85 FR 16406 (March 23, 2020) (SR–NYSE–2020–18).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC (''NYSE American''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Chicago, Inc. (''NYSE Chicago''), and NYSE National, Inc. (''NYSE National'' and together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEAmer–2020–23, SR–NYSEArca–2020–26, SR–NYSECHX–2020–10, and SR–NYSENAT–2020–14.

[7] *See* Securities Exchange Act Release No. 72721 (July 30, 2014), 79 FR 45562 (August 5, 2014) (SR–NYSE–2014–37).

[8] *See* 85 FR 16406, *supra* note 5.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–25 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–25 and should

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07073 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88527; File No. SR-Phlx-2020–16]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Temporarily Extend Certain Filing Requirements

March 31, 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 27, 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 temporarily extend the filing requirements for certain written reports, currently due April 1, 2020 pursuant to Options 10, Section 7, to June 1, 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

Given current market conditions, the Exchange proposes to provide its members temporary relief from filing certain supervision-related reports pursuant to Options 10, Section 7 (Supervision of Accounts).

In December 2019, COVID–19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.[3] By March 11, 2020, the World Health Organization characterized COVID–19 as a pandemic.[4] To slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses. These measures have affected the U.S. markets.[5] In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. While markets have seen significant declines, governments around the world are undertaking efforts to stabilize the economy and assist affected companies and their employees.[6]

Amidst this market uncertainty, the Exchange is seeking to address potential challenges that members may face in timely meeting their obligations to submit to the Exchange annual supervision-related reports under Options 10, Sections 7(g) and (h) (''Supervision Reporting Requirements''), especially in light of unforeseen and uncertain demands on resources required to respond to COVID–19. Options 10, Section 7(g) requires each Exchange member that conducts a non-member customer business to submit to the Exchange a written report on the member's supervision and compliance effort during the preceding year and on the adequacy of the member's ongoing compliance processes and procedures. Each member that conducts a public customer options business is also required to specifically include its options compliance program in the report.[7] The Section 7(g) report is due on April 1 of each year. Options 10, Section 7(h) requires that each member submit, by April 1 of each year, a copy of the Section 7(g) report to one or more control persons or, if the member has no control person, to the audit committee of its board of directors or its equivalent committee or group.[8]

Accordingly, the Exchange proposes to provide temporary relief for members from the Supervision Reporting Requirements by extending the April 1, 2020 filing deadlines described above to June 1, 2020. The Exchange believes that this temporary relief will permit members to focus on running their businesses and the immediate health crisis caused by the COVID–19 pandemic, including its impact on their employees, customers, and communities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade; to remove impediments to and

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See, e.g.,* Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), *available at https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30.* (''Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.'').

[4] *See* WHO Director-General's Opening Remarks at the Media Briefing on COVID–19 (March 11, 2020), *available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-11-march-2020.*

[5] ''Analysts showed that we saw the fastest 'correction' in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of $3.6 trillion.'' *See* Phil Mackintosh, Putting the Recent Volatility in Perspective, available at *https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05.*

[6] *See, e.g.,* the list of actions undertaken by the Board of Governors of the Federal Reserve System at *https://www.federalreserve.gov/covid-19.htm. See also* Families First Coronavirus Response Act, Public Law 116–127.

[7] The report shall include, but not be limited to, the information set out in Options 10, Section 7(g)(i)–(v).

[8] *See* Options 10, Section 7(h) for the meaning of the term ''control person'' and requirements in the case of a control person that is an organization.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

perfect the mechanism of a free and open market and a national market system; and, in general to protect investors and the public interest. As a result of uncertainty related to the ongoing spread of the COVID–19 virus, the U.S. exchanges are experiencing unprecedented market volatility. The proposed rule change would allow the Exchange to provide temporary relief for members from the Supervision Reporting Requirements, which currently requires members to provide written reports to the Exchange by April 1, 2020, and extend that deadline to June 1, 2020. The Exchange believes that this temporary relief is necessary and appropriate in the public interest, and consistent with the protection of investors, given the unforeseen and uncertain challenges, including business continuity implementation and market volatility, posed by COVID–19 to members that must comply with the Supervision Reporting Requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather to provide temporary relief for all members that are required to comply with the Supervision Reporting Requirements.

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 subparagraph (f)(6) of Rule 19b–4 thereunder.[12]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [13] normally does not become operative for 30 days after the date of its 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 requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Commission notes that the proposed rule change would allow the Exchange, in light of the COVID–19 pandemic, to provide temporary relief for members by extending the deadline for written reports pursuant to the Supervision Reporting Requirements from April 1, 2020 to June 1, 2020. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change 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.

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–2020–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2020–16. 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–2020–16 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07083 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 Commission has waived 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 also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88522; File No. SR–NYSECHX–2020–10]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for an Extension of the Temporary Waiver of the Co-location "Hot Hands" Fee

March 31, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the

[1] 15 U.S.C. 78s(b)(1).

''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 27, 2020 the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to an extension of the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes an extension of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The waiver of the Hot Hands fee was originally through March 29, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Mahwah, New Jersey data center (''Data Center''), from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE originally announced that the Data Center would be closed to third parties for the period from March 16, 2020 through March 29, 2020 (the ''Initial Closure''), to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Chicago Rule 7.1 to close the co-location facility of the Exchange to third parties.

ICE has now announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended to the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The date will be announced through a customer notice.

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[8] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Fee Schedule as follows (deletions bracketed, additions italicized per OFR):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [March 29, 2020] *the earlier of the reopening of the Mahwah, New Jersey data center or May 15, 2020.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in October 2019. *See* Securities Exchange Act Release No. 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR–NYSECHX–2019–27).

[5] *See* Securities Exchange Act Release No. 88400 (March 17, 2020), 85 FR 16434 (March 23, 2020) (SR–NYSECHX–2020–07).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* 84 FR 58778, *supra* note 4, at note 6. As specified in the Fee Schedule of NYSE Chicago, Inc. (''Fee Schedule''), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC (''NYSE''), NYSE American LLC (''NYSE American''), NYSE Arca, Inc. (''NYSE Arca''), and NYSE National, Inc. (''NYSE National'' and together, the ''Affiliate SROs''). *See id.* at 58779. Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–25, SR–NYSEAmer-2020–23, SR–NYSEArca-2020–26, and SR–NYSENAT–2020–14.

[7] *See* 84 FR 58778, *supra* note 4.

[8] *See* 85 FR 16434, *supra* note 5.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act 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–NYSECHX–2020–10 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–NYSECHX–2020–10. 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

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

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–NYSECHX–2020–10 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07078 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88521; File No. SR–NYSENAT–2020–14]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for an Extension of the Temporary Waiver of the Co-location "Hot Hands" Fee

March 31, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 27, 2020, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to an extension of the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes an extension of the temporary waiver of the co-location[4] ''Hot Hands'' fee through the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The waiver of the Hot Hands fee was originally through March 29, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Mahwah, New Jersey data center (''Data Center''), from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE originally announced that the Data Center would be closed to third parties for the period from March 16, 2020 through March 29, 2020 (the ''Initial Closure''), to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE National Rule 7.1 to close the co-location facility of the Exchange to third parties.

ICE has now announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended to the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The date will be announced through a customer notice.

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[8] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List as follows (deletions bracketed, additions italicized):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [March 29, 2020]*the earlier of the reopening of the Mahwah, New Jersey data center or May 15, 2020.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in May 2018. *See* Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR–NYSENAT–2018–07).

[5] *See* Securities Exchange Act Release No. 88399 (March 17, 2020), 85 FR 16428 (March 23, 2020) (SR–NYSENAT–2020–10).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* 83 FR 26314, *supra* note 4, at note 9. As specified in the Exchange's Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC (''NYSE''), NYSE American LLC (''NYSE American''), NYSE Arca, Inc. (''NYSE Arca''), and NYSE Chicago, Inc. (''NYSE Chicago'' and together, the ''Affiliate SROs''). *See id.* at note 11. Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–25, SR–NYSEAmer–2020–23, SR–NYSEArca–2020–26, and SR–NYSECHX–2020–10.

[7] *See* 83 FR 26314, *supra* note 4.

[8] *See* 85 FR 16428, *supra* note 5.

Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [12] of the Act and subparagraph (f)(2) of Rule 19b–4 [13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [14] of the Act 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:

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

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–NYSENAT–2020–14 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–NYSENAT–2020–14. 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–NYSENAT–2020–14 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07077 Filed 4–3–20; 8:45 am]

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[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88528; File No. SR–CBOE–2020–029]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 8.16 and Rule 9.2 To Temporarily Extend the Filing Requirements for Certain Supervision-Related Reports, Currently Due April 1, 2020 to June 1, 2020

March 31, 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 30, 2020, Cboe Exchange, Inc. (''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 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 8.16 and Rule 9.2 to temporarily extend the filing requirements for certain supervision-related reports, currently due April 1, 2020 to June 1, 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://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

Given current market conditions, the Exchange proposes to provide its Trading Permit Holders (''TPHs'') temporary relief from filing certain supervision-related reports pursuant to Rule 8.16 (Supervision) and Rule 9.2 (Supervision of Accounts).

The Exchange has been closely monitoring the current situation regarding the novel coronavirus (''COVID–19'') pandemic. The Exchange understands COVID–19 has placed stress on market participants' information technology infrastructure and the required deployment of significant resources, including to implement and adapt business continuity plans. Indeed, in response to the pandemic, the Exchange has taken various actions to allow it to maintain fair and orderly markets, including the closure of its trading floor, which currently remains inoperable until further notice.[5] The Exchange also notes that in response to COVID–19, the Financial Industry Reporting Authority (''FINRA'') recently issued temporary relief for member firms by, among other things, extending the deadline for submitting their Annual Reports and Financial and Operational Combined Uniform Single (''FOCUS'') Reports,[6] and other options exchanges have issued the same temporary relief for their members regarding supervisory reports as proposed herein.[7]

Currently, (1) Rule 8.16(g)(2) provides that by April 1 of each year each Trading Permit Holder shall submit to the Exchange written report on the Trading Permit Holder's supervision and compliance effort during the preceding year and on the adequacy of the Trading Permit Holder's ongoing compliance processes and procedures,

[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* Tradedesk Update No. C2020031204 (March 12, 2020) Novel Coronavirus Update, Trading Floor Closure.

[6] *See* FINRA Regulatory Notice 20–08 (March 9, 2020) available at *https://www.finra.org/rules-guidance/notices/20-08.*

[7] *See* SR–ISE–2020–014 (filed March 27, 2020) available at *http://ise.cchwallstreet.com/contents/pdf/2020/SR-ISE-2020-14.pdf; and* SR–Phlx–2020–016 (filed March 27, 2020) available at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQPHLX/pdf/phlx-filings/2020/SR-Phlx-2020-16.pdf.*

(2) Rule 9.2(g) provides that by April 1 of each year each TPH organization that conducts a non-Trading Permit Holder customer business shall submit to the Exchange a written report on the TPH organization's supervision and compliance effort during the preceding year and on the adequacy of the TPH organization's ongoing compliance processes and procedures, and (3) Rule 9.2 (h) provides that by April 1 of each year, each TPH organization shall submit a copy of the report that paragraph (g) (of Rule 9.2) requires the TPH organization to prepare to its one or more control persons or, if the TPH organization has no control person, to the audit committee of its board of directors or its equivalent committee or group. To meet the current April 1 deadlines in Rules 8.16 and 9.2, TPH personnel would have to divide their efforts and resources that are otherwise necessary to address ongoing disruptions and new stresses as a result of COVID–19. The proposed rule change provides relief to TPHs and their employees by extending these deadlines to June 1, 2020, thus allowing TPH personnel that are tasked with organizing, compiling and filing such reports, but are also tasked with maintaining critical operations, implementing business continuity plans, and otherwise adjusting the TPH's trading operations in line with evolving market conditions and initiatives to address such conditions to focus their attention on those immediate needs.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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)[10] 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 will foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. The proposed rule change will allow the Exchange to provide relief to its TPHs by extending certain supervisory reporting deadlines from April 1, 2020 to June 1, 2020 in light of the COVID–19 crisis. The Exchange understands this pandemic has caused, and continues to cause, stress on market participants' information technology infrastructure and the deployment of significant resources to address ongoing disruptions and new stresses. By allowing the Exchange to extend the deadlines for filing certain supervision related reports in Rules 8.16 and 9.2, the Exchange believes the proposed rule will allow TPH personnel, who would normally be tasked with organizing and compiling such reports, to focus their attention on maintaining critical operations, implementing business continuity plans, and otherwise adjusting their trading operations in line with evolving market conditions and initiatives in response to COVID–19. The Exchange also believes the proposed rule change removes impediments to and perfects the mechanism of a free and open market and a national market system because, as noted above, other options exchanges have recently filed with the Commission to extend the time for their members to file supervision-related reports through June 1, 2020.[11]

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 proposed rule change is not intended to address competitive issues. The Exchange does not believe the proposed rule would impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the Act, because the June 1, 2020 extension for supervision-related reports in Rules 8.16 and 9.2 will apply equally to all TPHs. The Exchange does not believe that the proposed rule change would impose any burden on intermarket competition because it relates only to the extension of the filing deadline for supervision-related reports. Additionally, and as stated above, other options exchange have recently filed to extend the filing deadline for their members' supervision-related reports through June 1, 2020.[12]

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[13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[15] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Commission notes that the proposed rule change would allow the Exchange, in light of the COVID–19 pandemic, to provide temporary relief for TPHs by extending the deadline for supervision-related reports in Rules 8.16 and 9.2 from April 1, 2020 to June 1, 2020. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See supra* note 7.

[12] *See supra* note 7

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

proposed rule change operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–029 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–2020–029. 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–2020–029 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07084 Filed 4–3–20; 8:45 am]

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[17] 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).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88524; File No. SR–ISE–2020–14]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Temporarily Extend the Filing Requirements for Certain Written Reports, Currently Due April 1, 2020 Pursuant to Options 10, Section 7, to June 1, 2020

March 31, 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 27, 2020, Nasdaq ISE, LLC (''ISE'' 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 temporarily extend the filing requirements for certain written reports, currently due April 1, 2020 pursuant to Options 10, Section 7, to June 1, 2020.

The text of the proposed rule change is available on the Exchange's website at *http://ise.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

Given current market conditions, the Exchange proposes to provide its members temporary relief from filing certain supervision-related reports pursuant to Options 10, Section 7 (Supervision of Accounts).[3]

In December 2019, COVID–19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.[4] By March 11, 2020, the World Health Organization characterized COVID–19 as a pandemic.[5] To slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses. These

[3] The Exchange notes that ISE Options 10, including Section 7, is incorporated by reference into the rulebooks of Nasdaq GEMX, LLC (''GEMX'') and Nasdaq MRX, LLC (''MRX''). As such, the amendments to ISE Options 10, Section 7 proposed herein will also impact GEMX and MRX Options 10, Section 7.

[4] *See, e.g.,* Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), *available at https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30.* (''Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.'').

[5] *See* WHO Director-General's Opening Remarks at the Media Briefing on COVID–19 (March 11, 2020), *available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.*

measures have affected the U.S. markets.[6] In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. While markets have seen significant declines, governments around the world are undertaking efforts to stabilize the economy and assist affected companies and their employees.[7]

Amidst this market uncertainty, the Exchange is seeking to address potential challenges that members may face in timely meeting their obligations to submit to the Exchange annual supervision-related reports under Options 10, Sections 7(g) and (h) (''Supervision Reporting Requirements''), especially in light of unforeseen and uncertain demands on resources required to respond to COVID–19. Options 10, Section 7(g) requires each Exchange member that conducts a non-member customer business to submit to the Exchange a written report on the member's supervision and compliance effort during the preceding year and on the adequacy of the member's ongoing compliance processes and procedures. Each member that conducts a public customer options business is also required to specifically include its options compliance program in the report.[8] The Section 7(g) report is due on April 1 of each year. Options 10, Section 7(h) requires that each member submit, by April 1 of each year, a copy of the Section 7(g) report to one or more control persons or, if the member has no control person, to the audit committee of its board of directors or its equivalent committee or group.[9]

Accordingly, the Exchange proposes to provide temporary relief for members from the Supervision Reporting Requirements by extending the April 1, 2020 filing deadlines described above to June 1, 2020. The Exchange believes that this temporary relief will permit members to focus on running their businesses and the immediate health crisis caused by the COVID–19 pandemic, including its impact on their employees, customers, and communities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general to protect investors and the public interest. As a result of uncertainty related to the ongoing spread of the COVID–19 virus, the U.S. exchanges are experiencing unprecedented market volatility. The proposed rule change would allow the Exchange to provide temporary relief for members from the Supervision Reporting Requirements, which currently requires members to provide written reports to the Exchange by April 1, 2020, and extend that deadline to June 1, 2020. The Exchange believes that this temporary relief is necessary and appropriate in the public interest, and consistent with the protection of investors, given the unforeseen and uncertain challenges, including business continuity implementation and market volatility, posed by COVID–19 to members that must comply with the Supervision Reporting Requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather to provide temporary relief for all members that are required to comply with the Supervision Reporting Requirements.

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[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[14] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Commission notes that the proposed rule change would allow the Exchange, in light of the COVID–19 pandemic, to provide temporary relief for members by extending the deadline for written reports pursuant to the Supervision Reporting Requirements from April 1, 2020 to June 1, 2020. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[6] ''Analysts showed that we saw the fastest 'correction' in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of $3.6 trillion.'' *See* Phil Mackintosh, Putting the Recent Volatility in Perspective, available at *https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05.*

[7] *See, e.g.,* the list of actions undertaken by the Board of Governors of the Federal Reserve System at *https://www.federalreserve.gov/covid-19.htm. See also* Families First Coronavirus Response Act, Public Law 116–127.

[8] The report shall include, but not be limited to, the information set out in Options 10, Section 7(g)(1)–(6).

[9] *See* Options 10, Section 7(h) for the meaning of the term ''control person'' and requirements in the case of a control person that is an organization.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 Commission has waived this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 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).

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–ISE–2020–14 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–ISE–2020–14. 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–ISE–2020–14 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07080 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88526; File No. SR–CBOE–2020–024]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

March 31, 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, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its fees schedule. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Footnote 12 of the Fees Schedule, which governs pricing changes in the event the Exchange trading floor becomes inoperable. In the event the trading floor becomes inoperable, the Exchange will continue to operate in a screen-based only environment using a floorless configuration of the System that is operational while the trading floor facility is inoperable. The Exchange would operate using that configuration only until the Exchange's trading floor facility became operational. Open outcry trading would not be available in the event the trading floor becomes inoperable. Particularly, the Exchange proposes to incorporate into Footnote 12, changes related to Related Future Cross (''RFC'') transactions.

By way of background, the Exchange recently adopted Rule 5.24(e)(1)(D), which provides that in the event the trading floor is inoperable, a Trading Permit Holder (''TPH'') may execute an RFC order, which is comprised of an SPX or VIX option combo order coupled with a contra-side order or orders totaling an equal number of option combo orders, which is identified to the Exchange as being part of an exchange of option contracts for related futures positions.[3] Particularly, Rule 5.24(e)(1)(D) permits unexposed crosses of riskless packaged transactions (*i.e.,* RFC transactions) which include SPX/SPXW or VIX option combos offset by futures contracts. The proposal to allow RFC transactions was adopted to replicate functionality that is otherwise available when the Exchange is operating with an open outcry environment. RFC transactions are intended to provide means for transferring risk from futures positions into related combo positions for purposes of reducing capital requirements on portfolios held at bank clearing firms.

The Exchange first proposes to provide that in the event the trading floor becomes inoperable, the Exchange shall waive the SPX and SPXW Execution Surcharges for SPX and SPXW volume executed as an RFC order for the duration of time the Exchange operates in a screen-based only environment. The Exchange currently assesses a SPX Execution Surcharge of $0.21 per contract and a SPXW Execution Surcharge of $0.13 per

[3] *See* SR–CBOE–2020–023.

contract for non-Market Maker orders in SPX and SPXW, respectively that are executed electronically (with some exceptions).[4] The Execution Surcharges were adopted to ensure that there is reasonable cost equivalence between the primary execution channels for SPX and SPXW. More specifically, the Execution Surcharges minimize the cost differentials between manual and electronic executions, which is in the interest of the Exchange as it must both maintain robust electronic systems as well as provide for economic opportunity for floor brokers to continue to conduct business, as the Exchange believes they serve an important function in achieving price discovery and customer executions.[5] In the event the trading floor becomes inoperable, the only execution available for SPX and SPXW would be electronic executions. The Exchange still wishes to encourage floor brokers to continue to conduct business on the Exchange, albeit electronically when the floor is inoperable. To that end, in order to approximate the trading floor environment electronically, the Exchange will allow TPHs to execute RFC orders electronically, as noted above. As such, the Exchange does not wish to discourage floor brokers from executing SPX and SPXW RFC transactions when the trading floor is inoperable by assessing the Execution Surcharges such volume. Indeed, in the absence of the trading floor being inoperable, RFC orders would otherwise execute on the floor[6] and not be subject to the Execution Surcharges. The Exchange notes that AIM executions are similarly excluded from the Execution Surcharges as such functionality is similarly only made available for SPX in the event the trading floor is inoperable.[7]

The Exchange next proposes to adopt an RFC Execution Surcharge for RFC initiating orders for all market participants which would apply only when the Exchange operates in a screen-based only environment and which would be invoiced to the executing TPH. Specifically, the Exchange proposes to adopt a $0.05 per contract fee for SPX and SPXW RFC initiating orders and a $0.04 per contract fee for VIX RFC initiating orders. The Exchange notes that currently, SPX, SPXW and VIX orders executed via open-outcry are assessed floor brokerage fees. Specifically, SPX/SPXW orders are assessed a floor brokerage fee of $0.04 per contract fee for non-crossed orders and a $0.02 per contract fee for crossed orders and VIX orders are assessed a floor brokerage fee of $0.03 per contract for non-crossed orders and $0.015 per contract for crossed orders. The Exchange notes that in the event the trading floor becomes inoperable, volume that would otherwise be executed on the floor would have to be executed electronically. The Exchange believes it's appropriate to continue to assess this volume a modest fee, notwithstanding the fact that it is being moved to an electronic channel. The Exchange notes the proposed fees are the same as applied to SPX/SPXW and VIX AIM Agency/Primary Orders (*i.e.,* ''AIM Execution Surcharge''), which was adopted recently for similar reasons and is applied only in the event the trading floor is inoperable. The Exchange therefore proposes to amend the title to AIM Execution Surcharge to ''AIM and RFC Execution Surcharge Fee'' and modify Footnote 12 to clarify that this Surcharge will also apply to volume executed as an RFC transaction.

The Exchange also proposes to provide that SPX/SPXW and VIX contracts executed as an RFC order during the time when the Exchange operates in a screen-based only environment will not count towards the 1,000 contract thresholds for the electronic SPX/SPXW and VIX Tier Appointment Fees. Currently, the Exchange assesses separate monthly Tier Appointment Fees to electronic and floor Market-Maker holding a Market-Maker Electronic Access Permit or Market-Maker Floor Permit, respectively, that trade SPX (including SPXW) and VIX contracts at any time during the month. The Exchange proposes to exclude SPX/SPXW and VIX volume executed as an RFC order during the time when the Exchange operates in a screen-based only environment, as the Exchange does not wish to discourage the sending of such orders during that time. The Exchange notes that the electronic Tier Appointment fees are intended to be assessed to Market-Maker TPHs who act as Market-Makers electronically and engage in trading of these products (as opposed to those who normally execute volume via open outcry, but must participate electronically due to the trading floor being inoperable).

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.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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 Section 6(b)(4) of the Act,[10] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes the proposed rule change to waive SPX and SPXW Execution Surcharges for RFC orders in the event the trading floor becomes inoperable is reasonable because market participants will not be subject to these extra surcharge for these executions. As noted above, the Execution Surcharges minimize the cost differentials between manual and electronic executions, which is in the interest of the Exchange as it must both maintain robust electronic systems as well as provide for economic opportunity for floor brokers to continue to conduct business, as the Exchange believes they serve an important function in achieving price discovery and customer executions.[11] In the event the trading floor becomes inoperable, the Exchange still wishes to incentivize floor brokers to conduct business on the Exchange, albeit electronically and as such does not wish to assess a surcharge on volume that was otherwise executed on floor and not

[4] *See* Cboe Options Fees Schedule, Footnote 21.

[5] *See e.g.,* Securities Exchange Act Release No. 71295 (January 14, 2014) 79 FR 3443 (January 21, 2014) (SR–CBOE–2013–129).

[6] If the trading floor is open, floor brokers may execute crosses of option combos (*i.e.,* synthetic futures) on the trading floor on behalf of market participants who were exchanging futures contracts for related options positions. Market participants enter into these exchanges in or to swap related exposures. For instance, if a market participant has positions in VIX options but would prefer to hold a corresponding position in VIX futures (such as, for example, to reduce margin or risk related to the option positions), that market participant may swap its VIX options positions with another market participant's VIX futures positions that have corresponding risk exposure.

[7] *See* Cboe Options Fees Schedule, Footnote 12.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(4).

[11] *See* Securities Exchange Act Release No. 71295 (January 14, 2014) 79 FR 3443 (January 21, 2014) (SR–CBOE–2013–129).

electronically as an RFC order. As discussed above, market participants may be able to execute RFC orders comprised of SPX or SPXW options electronically in the event the trading floor is inoperable in order to best approximate the trading floor in an electronic environment. Indeed, the Exchange believes waiving the Execution Surcharges for volume executed as an RFC order in the event the trading floor is inoperable will promote and encourage trading of these products notwithstanding the fact that manual executions are no longer available. Additionally, the Exchange does not wish to assess the Execution Surcharges on RFC transactions as such transactions are intended to replicate functionality that is otherwise available when the Exchange is operating with an open outcry environment and is further intended to provide means for transferring risk from futures positions into related combo positions for purposes of reducing capital requirements on portfolios held at bank clearing firms. The Exchange believes the proposed change is also equitable and not unfairly discriminatory as it applies uniformly to all similarly situated market participants that submit RFC orders who will be subject to equivalent execution costs while the trading floor is inoperable. Also, as noted above, the Exchange notes that AIM executions are similarly excluded from the Execution Surcharges as such functionality is similarly only made available in the event the trading floor is inoperable.

The Exchange believes the proposal to adopt an RFC Execution Surcharge for SPX/SPXW and VIX RFC initiating orders is reasonable as the proposed rates are similar to the total rates charged for volume that is executed via open-outcry.[12] The Exchange also notes that the Fees Schedule already provides for a similar scenario of such rates being assessed in the event the trading floor is inoperable. For example, Footnote 15 of the Fees Schedule provides that in the event the Exchange's exclusively listed options must be traded at a Back-up Exchange pursuant to Cboe Options Rule 5.26, the Back-up Exchange has agreed to apply the per contract and per contract side fees (*i.e.,* the Floor Brokerage fees) to such transactions. Accordingly, the Exchange believes it's similarly appropriate to adopt and apply similar fees to transactions that must occur via an electronic execution channel (instead of on a Back-Up Exchange) due to the Exchange's trading floor being inoperable. The Exchange also notes that as discussed above, it is not otherwise assessing the SPX/SPXW Execution Surcharges on RFC SPX/SPXW orders. The Exchange believes the proposed change is also equitable and not unfairly discriminatory as it applies uniformly to all similarly situated market participants that submit RFC orders who will be subject to equivalent execution costs while the trading floor is inoperable. Additionally, the Exchange notes the RFC Execution Surcharge is the same as the AIM Execution Surcharge, which was recently adopted for similar reasons for when the trading floor is inoperable.[13]

The Exchange believes its proposal to provide that SPX/SPXW and VIX contracts executed as an RFC order during a time when the Exchange operates in a screen-based only environment will not count towards the 1,000 contract thresholds for the electronic SPX/SPXW and VIX Tier Appointment Fees is reasonable as Market-Makers that would otherwise meet the current contract thresholds due to the need to participate on the Exchange electronically will not be subject to an additional Tier Appointment Fee for volume executed as an RFC order. The Exchange believes the proposed change is reasonable as the Tier Appointment fees were intended to apply to TPHs who act as electronic Market-Makers in SPX/SPX and VIX, not those that, notwithstanding the trading floor being inoperable, would act as floor Market-Makers and trade these products. Accordingly, the Exchange does not wish to assess the Tier Appointment fees to Market-Makers who do not usually conduct significant electronic volume in these products and would not participate electronically if not for the trading floor being inoperable. Additionally, the Exchange does not wish to discourage the use of RFC orders for SPX/SPXW and VIX as RFC transactions would provide Market-Makers with needed relief from the effect of the current exposure method (''CEM'') on the options market. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all similarly situated market participants, as it applies to all Market-Makers trading in these products. The Exchange notes such exclusion is similar to the exclusion of SPX/SPXW and VIX volume executed via AIM.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes the proposed changes are not intended to address any competitive issue, but rather to address fee changes it believes are reasonable in the event the trading floor becomes inoperable, thereby only permitting electronic participation on the Exchange. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply equally to all similarly situated market participants. The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes only affect trading on the Exchange in limited circumstances.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and paragraph (f) of Rule 19b–4[16] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[12] *See* Cboe Options Fees Schedule, Floor Brokerage Fees.

[13] *See* SR–CBOE–2020–021.

[14] *See* Cboe Options Fees Schedule, Footnote 12.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

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–2020–024 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–2020–024. 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 offices 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–2020–024, and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07082 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88519; File No. SR–Phlx–2020–09]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate the Phlx Series 8000 and 9000 Rules and Incorporate by Reference the Disciplinary Rules of The Nasdaq Stock Market LLC

March 31, 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 20, 2020, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to relocate the Phlx Series 8000 and 9000 Rules from its current rulebook (''Rulebook'') into its new Rulebook shell. The Exchange is also proposing to simultaneously replace the text of the current Phlx Series 8000 and 9000 Rules with introductory paragraphs to each that incorporate by reference The Nasdaq Stock Market LLC's (''Nasdaq'') Series 8000 and 9000 Rules located in Nasdaq General 5 Discipline.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule Relocation

The Exchange proposes to relocate the current Phlx Rule 8000 and 9000 Series Rules into the new Rulebook shell. The relocation and harmonization of these rules is part of the Exchange's continued effort to promote efficiency and conformity of its processes with those of its Affiliated Exchanges.[3] The Exchange believes that the placement of these Phlx Rules into their new location in the shell will facilitate the use of the Rulebook by members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Specifically, the Exchange proposes to relocate the following rules into General 5 Discipline:

Proposed new rule number	Current rule number
Section 1	Rule 9110(d) Disciplinary Jurisdiction.
Section 2	8000. Investigations and Sanctions.
Section 3	9000. Code of Procedure.

Incorporation by Reference

The Exchange also proposes to simultaneously replace the current Phlx Series 8000 and 9000 Rules with introductory paragraphs to each that incorporate by reference the Nasdaq Series 8000 and 9000 Rules (located in General 5 Discipline), respectively, and state that such Nasdaq Rules shall be applicable to Exchange Members, Member Organizations, persons associated with Member Organizations, and other persons subject to the Exchange's jurisdiction.[4]

Except as noted below, the Nasdaq Series 8000 and 9000 Rules are substantially similar to the current Phlx Series 8000 and 9000 Rules, respectively. To account for any

[3] The term ''Affiliated Exchanges'' refers to Nasdaq; Nasdaq BX, Inc.; Nasdaq ISE, LLC; Nasdaq GEMX, LLC; and Nasdaq MRX, LLC.

[4] The Exchange notes that the proposed changes will not become operative unless and until the Commission approves the Exchange's request, which it has filed pursuant to Section 36 of the Exchange Act and SEC Rule 0–12 thereunder, for an exemption from the rule filing requirements of Section 19(b) of the Exchange Act as to changes to Phlx Series 8000 (New General 5, Section 2) and 9000 (New General 5, Section 3) Rules that are effected solely by virtue of a change to the Nasdaq Series 8000 or 9000 Rules.

differences that do exist, the proposed introductory paragraphs list instances in which cross references in the Nasdaq Series 8000 and 9000 Rules to other Nasdaq rules shall be read to refer instead to the Exchange Rules, and references to Nasdaq terms (whether or not defined) shall be read to refer to the Exchange-related meanings of those terms. For example, references in both the Nasdaq Series 8000 and 9000 Rules to the following terms shall be read to refer to the Exchange-specific meanings of those terms: the terms ''Exchange'' or ''Nasdaq'' shall be read to refer to the Phlx Exchange; the terms ''Rule'' or ''Rules of Nasdaq'' shall be read to refer to the Phlx Rules; the terms ''Board'' or ''Nasdaq Board'' shall be read to refer to the Phlx Board of Directors; the terms ''member'' or ''member firm'' shall be read to refer to a Phlx member organization, except that with respect to Rules 9268(e)(2), 9269(d)(2), 9312(a)(3), 9351(a), 9524(a)(10), 9524(b)(3), and 9559(q)(1), the term ''member'' shall be read also to apply to a Phlx member; the term ''Associated Person'' shall be read to refer to a Phlx Member or person associated with a Phlx member organization; the term ''person associated with a member'' shall be read to refer to a Phlx member or a person associated with a Phlx member organization; [5] the terms ''Nasdaq Regulation'' or ''Nasdaq Regulation Department'' shall be read to refer to the Phlx Regulation Department; and the term ''Chief Regulatory Officer'' shall be read to refer to the Chief Regulatory Officer of Phlx.

Additionally, the proposed introduction to the Phlx Series 8000 Rules (New General 5, Section 2) states that references in the Nasdaq Series 8000 Rules to ''Rule 0120'' [6] shall be read to refer to Phlx Rule General 1, Section 1 and references in the Nasdaq Series 8000 Rules to ''Rule 1015'' shall be read to refer to Phlx Rule General 3, Section 16(a).

The proposed introduction to the Phlx Series 8000 Rules (New General 5, Section 2) also indicates how certain of the Nasdaq Series 8000 Rules should be read to apply to Exchange members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Specifically, when applied to a Phlx member, Nasdaq Rule 8310(a)(3) shall also permit the suspension of the permit of a Phlx member and 8310(a)(4) shall also permit the revocation or cancellation of the permit of a Phlx member, or expulsion of a Phlx member. In addition, IM–8310–3(c)(1) shall also permit the Phlx Regulation Department to release to the public information with respect to any disciplinary decision issued pursuant to the Phlx Series 9000 Rules (New General 5, Section 3) imposing a suspension, cancellation or expulsion of a Phlx member, or suspension or revocation of a Phlx member's permit or any decision issued pursuant to the Rule 9550 Series imposing a suspension or cancellation of the Phlx member, or a suspension or bar of the association of a Phlx member with a Phlx member organization. Moreover, IM–8310–3(g) and (h) also shall be read to apply to a Phlx member with respect to decisions of the Exchange that impose upon him or her a monetary sanction of $10,000 or more or a penalty of expulsion, revocation, suspension, or bar; and IM–8310(i) also shall be read to apply to a Phlx member with respect to any order issued by the Commission of suspension, expulsion, bar, or the imposition of monetary sanctions of $10,000 or more. The inclusion of these provisions in the introductory paragraph ensures that there is no change in the way current Phlx Rules 8310 and IM–8310–3 are applied to Phlx Members who are sanctioned for violation of the Phlx Rules.

The proposed introduction to the Phlx Series 8000 Rules (New General 5, Section 2) clarifies that, while Rules 8320(a)(2), (b), and (c) in the Nasdaq Series 8000 Rules shall also apply to Phlx members, subsection (a)(1) shall have no application to the Exchange or its members, member organizations, persons associated with member organizations, and other persons subject to the Exchange's jurisdiction. The inclusion of this in the introductory paragraph is needed because that subsection relates specifically to Nasdaq Options Market members, and there is no analogous rule in the Phlx Series 8000 Rules (New General 5, Section 2).

Finally, the introductory paragraph to the Phlx Series 8000 Rules (New General 5, Section 2) explains that Nasdaq Rule IM–8310–1 shall have no application to the Phlx Exchange or its members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Instead, current Phlx Rule IM–8310–1 shall continue to apply. While the language of Nasdaq Rule IM–8310–1 and current Phlx Rule IM–8310–1 is substantially similar, certain differences exist given the existence of member organizations on the Exchange such that maintaining the current Phlx Rule language is necessary.

With respect to the Phlx Series 9000 Rules (New General 5, Section 3), the proposed introduction states that cross-references in the Nasdaq Series 9000 Rules to the following rules shall be read to refer to the following Exchange Rules:

Nasdaq rule [7]	Corresponding exchange rule
0120	General 1, Section 1.
1013	General 3, Section 5 or General 3, Section 2.
1015	General 3, Section 16(a).
1160	General 3, Section 7(d).
2010A	Options 9, Section 1.
2160	General 2, Section 4.
2170	General 9, Section 53.
4110A	Options 6D, Section 1.
4120A	Options 6D, Section 1.
Options 9, Section 4.	General 9, Section 53.

Inaddition, when applied to a Phlx member organization, Rule 9558(a)(2) and any other applicable rules in the Nasdaq Rule 9000 series shall also allow the summary suspension of the associated permit(s) of a Phlx member organization. This language is necessary to make it clear that if the Chief Regulatory Officer provides written authorization to the Financial Industry Regulatory Authority (''FINRA'') staff to issue on a case-by-case basis a written notice that summarily suspends a Phlx member organization, the Phlx member organization's associated permit(s) may also be suspended.

Moreover, as with the current Phlx Series 8000 Rules, the proposed introduction to the Phlx Series 9000 Rules (New General 5, Section 3) indicates how certain of the Nasdaq Series 9000 Rules should be read to apply to Exchange members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction [8] and indicates

[5] The Exchange notes that the term ''member'' under Nasdaq's rules is synonymous with the Exchange's definition of ''member organization,'' whereas the definition of a ''member'' of the Exchange relates to the permit holder. Nasdaq does not have such a concept. Under the Phlx rules, a ''member'' is a natural person, where as a ''member organization'' is an entity and not a person.

[6] The definitions in Nasdaq Rule 0120 are now located under the General 1 title (''General Provisions'') in the Nasdaq rulebook. *See* Securities Exchange Act Release No. 34–87778 (December 17, 2019), 84 FR 70590 (December 23, 2019) (SR–NASDAQ–2019–098). The Exchange plans to submit a subsequent filing for the Nasdaq rulebook to address references to rules in the Nasdaq Rulebook that have since been changed.

[7] The Exchange plans to submit a subsequent filing for the Nasdaq Series 8000 and 9000 Rules to replace references to the following rules with the new rule cites: Rules 0120 (now General 1), 1160 (now General 2, Section 11), 2010A (now General 9, Section 1), 2160 (now General 2, Section 14), 4110A (now General 9, Section 40), and 4120A (now General 9, Section 41).

[8] Rule 9270(c)(5) in the current Phlx Rule 9000 Series refers to the ''Exchange Enforcement

that certain of the language in particular rules of the Current Phlx Series 8000 and 9000 Rules will be maintained. Specifically:

1. Rule 9110(d) (''Jurisdiction'') in the Nasdaq Series 9000 Rules shall not apply to the Exchange or its members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Instead, current Phlx Rule 9110(d) shall apply. While the language of Nasdaq Rule 9110(d) and current Phlx Rule 9110(d) is substantially similar, certain differences exist given the existence of member organizations and members on the Phlx Exchange such that maintaining the current Phlx Rule language is necessary.[9] Moreover, as noted above, current Phlx Rule 9110(d) will be relocated to New General 5, Section 1.

2. The Waiver of Ex Parte Prohibition set forth in Nasdaq Rule 9143(e)(3) and Separation of Functions set forth in Nasdaq Rule 9144(c)(3) shall also apply to violation letters executed pursuant to Phlx Rule 9216(b)(2). The inclusion of this in the introductory paragraph is necessary because the Nasdaq rules do not provide for the issuance of violation letters, whereas the Phlx rules do. This provision therefore ensures that there is no change in the application of the Waiver of Ex Parte Prohibition and Separation of Functions rules to Phlx member organizations or persons associated with member organizations who submit executed violation letters.

3. The following text should be read to follow the existing paragraph in Nasdaq Rule 9211(a)(1), which is identical to the existing text in current Phlx Rule 9211(a)(1): ''When the number of violations under Exchange Rules is determined based upon an exception-based surveillance program, the Phlx Regulation Department or the Department of Enforcement may aggregate, or ''batch,'' individual violations of Exchange order handling Rules and consider such ''batched'' violations as a single offense only in accordance with the guidelines set forth in the Exchange's Numerical Criteria for Bringing Cases for Violations of Exchange Order Handling Rules. In addition, the Phlx Regulation Department or the Department of Enforcement may batch individual violations of Options 2, Section 5(c) pertaining to quote spread parameters (and corresponding Options Floor Procedure Advice Options 11, Section 7). In the alternative, the Phlx Regulation Department or the Department of Enforcement may request authorization from the FINRA Office of Disciplinary Affairs to issue a complaint when (i) the Phlx Regulation Department or the Department of Enforcement determines that there exists a pattern or practice of violative conduct without exceptional circumstances, or (ii) any single instance of violative conduct without exceptional circumstances is deemed to be egregious.'' The inclusion of this in the introductory paragraph is necessary because the Nasdaq Rules do not provide for the ''batching'' of individual violations, whereas the Phlx Rules do. Maintaining this provision therefore ensures that the current process of ''batching'' on the Exchange for certain violations remains unchanged.

4. Rules 9216 and IM–9216 in the Nasdaq Rules shall not apply to Exchange members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Instead, current Phlx Rules 9216 and IM–9216 shall apply. Phlx Rules 9216 and IM–9216 include provisions unique to that Exchange because, unlike Nasdaq, it has a trading floor. In addition, Phlx Rule 9216 provides for the imposition of fines in excess of $2,500 but not to exceed $10,000. Maintaining the existing language therefore ensures that the procedures applicable to acceptance, waiver, and consent letters, minor rule violation letters, and violation letters set forth in the existing Phlx rules remain unchanged. The Exchange also proposes to update certain terms and rule references that exist in Current Phlx Rule IM–9216 to align them with current terms and rule references. Recently, the Exchange updated the terms ''Registered Options Trader'' to ''Floor Market Maker'' and ''Specialist'' to ''Lead Market Maker.''[10] Those new terms will be reflected in New Phlx Rule IM–9216. In addition, due to the recent relocation in the Phlx Rulebook of rules that are subject to the minor rule violation plan and the floor option procedure advices, the Exchange is updating the rule references as follows:

Sanctions User's Guide,'' whereas Rule 9270(c)(5) in the Nasdaq Rule 9000 Series refers to ''sanction guidelines.'' The Exchange is not preserving the reference to the Exchange Enforcement Sanctions User's Guide (the ''Sanctions User Guide'') because the Exchange, like Nasdaq, consults FINRA's sanction guidelines when determining appropriate remedial sanctions. The Exchange notes that, pursuant to a September 11, 2000, settlement with the Commission (the ''Settlement''), *see* Release No. 43268, September 11, 2000, the Exchange was required to ''adopt rules establishing, or modifying existing, sanctioning guidelines such that they are reasonably designed to effectively enforce compliance with such exchange's options order handling rules, including, the duty of best execution with respect to the handling of orders after the broker-dealer routes the order to such respondent exchange, limit order display, priority, firm quote, and trade reporting rules.'' The Exchange thereafter sought Commission approval to adopt new sanctioning guidelines to assist the Exchange in enforcing compliance with its options order handling rules. *See* Securities Exchange Act Release No. 45415 (February 7, 2002), 67 FR 6781 (February 13, 2002). The Exchange received Commission approval on March 15, 2002. *See* Securities Exchange Act Release No. 45569 (March 15, 2002), 67 FR 13397 (March 22. 2002). In approving the Sanctions User Guide, the Commission noted that ''the Commission expects the Exchange to continue to evaluate the adequacy of the proposed sanctioning guidelines to determine whether they do, in fact, effectively enforce compliance with the options order handling rules.'' *See* Securities Exchange Act Release No. 45569 (March 15, 2002), 67 FR 13397, 13398 (March 22, 2002).

After Nasdaq acquired Phlx in 2008, Phlx contracted with FINRA in 2010 through a regulatory services agreement to perform certain of the investigation and enforcement functions on its behalf that the Exchange's enforcement department had previously performed. Over time, with the support of the Exchange, FINRA began consulting FINRA's sanction guidelines when determining appropriate remedial sanctions for Members, Member Organizations, persons associated with Member Organizations, and other persons subject to the Exchange's jurisdiction. The National Adjudicatory Council (''NAC'') (formerly the National Business Conduct Committee) developed the sanctions guidelines. The NAC is an independent committee of FINRA comprised of professionals who also review initial decisions rendered in FINRA disciplinary and membership proceedings. FINRA's guidelines include guidance on sanctioning a member for failing to comply with best execution obligations, limit order display rules, and trade reporting rules. For those rules not specifically covered by FINRA's sanctions guidelines, such as priority and firm quote rules, FINRA and/or the Exchange, as applicable, consults the guidelines for analogous violations when determining the appropriate sanction. For each rule covered, the guidelines set forth factors that may be taken into account when determining the appropriate sanction, and the recommended sanction or sanction range (which are higher than the Sanctions User Guide recommends). The guidelines do not prescribe specific sanctions for particular violations. Instead, the objective is to provide recommended sanctions based on a number of factors that may be considered pertinent in determining what sanction should be levied. FINRA's guidelines also provide direction on when to consider a suspension, bar or other sanctions. The Exchange believes the higher sanction ranges and guidance on when to suspend or bar a member lead to better deterrence of misconduct. In addition, FINRA's sanctions guidelines are available publicly (*see https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf*). The Exchange believes that public access to guidelines that the Exchange considers when assessing remedial sanctions improves regulation and leads to better conduct.

The Exchange notes that all other Affiliated Exchanges currently refer to FINRA's sanctions guidelines when determining appropriate remedial sanctions for each of its members, including Nasdaq's other options markets, the Nasdaq Options Market, the BX Options Market, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC.

[9] *See supra,* n.5.

[10] *See* Securities Exchange Act Release No. 85740 (April 29, 2019), 84 FR 19136 (May 3, 2019); Securities Exchange Act Release No. 88213 (February 14, 2020), 85 FR 9859 (February 20, 2020).

Old cite	New cite
B–12	B–11.
E–1	D–1.
F–2	E–2.
F–4	E–3.
F–5	E–4.
F–6	E–5.
F–8	E–6.
F–9	E–7.
F–11	E–8.
F–12	E–9.
F–13	Options 11, Section 6.
F–15	Options 11, Section 7.
F–19	Options 11, Section 8.
F–23	E–13.
F–25	E–14.
F–27	Options 11, Section 9.
F–30	E–15.
F–31	E–16.
F–33	Options 11, Section 10.
F–34	Options 11, Section 11.
F–35	Options 11, Section 12.
G–1	Options 11, Section 13.
Section H Of the Options Floor Procedure Advices.	Options 8, Section 39, F.

5. Rule 9231(b)(1)(C) in the Nasdaq Rules shall be read to allow the Chief Hearing Officer to select as a Panelist a person who previously served as a Governor of the Exchange prior to its acquisition by Nasdaq, Inc., but does not serve currently in that position; and 9231(b)(1)(D) shall be read to allow a person who is a member of FINRA's Market Regulation Committee to be among the FINRA Panelists approved by the Exchange Board at least annually whom the Chief Hearing Officer may also select as a Panelist. This language is necessary to preserve the pool of individuals from whom the Chief Hearing Officer may select to serve as a Panelist for Phlx disciplinary matters.

6. When applied to a Phlx member organization, Rule 9558(a)(2) in the Nasdaq Rule 9000 Series shall also allow the summary suspension of the associated permit(s) of a Phlx member organization. This language is necessary to make it clear that if the Chief Regulatory Officer provides written authorization to FINRA staff to issue on a case-by-case basis a written notice that summarily suspends a Phlx member organization, the Phlx member organization's associated permit(s) may also be suspended.

7. Rules 9552(f), 9553(g), 9554(g), 9555(g), 9556(g), and 9558(g) in the Nasdaq 9000 Series shall be read to continue to allow the filing of a request for termination of a suspension (or a request for termination of the limitation, prohibition or suspension with respect to Rules 9555(g) and 9558(g)), to be made with either the head of the Exchange or the FINRA department or office that issued the notice or that is handling the matter on behalf of the issuing department or office. The inclusion of this language is necessary so that it is clear that such filings may continue to be made with the Exchange.

8. Rule 9610(b) in the Nasdaq Series 9000 Rules shall not apply to the Exchange or its members, member organizations, persons associated with member organizations, or other persons subject to its jurisdiction. Instead, current Phlx Rule 9610(b) shall apply. While the language of Nasdaq Rule 9610(b) and current Phlx Rule 9610(b) is substantially similar, certain differences exist given the existence of member organizations and members on the Phlx Exchange such that maintaining the current Phlx Rule language is necessary.

9. Finally, the Exchange notes that FINRA amended its rules to reflect an internal reorganization of FINRA's Enforcement Operations.[11] In July 2017, FINRA announced its plan to consolidate its existing enforcement functions into a unified Department of Enforcement. According to FINRA, its rule change makes technical and other non-substantive changes to FINRA Rules 9000 Series Code of Procedure (the ''Code'') to reflect the single Department of Enforcement.[12] The rule change removed references to the Market Regulation department, its head and employees from the Code where those references reflect the previously separate Market Regulation enforcement function. In light of FINRA's reorganization, Nasdaq likewise removed references to the Market Regulation department, its head and employees from the Code, and re-lettered the remainder of those sections where such re-lettering was necessary (*i.e.,* Rule 9120). Because FINRA's Market Regulation department no longer exists, the Exchange does not need to preserve references to that entity with this rule change.

2. Statutory Basis

Rule Relocation

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(5) of the Act,[14] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by bringing greater transparency to its rules by relocating its Rules into the new Rulebook shell together with other rules which have already been relocated. The Exchange's proposal is consistent with the Act and will protect investors and the public interest by harmonizing its rules, where applicable, across Nasdaq markets so that members of the Affiliated Exchange can readily locate rules which cover similar topics. The relocation and harmonization of these Phlx Rules is part of the Exchange's continued effort to promote efficiency and conformity of its processes with those of its Affiliated Exchanges. The Exchange believes that the placement of these Phlx Rules into their new location will facilitate the use of the Rulebook by members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction. Specifically, the Exchange believes that market participants that are members of more than one Nasdaq market will benefit from the ability to compare Rulebooks.

The Exchange is not substantively amending rule text unless noted otherwise within this rule change. The Exchange has already completed relocating corresponding rules into the same location in most of its Affiliated Exchange's Rulebooks for ease of reference.[15] The Exchange believes its proposal will benefit investors and the general public by increasing the transparency of its Rulebook and promoting easy comparisons among the various Nasdaq Rulebooks.

Incorporation by Reference

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(b)(5) of the Act,[17] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect

[11] *See* Securities Exchange Act Release No. 83781 (August 6, 2018), 83 FR 39802 (August 10, 2018) (FINRA No. SR–FINRA–2018–027).

[12] *Id.*

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *See* Securities Exchange Act Release No. 86138 (June 18, 2019), 84 FR 29567 (June 24, 2019); Securities Exchange Act Release No. 86346 (July 10, 2019), 84 FR 33999 (July 16, 2019); Securities Exchange Act Release No. 86424 (July 22, 2019), 84 FR 36134 (July 26, 2019); and Securities Exchange Act Release No. 87778 (December 17, 2019), 84 FR 70590 (December 23, 2019). The Exchange plans to submit a similar rule filing for Nasdaq BX, Inc. in short order.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

investors and the public interest, by consolidating its rules into a single rule set. The Exchange intends to file a similar proposed rule change for the Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC markets, so that the Nasdaq 8000 Series and 9000 Series Rules which govern the investigative and disciplinary processes are similarly incorporated by reference into those rulebooks.

Replacing the current Phlx Series 8000 and 9000 Rules with introductory paragraphs to each that incorporate by reference Nasdaq Series 8000 and 9000 Rules, respectively, will provide an easy reference for members, associated persons, and other persons subject to the Exchange's jurisdiction seeking to understand and follow the investigative and disciplinary processes across all of Nasdaq's Exchanges. As noted, the Exchange intends to file similar rule changes for other affiliated markets so that the Nasdaq Series 8000 and 9000 Rules are the source document for all of the Affiliated Exchanges' investigative and disciplinary processes. The Exchange notes that the substance of the current rules is not changing. The Exchange desires to conform its rules to give its members and the members of its Affiliated Exchanges the ability to quickly locate rules in one central location.

The Exchange also believes that the proposal is consistent with Section 6(b)(6) of the Act,[18] which requires that the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. As noted above, the Exchange proposes to include introductory paragraphs to each of the Phlx Series 8000 and 9000 Rules (new General 5, Sections 2 and 3, respectively) that list instances in which cross references in the Nasdaq Series 8000 and 9000 Rules to other Nasdaq rules should be read to refer instead to the Exchange Rules and references to Nasdaq terms (whether or not defined) shall be read to refer to the Exchange-related meanings of those terms. This is consistent with the Act because it minimizes confusion and ensures the proper application of the Nasdaq Rules to Phlx. Also as noted above, the introductory paragraphs (1) indicate that certain of the Current Phlx Series 8000 and 9000 Rules, or portions thereof, will continue to apply to the Exchange, Phlx members, member organizations, persons associated with member organizations, and other persons subject to the Exchange's jurisdiction, rather than the analogous Nasdaq Series 8000 and 9000 Rules;[19] (2) describe how certain of the Nasdaq Series 8000 and 9000 Rules should be read to apply to Exchange members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction;[20] and (3) indicate that certain of the language in particular rules of the current Phlx Series 8000 and 9000 Rules will be maintained.[21] With respect to (1), the Exchange is also updating certain terms and rule references in Current Phlx Rule IM–9216 to align them with current terms and rule references contained elsewhere in the Exchange's Rulebook. The inclusion of these clarifying provisions is consistent with the Act because it preserves the way that certain Phlx Rules that differ from or do not exist in the Nasdaq Rules are applied. Moreover, updating certain terms and rule references in Current Phlx Rule IM–9216 is consistent with the Act because it conforms the text in that rule to changes already made elsewhere in the Rulebook, thus ensuring accurate terms and rule references throughout. Adding this text therefore ensures the consistent application of Phlx Rules to its members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that this rule change does not impose an undue burden on competition because the Exchange is merely incorporating Nasdaq's Series 8000 and 9000 Rules, which are substantially similar to the current Phlx Series 8000 and 9000 Rules. Those rules will now apply to Phlx members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction. To the extent that there are differences between the two rule sets, the Exchange notes those differences in introductory paragraphs to each of the Phlx Series 8000 and 9000 Rules (new General 5, Sections 2 and 3, respectively). As noted above, the proposed introductory paragraphs list instances in which cross references in Nasdaq Series 8000 and 9000 Rules to other Nasdaq rules shall be read to refer instead to the Exchange Rules, and references to Nasdaq terms (whether or not defined) shall be read to refer to the Exchange-related meanings of those terms. The introductory paragraphs also (1) indicate that certain of the current Phlx Series 8000 and 9000 Rules, or portions thereof, will continue to apply to the Exchange, Phlx members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction, rather than the analogous Nasdaq Series 8000 and 9000 Rules; (2) describe how certain rule text of the Nasdaq Series 8000 and 9000 Rules should be read to apply to the Exchange, Phlx members, member organizations, persons associated with member organizations, or other persons subject to the Exchange's jurisdiction; and (3) indicate that certain of the language in particular rules of the current Phlx Series 8000 and 9000 Rules will be maintained. Because Nasdaq's current Series 8000 and 9000 Rules are substantially similar to the current Phlx Series 8000 and 9000 Rules, and because the introductory paragraphs ensure that any differences are preserved, the proposed changes do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, updating certain terms and rule references in Current Phlx Rule IM–9216 does not do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because it conforms the text in that rule to changes already made elsewhere in the Rulebook, thus ensuring accurate terms and rule references throughout.

Finally, the Exchange believes that the proposed amendments do not impose an undue burden on competition because the amendments to relocate the Rules are non-substantive. This rule change is intended to bring greater clarity to the Exchange's Rules.

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.

[18] 15 U.S.C. 78f(b)(6).

[19] Rules IM–8310–1, 9110(d), 9211(a)(1), 9216, IM–9216, and 9610(b).

[20] Rule 8310, IM–8310–3, 8320 and 9558(a)(2).

[21] Rules 9143(e)(3), 9144(c)(3), 9231(b)(1)(C), 9231(b)(1)(D), 9552(f), 9553(g), 9554(g), 9555(g), 9556(g), and 9558(g).

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 [22] and Rule 19b–4(f)(6) thereunder.[23]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2020–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2020–09. 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–2020–09 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 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.

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88520; File No. SR–NYSEARCA–2020–26]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for an Extension of the Temporary Waiver of the Co-Location "Hot Hands" Fee

March 31, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 27, 2020, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to an extension of the temporary waiver of the co-location "Hot Hands" fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes an extension of the temporary waiver of the co-location [4] "Hot Hands" fee through the earlier of the reopening of the Mahwah, New Jersey data center ("Data Center") or May 15, 2020. The waiver of the Hot Hands fee was originally through March 29, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. ("ICE"). Through its ICE Data Services ("IDS") business, ICE operates the Mahwah, New Jersey data center ("Data Center"), from which the Exchange provides co-location services to Users.[6] Among those services is a

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission ("Commission") in 2010. *See* Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100).

[5] *See* Securities Exchange Act Release No. 88398 (March 17, 2020), 85 FR 16398 (March 23, 2020) (SR–NYSEArca–2020–22).

[6] For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly

''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE originally announced that the Data Center would be closed to third parties for the period from March 16, 2020 through March 29, 2020 (the ''Initial Closure''), to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Arca Rules 7.1–E and 7.1–O to close the co-location facility of the Exchange to third parties.

ICE has now announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended to the earlier of the reopening of the Mahwah, New Jersey data center (''Data Center'') or May 15, 2020. The date will be announced through a customer notice.

If a User's equipment requires work while a Rules 7.1–E and 7.1–O closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[8] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Fee Schedules as follows (deletions bracketed, additions italicized per OFR):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [March 29, 2020] *the earlier of the reopening of the Mahwah, New Jersey data center or May 15, 2020.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rules 7.1–E and 7.1–O closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rules 7.1–E and 7.1–O closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the NYSE Arca Options Fees and Charges and the NYSE Arca Equities Fees and Charges (together, the ''Fee Schedules''), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC (''NYSE''), NYSE American LLC (''NYSE American''), NYSE Chicago, Inc. (''NYSE Chicago''), and NYSE National, Inc. (''NYSE National'' and together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–25, SR–NYSEAmer–2020–23, SR–NYSECHX–2020–10, and SR–NYSENAT–2020–14.

[7] *See* Securities Exchange Act Release No. 72720 (July 30, 2014), 79 FR 45577 (August 5, 2014) (SR–NYSEArca–2014–81).

[8] *See* 85 FR 16398, *supra* note 5.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rules 7.1–E and 7.1–O closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act 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–NYSEARCA–2020–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2020–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2020–26 and should be submitted on or before April 27, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–07076 Filed 4–3–20; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

[15] 17 CFR 200.30–3(a)(12).

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1269 (Sub-No. 1X)]

Iowa Traction Railway Company—Discontinuance of Service Exemption—in Cerro Gordo County, Iowa

Iowa Traction Railway Company (Iowa Railway) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over a three-mile rail line between milepost 155.5, located approximately 100 yards south of Elm Drive, and milepost 152.5, located approximately 600 yards north of County Highway B–20, in Mason City (the City), Cerro Gordo County, Iowa (the Line). The Line traverses U.S. Postal Service Zip Code 50401.

Iowa Railway has certified that: (1) No local traffic has moved over the Line for at least two years; (2) no overhead traffic has moved over the Line for at least two years; (3) no formal complaint filed by a user of rail service on the Line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the

discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) [1] to subsidize continued rail service has been received, this exemption will be effective on May 6, 2020, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) [2] must be filed by April 16, 2020.[3] Petitions for reconsideration must be filed by April 27, 2020, with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001.

A copy of any petition filed with Board should be sent to Iowa Railway's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1666, Chicago, IL 60604–1228.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available at *www.stb.gov.*

Decided: April 1, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2020–07174 Filed 4–3–20; 8:45 am]

BILLING CODE 4915–01–P

[1] Persons interested in submitting an OFA to subsidize continued rail service must first file a formal expression of intent to file an offer, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[2] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

[3] As explained in the Board's decision served concurrently in this docket, requests for issuance of a notice of interim trail use or abandonment under the National Trails System Act will not be accepted. Moreover, because this is a discontinuance proceeding and not an abandonment, public use conditions are not appropriate. Furthermore, no environmental review is required because the Line was previously abandoned and an environmental review was conducted in that proceeding. *See Chi. & N. W. Transp. Co.—Aban. Exemption—Mason City, Iowa,* AB 1 (Sub-No. 205X) (ICC served Jan. 19, 1988) (environmental review).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2020–0059]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Extended Operations (ETOPS) of Multi-Engine Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 22, 2020. The collection involves information related to Extended Operations of Multi Engine Airplanes. A final rule published on January 16, 2007 codified previous practices that permitted certificated air carriers to operate two-engine airplanes over long range routes. The FAA uses this information collection to ensure that aircraft for long range flights are equipped to minimize diversions, to preclude and prevent diversions in remote areas, and to ensure that all personnel are trained to minimize any adverse impacts of a diversion.

DATES: Written comments should be submitted by May 6, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Timothy McClain by email at: *Timothy.McClain@faa.gov;* phone: 202–267–4112

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0718.

Title: Extended Operations (ETOPS) of Multi-Engine Airplanes.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 22, 2020 (85 FR 3742). The final rule codified the previous practices that permitted certificated air carriers to operate two-engine airplanes over these long-range routes and extended the procedures for extended operations to all passenger-carrying operations on routes beyond 180 minutes from an alternate airport. This option is voluntary for operators and manufacturers. The FAA uses this information collection to ensure that aircraft for long range flights are equipped to minimize diversions, to preclude and prevent diversions in remote areas, and to ensure that all personnel are trained to minimize any adverse impacts of a diversion.

Respondents: Approximately 20 Operators and 4 Manufacturers and 7 future operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: Burden per Operator varies per operation.

Estimated Total Annual Burden: 36,536 Hours.

Issued in Washington, DC, on March 31, 2020.

Sandra L. Ray,

Aviation Safety Inspector, FAA, Policy Integration Branch, AFS–270.

[FR Doc. 2020–07071 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver of Aeronautical Land Use Assurance; Arlington Municipal Airport, Arlington, WA

AGENCY: Federal Aviation Administration, (FAA), DOT.

ACTION: Notice.

SUMMARY: Notice is being given that the FAA is considering a proposal from the City of Arlington Airport Director to change certain portions of the airport from aeronautical use to non-aeronautical use at Arlington Municipal Airport, Arlington, WA. The proposal consists of 292.35 acres identified on the Airport Layout Plan as the Airport Business Park and the Airport Industrial Park.

DATES: Comments are due within 30 days of the date of the publication of this notice in the **Federal Register**. Written comments can be provided to Ms. Cayla D. Morgan, Environmental Protection Specialist, Seattle Airports District Office, 2220 S 216th Street, Des Moines, WA 98198, (206) 231–4130.

FOR FURTHER INFORMATION CONTACT: Mr. David M. Ryan, Airport Director, City of Arlington, 18204 59th Avenue NE, Arlington, WA 98223; or Ms. Cayla D. Morgan, Environmental Protection Specialist, Seattle Airports District Office, 2220 S 216th Street, Des Moines, WA 98198, (206) 231–4130. Documents reflecting this FAA action may be reviewed at the above locations.

SUPPLEMENTARY INFORMATION: Under the provisions of Title 49, U.S.C. 47153(c), and 47107(h)(2), the FAA is considering a proposal from the Airport Director, City of Arlington, to change a portion of the Arlington Municipal Airport from aeronautical use to non-aeronautical use. The Airport Industrial Park on the east side of the airfield consists of light industrial manufacturing, office and storage uses. The area has nearly reached full build out and any future use will remain the same. The Airport Business Park located on the west side of the airfield which only has two existing facilities will be developed for light industrial manufacturing, clean technology, corporate offices, and retail along the southern boarder adjacent to State Route 531.

The lease revenue associated with this property will be used to fund airport projects and operating expenses. The FAA concurs that the parcels are no longer needed for aeronautical purposes. The proposed use of this property is compatible with other airport operations in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in **Federal Register** on February 16, 1999.

Issued in Des Moines, Washington on March 30, 2020.

Joelle Briggs,

Manager, Seattle Airports District Office.

[FR Doc. 2020–07101 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that it is appropriate to grant a Buy America waiver to the Inter-Island Ferry Authority (IFA) of Alaska for procurement of foreign iron and steel components for refurbishment of two ferry vessels, specifically including (i) two sets of reduction gear replacement parts, one for the M/V Stikine ferry and the other for the M/V Prince of Wales ferry; and (ii) one set of pitch control units for the M/V Prince of Wales ferry.

DATES: The effective date of the waiver is April 7, 2020.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *Gerald.Yakowenko@dot.gov.* For legal questions, please contact Mr. Patrick Smith, FHWA Office of the Chief Counsel, (202) 366–1345, or via email at *Patrick.C.Smith@dot.gov.* Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Publishing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America regulation, 23 CFR 635.410, requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not produced in the United States in sufficient and reasonably available quantities. This notice provides information regarding FHWA's finding that it is appropriate to grant IFA a Buy America waiver for procurement of non-domestic iron and steel components for refurbishment of two ferry vessels, specifically including (i) two sets of reduction gear replacement parts, one for the M/V Stikine ferry and the other for the M/V Prince of Wales ferry; and (ii) one set of pitch control units for the M/V Prince of Wales ferry. The reduction gear replacement units and pitch control units are not available to be produced using 100 percent domestic steel or iron.

Background on the IFA System: The IFA system provides the only ferry service to Prince of Wales (POW) Island, which is the fourth-largest island in the United States with a landmass of 2,577 square miles. It has a population of approximately 6,000. The POW Island is located west of the City of Ketchikan, but is not accessible by road or bridge. Because of the lack of road access, residents and visitors rely heavily on the IFA ferries to reach POW Island or return to the mainland. The IFA ferries make daily runs between Ketchikan and Hollis, a census-designated place on POW Island. The ferries include passenger and vehicle decks. They carry more than 50,000 passengers and 12,000 vehicles annually.

The IFA provides critical ferry service to businesses and individuals on POW Island. For example, island residents rely on ferry service for access to health care, employment, and markets in Ketchikan including for groceries, goods, and services. In addition, many businesses on POW Island and in Ketchikan rely on this daily transportation connection to transport goods and customers. Finally, passengers brought to the island from the mainland support the island's tourism industry.

Considering the lack of access to POW Island by road or bridge, the IFA system is the only reliable and affordable mode of transportation for many users. The IFA system is critical to users in a way that not all Federal-aid-supported ferry systems are: It is the only available route for owner-occupied vehicles to access the island. Although POW Island may also be accessed by more expensive air travel or much slower cargo barges, the IFA system provides a reliable, middle alternative that is essential to many of its users (including low-income users who cannot afford alternative modes). It also provides transportation security on

days when weather prevents travel by air.

The IFA is a public, non-profit corporation organized under Alaska's Municipal Port Authority Act. The IFA is governed by a Board of Directors who are appointed by the member communities. Although the IFA is separate from the State of Alaska, its operations are dependent on subsidies from the State government. The IFA reports that it runs approximately 75 to 80 percent of its operational costs out of incoming revenue from fares; subsidies from the State cover the remainder. The IFA maintains that current fiscal problems in Alaska have put those subsidies at risk and make it highly unlikely that IFA or Alaska will be able to cover significant cost overruns on the ferry refurbishment project.

Need for refurbishment of IFA ferries: The IFA owns two ferries, the M/V Stikine and the M/V Prince of Wales. The M/V Prince of Wales was built in 2002 and the M/V Stikine was built in 2005. The IFA needs to refurbish both ferries to keep them in service and allow them to continue operating safely. The IFA reports that the anticipated service life for these vessels, with proper maintenance and refurbishment, may be up to 50 years. Thus, IFA anticipates that the ferries may have a remaining service life of 25 years to 35 years if they are maintained and refurbished as required. During preliminary engineering, the IFA confirmed that most parts needed for the refurbishment will comply with FHWA's Buy America requirements. The IFA identified only two parts needed for the refurbishment project that could not satisfy FHWA's Buy America requirements: (i) Reduction gear replacement parts for both ferries; and (ii) pitch control units for the M/V Prince of Wales.

Based on estimates received from IFA, the two parts requiring waivers constitute approximately 30 percent of the total estimated project cost of approximately $3 million. The IFA has confirmed that both the reduction gear replacement parts and the pitch control units can be installed domestically in the shipyard in Ketchikan, Alaska.

The existing reduction gears on both vessels have exceeded their recommended service life and must be replaced. The IFA maintains that there are no satisfactory replacement reduction gears made domestically meeting FHWA's Buy America requirement that will ensure: (i) Synchronization with its existing propulsion (or powertrain) system; and (ii) continued safe operation of the ferries. The existing reduction gears on both ferries were manufactured by Reintjes GmbH in Germany. Considering the age and hours of use of the existing reduction gears, the IFA maintains that there is urgent need for the replacement parts to ensure the continued safe transportation of its users. The IFA also maintains the replacement is urgent due to the importance of the IFA system to the communities it serves in terms of access and connectivity. The service life of the replacement reduction gears would be 13 to 15 years.

The IFA also maintains that the existing pitch control units in the M/V Prince of Wales are obsolete and must be replaced. It maintains that there are no satisfactory pitch control units made domestically meeting FHWA's Buy America requirement that will ensure: (i) Synchronization with its existing propulsion system; and (ii) continued safe operation of the ferry. The IFA also maintains that timely replacement of this part is necessary to ensure the continued safe transportation of its users and due to the importance of the IFA system to the communities it serves in terms of access and connectivity. The service life of the replacement pitch control units would be 15 to 20 years.

Waiver Request and Supporting Information: The IFA originally submitted a Buy America waiver request to FHWA for the reduction gear replacement parts and pitch control units in September 2018. Prior to submitting its waiver request, IFA sought but failed to identify domestic manufacturers for these products. Consistent with Executive Order 13788, after receiving the request, FHWA requested that IFA seek to maximize the use of goods, products, and materials produced in the U.S. on the project. In response to this request and several iterations of follow-up questions from FHWA, IFA spent the ensuing 12 months seeking to identify domestic manufacturers for the parts that it had not identified in its original search or, if full compliance was not possible, foreign manufacturers that could maximize use of domestic content by using greater quantities of U.S. steel. These search activities continued between September 2018 and September 2019. Although IFA did not identify compliant products, IFA provided information to FHWA supporting its waiver request, including:

- Information describing the domestic content characteristics of the manufactured products needed, including the sources and assembly locations of those products;
- information supporting the technical necessity of these specific products for the continued safe operation of the ferries and demonstrating that alternative designs were infeasible;
- information documenting efforts to maximize domestic content even if full compliance was not possible, including efforts to have foreign manufacturers incorporate domestic steel; and
- information describing the effects of denying the request, including the infeasibility of completing the acquisitions without Federal funding.

For the reduction gears on both vessels, IFA determined that only the original equipment manufacturer, Reintjes GmbH, could produce replacement parts to synchronize with its existing system and ensure continued safe operation. Due to existing supply contracts and warranty requirements for its parts, Reintjes GmbH was unable to offer an option to produce the reduction gears using United States steel.

For the pitch control units on the M/V Prince of Wales, IFA reported the following: It identified a manufacturer in Denmark that could potentially produce the parts using United States steel. However, considering the revised cost of raw materials and the transportation costs for sending the materials from the United States to Denmark, among other factors, this option increased the cost estimate for the pitch control units by approximately $750,000 compared to pitch control units produced with foreign steel (including both parts and installation). This doubled the total cost estimate for the parts. The IFA also identified a manufacturer in Sweden that could produce an alternate propulsion system for the M/V Prince of Wales using mostly Unites States content, but this option would increase the project cost by at least $1.5 million compared to pitch control units produced with foreign steel (including both parts and installation). This more than tripled the total cost estimate for refurbishing the pitch control units. Moreover, the manufacturer could not guarantee that the alternate propulsion system would properly synchronize with all other existing parts on the M/V Prince of Wales. The IFA determined that these alternatives would be cost prohibitive: If required to purchase one of these options, IFA would not be able to refurbish the vessel. This would effectively end the remaining service life of the M/V Prince of Wales, which could otherwise continue in operation for decades if properly refurbished and maintained. The IFA also maintains that the current fiscal situation in Alaska makes the State government unwilling to increase the existing subsidy to absorb significant cost overruns relative

to IFA's estimate for pitch control units produced with foreign steel.

Public Comments on Waiver Request: In accordance with the Consolidated Appropriations Act of 2016 (Pub. L. 114–113) and the Continuing Appropriations Act of 2017 (Pub. L. 114–223), FHWA published a notice of intent to issue a waiver on its website, *https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=155,* on February 19, 2020. The FHWA received six comments in response to the publication. Four comments supported the waiver, one comment was generally opposed to the waiver, and one comment was nonresponsive. The comment FHWA considered non-responsive appeared to request FHWA to publish notice of its waiver finding in the **Federal Register**, which FHWA does through this notice. The comment opposing the waiver did not offer any information on the availability of compliant products, nor did it suggest specific, additional actions that IFA could take to maximize its use of goods, products, and materials produced in the United States. Thus, IFA has not received any new information indicating that the subject parts can be produced by domestic manufacturers.

Finding and Request for Comments

Based on all the information available to the Agency, FHWA concludes that there are no domestic manufacturers of the reduction gear replacement parts and pitch control units needed for refurbishment of the M/V Stikine and M/V Prince of Wales by IFA. This finding is only for the procurement of non-domestic iron and steel components for refurbishment of two ferry vessels, specifically including (i) two sets of reduction gear replacement parts, one for the M/V Stikine ferry and the other for the M/V Prince of Wales ferry; and (ii) one set of pitch control units for the M/V Prince of Wales ferry.

The IFA and its contractors and subcontractors involved in the procurement of the reduction gear replacement parts and pitch control units are reminded of the need to comply with the Cargo Preference Act in 46 CFR part 38, if applicable.

In accordance with the provisions of Section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 5 days following the effective date of the finding. Comments may be submitted to FHWA's website via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410

Nicole R. Nason,

Administrator, Federal Highway Administration.

[FR Doc. 2020–07145 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Utah

AGENCY: Federal Highway Administration (FHWA), Department of Transportation, Utah Department of Transportation (UDOT).

ACTION: Notice of limitations on claims for judicial review of actions by UDOT and other federal agencies.

SUMMARY: The FHWA, on behalf of UDOT, is issuing this notice to announce actions taken by UDOT that are final Federal agency actions. The final agency actions relate to a proposed highway project, improvements to Interstate 15 (I–15), at milepost (MP) 11 in Washington City, Washington County, State of Utah. Those actions grant licenses, permits and/or approvals for the project. The UDOT's Record of Decision (ROD) provides details on the Selected Alternative for the proposed improvements.

DATES: By this notice, FHWA, on behalf of UDOT, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before September 3, 2020. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Elisa Albury, Environmental Program Manager, UDOT Environmental Services, P.O. Box 143600, Salt Lake City, UT 84114; (801)–834–5284; email: *ealbury@utah.gov.* UDOT's normal business hours are 8 a.m. to 5 p.m. (Mountain Time Zone), Monday through Friday, except State and Federal holidays.

SUPPLEMENTARY INFORMATION: Effective January 17, 2017, FHWA assigned to UDOT certain responsibilities of FHWA for environmental review, consultation, and other actions required by applicable Federal environmental laws and regulations for highway projects in Utah, pursuant to 23 U.S.C. 327. Actions taken by UDOT on FHWA's behalf pursuant to 23 U.S.C. 327 constitute Federal agency actions for purposes of Federal law. Notice is hereby given that UDOT has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the I–15 Milepost 11 Interchange project in the State of Utah.

The project proposes to construct a new interchange at Main Street, widening Main Street from two lanes to five lanes between Buena Vista Boulevard and Telegraph Street, and improvements to the Green Spring Drive/Telegraph Street intersection. The purpose of the project is to maintain the operations and safety of I–15 between Exit 10 and Exit 13; and enhance the mobility and safety of the transportation system in Washington City's primary business district. These improvements were identified in the EIS prepared for the project by UDOT as Alternative 4. The project is included in UDOT's adopted 2020–2025 State Transportation Improvement Plan (STIP) as project number 14560 and is scheduled for final design and right-of-way acquisition in fiscal year 2022. The project is also included in Phase 1 (project number 36) of the Dixie Metropolitan Planning Organization's *2019–2050 Regional Transportation Plan* approved in October 2019.

The actions by UDOT, and the laws under which such actions were taken, are described in the EIS approved on September 13, 2019, and the ROD (Record of Decision for I–15 Milepost Interchange; Washington City, Washington County, Utah, Project No. F–I15–1(166)11)) approved on September 13, 2019, and other documents in the UDOT project records. The EIS and ROD are available for review by contacting UDOT at the address provided above. In addition, these documents can be viewed and downloaded from the project website at *www.mp11.org.* This notice applies to the EIS, the ROD, the NHPA Section 106 review, the Endangered Species Act determination, the noise review and noise abatement determination, and all other UDOT and federal agency decisions and other actions with respect to the project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to the following laws (including their implementing regulations):

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128]; MAP–21, the

Moving Ahead for Progress in the 21st Century Act [Pub. L. 112–141].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712]; The Bald and Golden Eagle Protection Act [16 U.S.C. 668].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377]; Coastal Barrier Resources Act [16 U.S.C. 3501–3510]; Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(M, 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Noise:* Federal-Aid Highway Act of 1970, Public Law 91–605 [84 Stat. 1713]; [23 U.S.C. 109(h) & (i)].

10. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Ivan Marrero,

Division Administrator, Federal Highway Administration, Salt Lake City, Utah.

[FR Doc. 2020–07127 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0320; FMCSA–2017–0254]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for four individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on March 22, 2020. The exemptions expire on March 22, 2022. Comments must be received on or before May 6, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2015–0320 or FMCSA–2017–0254 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2015-0320* or *http://www.regulations.gov/docket?D=FMCSA-2017-0254.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2015–0320; FMCSA–2017–0254), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. 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 that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to: *http://www.regulations.gov/docket?D=FMCSA-2015-0320* or *http://www.regulations.gov/docket?D=FMCSA-2017-0254.* Click on the ''Comment Now!'' button and type your comment into the text box on 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.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=2015-0320* or *http://www.regulations.gov/docket?D=FMCSA-2017-0254* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. 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.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The four individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the four applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The four drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of March 22, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following four individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Daniel Halstead (NV)

Matthew Heinen (MN)

Derick Pendergrass (NC)

Paul Vitous (WA)

The drivers were included in docket numbers FMCSA–2015–0320 and FMCSA–2017–0254. Their exemptions are applicable as of March 22, 2020, and will expire on March 22, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the four exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07116 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0327; FMCSA–2016–0003; FMCSA–2017–0057]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 14 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2015-0327* or *http://www.regulations.gov/docket?D=FMCSA-2016-0003* or *http://www.regulations.gov/docket?D=FMCSA-2017-0057* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. 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.transportation.gov/privacy.*

II. Background

On February 6, 2020, FMCSA published a notice announcing its decision to renew exemptions for 14 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (85 FR 6999). The public comment period ended on March 9, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based upon its evaluation of the 14 renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirement in § 391.41 (b)(11).

As of February 24, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), Yoel Perez (FL) has satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers. (85 FR 6999)

This driver was included in docket number FMCSA–2015–0327. The exemption is applicable as of February 24, 2020, and will expire on February 24, 2022.

As of February 19, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (85 FR 6999):

Wyatt Baldwin (NV)

Marion Bennett, Jr. (MD)

Richard Davis (OH)

Adam Hayes (CA)

Michael Lidster (IL)

Adrian Lopez (TX)

Michael Quinonez (NM)

Khon Saysanam (TX)

Jeffrey Schulkers (KY)

Jason Thomas (TX)

Roderick Thomas (GA)

Joshua Tinley (AZ)

Kerri Wright (OK)

The drivers were included in docket number FMCSA–2016–0003 or FMCSA–2017–0057. Their exemptions are applicable as of February 19, 2020, and will expire on February 19, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07118 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0107; FMCSA–2013–0109; FMCSA–2017–0253]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for four individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2013-0107* or *http://www.regulations.gov/docket?D=FMCSA-2013-0109* or *http://www.regulations.gov/docket?D=FMCSA-2017-0253* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. 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.transportation.gov/privacy.*

II. Background

On February 20, 2020, FMCSA published a notice announcing its decision to renew exemptions for four individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (85 FR 9928). The public comment period ended on March 23, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the four renewal exemption applications and comments received, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of February and are discussed below.

As of February 14, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (85 FR 9928): John Johnson (WI) and George Webb (MA).

The drivers were included in docket number FMCSA–2013–0107 and FMCSA–2013–0109. Their exemptions are applicable as of February 14, 2020, and will expire on February 14, 2022.

As of February 19, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (85 FR 9928): Anthony Kornuszko (PA) and Jeffrey Mills (NC).

The drivers were included in docket number FMCSA–2017–0253. Their exemptions are applicable as of February 19, 2020, and will expire on February 19, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07121 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0122; FMCSA–2012–0123; FMCSA–2012–0332; FMCSA–2013–0122; FMCSA–2013–0124; FMCSA–2015–0327; FMCSA–2017–0057; FMCSA–2017–0059]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 27 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below. Comments must be received on or before May 6, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0122, FMCSA–2012–0123, FMCSA–2012–0332, FMCSA–2013–0122, FMCSA–2013–0124, FMCSA–2015–0327, FMCSA–2017–0057, or FMCSA–2017–0059 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2012–0122, FMCSA–2012–0123, FMCSA–2012–0332, FMCSA–2013–0122, FMCSA–2013–0124, FMCSA–2015–0327, FMCSA–2017–0057, or FMCSA–2017–0059), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. 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 that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2012–0122, FMCSA–2012–0123, FMCSA–2012–0332, FMCSA–2013–0122, FMCSA–2013–0124, FMCSA–2015–0327, FMCSA–2017–0057, or FMCSA–2017–0059, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on 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.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2012–0122, FMCSA–2012–0123, FMCSA–2012–0332, FMCSA–2013–0122, FMCSA–2013–0124, FMCSA–2015–0327, FMCSA–2017–0057, or FMCSA–2017–0059, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. 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.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The 27 individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse

evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 27 applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The 27 drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of April and are discussed below.

As of April 2, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 15 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Kathleen Abenchuchan (IA)
Roger Boge (IA)
Johnny Brewer (OH)
Jada Hart (IA)
Sean Hunt (TX)
Paul Klug (IA)
Dayton Lawson, Jr. (MI)
Scott Miller (IA)
Calvin Payne (MD)
Kiley Peterson (IA)
Samuel Sherman (MN)
Darren Talley (NC)
Thomas Warner, II (WA)
Allen Whitener (TX)
Johnny Wu (DE)

The drivers were included in docket number FMCSA–2013–0124, FMCSA–2015–0327, FMCSA–2017–0057, and FMCSA–2017–0059. Their exemptions are applicable as of April 2, 2020, and will expire on April 2, 2022.

As of April 21, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Andrew Alcozer (IL)
Roman Landa (CA)
Darren Nordquist (WI)
Jacob Paullin (WI)
Ryan Pope (CA)
Ronald Rutter (CA)
Russell Smith, (OH)

The drivers were included in docket number FMCSA–2012–0122 and FMCSA–2012–0123. Their exemptions are applicable as of April 21, 2020, and will expire on April 21, 2022.

As of April 23, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Donald Lynch (AR) and Zachary Rietz (TX)

The drivers were included in docket number FMCSA–2012–0332. Their exemptions are applicable as of April 23, 2020, and will expire on April 23, 2022.

As of April 24, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following three individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Kwinton Carpenter (OH)
Quinton Murphy (WI)
Andrey Shevchenko (MN)

The drivers were included in docket number FMCSA–2013–0122 and FMCSA–2013–0124. Their exemptions are applicable as of April 24, 2020, and will expire on April 24, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 27 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41 (b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2020–07122 Filed 4–3–20; 8:45 am]
BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0005]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt eight individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on March 10, 2020. The exemptions expire on March 10, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office

hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0005* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. 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.*

II. Background

On February 6, 2020, FMCSA published a notice announcing receipt of applications from eight individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (85 FR 6997). The public comment period ended on March 9, 2020, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received one comment in this proceeding. Victoria Johnson submitted a comment stating that the MN Department of Public Safety has no objections to the decision to grant an exemption to Charles E. Klock.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on medical reports about the applicants' vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the February 6, 2020, **Federal Register** notice (85 FR 6997) and will not be repeated here.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The eight exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, central serous retinopathy, complete loss of vision, macular scarring, retinal scarring, and scarring. In most cases, their eye conditions did not develop recently. Four of the applicants were either born with their vision impairments or have had them since childhood. The four individuals that developed their vision conditions as adults have had them for a range of 4 to 22 years. Although each applicant has one eye that does not meet the vision requirement in § 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 5 to 62 years. In the past 3 years, one driver was involved in a crash, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in § 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in § 391.41(b)(10) and (b) by a certified medical examiner (ME) who attests that the individual is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/

her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the eight exemption applications, FMCSA exempts the following drivers from the vision requirement, § 391.41(b)(10), subject to the requirements cited above:

Lance D. Duffie
Lester Johnson
James M. Kivett
Charles E. Klock
Clayton D. Lowther
Jared G. New
David Perea
Juan Santay-Ajanel

In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07120 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0294; FMCSA–2013–0442; FMCSA–2015–0321; FMCSA–2017–0254; FMCSA–2018–0050]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 17 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before May 6, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0294, Docket No. FMCSA–2013–0442, Docket No. FMCSA–2015–0321, Docket No. FMCSA–2017–0254, Docket No. FMCSA–2018–0050 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2012–0294, Docket No. FMCSA–2013–0442, Docket No. FMCSA–2015–0321, Docket No. FMCSA–2017–0254, Docket No. FMCSA–2018–0050), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. 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 that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2012–0294, FMCSA–2013–0442, FMCSA–2015–0321, FMCSA–2017–0254, or FMCSA–2018–0050, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on 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.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2012–0294, FMCSA–2013–0442, FMCSA–2015–0321, FMCSA–2017–0254, or FMCSA–2018–0050, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. 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.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The 17 individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 17 applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The 17 drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of April and are discussed below.

As of April 8, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers: Aaron Harms (MO) and Michael Ranalli (PA).

The drivers were included in docket numbers FMCSA–2012–0294 and FMCSA–2017–0254. Their exemptions are applicable as of April 8, 2020, and will expire on April 8, 2022.

As of April 11, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following nine individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Scott Gessner (PA)
Jerry L. Henderson (IN)
Preston R. Kanagy (TN)
Steven Shirley (UT)
Matthew J. Staley (CO)
Mohammad Warrad (IA)
Richard J. Wenner (MN)
John C. Wolfe (PA)
Dennis R. Zayic (MN)

The drivers were included in docket number FMCSA–2015–0321. Their exemptions are applicable as of April 11, 2020 and will expire on April 11, 2022.

As of April 23, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers: Randy Pinto (PA) and James Spece (PA).

The drivers were included in docket number FMCSA–2013–0442. Their exemptions are applicable as of April 23, 2020, and will expire on April 23, 2022.

As of April 26, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following four individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Brian Johnson (MN)
Gerald Klein Jr. (ID)
Shane W. Martinek (OK)
William P. Swick (MI)

The drivers were included in docket number FMCSA–2018–0050. Their exemptions are applicable as of April 26, 2020, and will expire on April 26, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the 17 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07117 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0006]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from eight individuals for an exemption from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions will enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Comments must be received on or before May 6, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2020–0006 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0006.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0006), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. 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 that FMCSA can contact you if there are questions regarding your submission. To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0006.* Click on the ''Comment Now!'' button and type your comment into the text box on 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.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0006* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

C. 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.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The eight individuals listed in this notice have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

On July 16, 1992, the Agency first published the criteria for the Vision Waiver Program, which listed the conditions and reporting standards that CMV drivers approved for participation would need to meet (57 FR 31458). The current Vision Exemption Program was established in 1998, following the enactment of amendments to the statutes governing exemptions made by § 4007 of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107, 401 (June 9, 1998). Vision exemptions are considered under the procedures established in 49 CFR part 381 subpart C, on a case-by-case basis upon application by CMV drivers who do not meet the vision standards of § 391.41(b)(10).

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely in intrastate commerce with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at *https://www.regulations.gov/docket?D=FMCSA-1998-3637.*

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrated the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively.[1] The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

III. Qualifications of Applicants

Terry M. Baldwin

Mr. Baldwin, 55, has had retinal dysplasia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, light perception only. Following an examination in 2019, his optometrist stated, ''Since Mr. Baldwin has been living his entire life with his left eye vision deficit, he has obviously made compensatory adaptations and has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Baldwin reported that he has driven straight trucks for 16 years, accumulating 166,400 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Samuel L. Eakman, Jr.

Mr. Eakman, 51, has a prosthetic in his right eye due to a traumatic incident in childhood. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2019, his optometrist stated, ''Considering Mr. Eakman has had a Commercial Drivers License since 2011 and has performed those tasks without issue, I feel he has sufficient vision to perform driving tasks and has long ago recognized other ways of determining object spacing other than actual binocular vision.'' Mr. Eakman reported that he has driven straight trucks for 23 years, accumulating 575,000 miles. He holds a Class AM CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Raymond C. King

Mr. King, 34, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/30, and in his left eye, 20/50. Following an examination in 2019, his ophthalmologist stated, ''Mr. King has sufficient vision to operate a commercial vehicle.'' Mr. King reported that he has driven straight trucks for 4 years, accumulating 200,000 miles, and tractor-trailer combinations for 6 years, accumulating 525,000 miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV; he exceeded the speed limit by 15 mph.

Robert G. Lanning

Mr. Lanning, 58, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, counting fingers. Following an examination in 2019, his optometrist stated, ''I certify that my patient, Robert G. Lanning, has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Lanning reported that he has driven straight trucks for 15 years, accumulating 300,000 miles. He holds an operator's license from Virginia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gary D. Larson

Mr. Larson, 25, has a macular scar in his right eye due to a traumatic incident in childhood. The visual acuity in his right eye is 20/150, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, ''In my medical opinion, I believe Mr. Larson has sufficient visual capabilities to perform the driving tasks required to operate a commercial vehicle.'' Mr. Larson reported that he has driven straight trucks for 3 years, accumulating 156,000 miles. He holds an operator's license from Nebraska. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Larry Owen

Mr. Owen, 70, has had a retinal detachment in his right eye since 2014. The visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, ''In my medical opinion, Mr. Owen has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr.

[1] A thorough discussion of this issue may be found in a FHWA final rule published in the **Federal Register** on March 26, 1996 and available on the internet at *https://www.govinfo.gov/content/pkg/FR-1996-03-26/pdf/96-7226.pdf.*

Owen reported that he has driven buses for 14 years, accumulating 700,000 miles. He holds an operator's license from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John C. Perrone, Jr.

Mr. Perrone, 21, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is 20/150, and in his left eye, 20/20. Following an examination in 2019, his ophthalmologist stated, ''Patient has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Perrone reported that he has driven straight trucks for 3 years, accumulating 9,750 miles. He holds an operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald D. Wilson

Mr. Wilson, 58, has had optic nerve atrophy in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, light perception only. Following an examination in 2019, his optometrist stated, ''As far as I can conclude, Mr. Wilson is visually competent to operate a commercial vehicle.'' Mr. Wilson reported that he has driven straight trucks for 35 years, accumulating 1.4 million miles, and tractor-trailer combinations for 12 years, accumulating 240,000 miles. He holds a Class DA CDL from Kentucky. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments and material received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07119 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0107; FMCSA–2015–0119; FMCSA 2015–0320]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for seven individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on January 21, 2020. The exemptions expire on January 21, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2013-0107* or *http://www.regulations.gov/docket?D=FMCSA-2015-0119* or *http://www.regulations.gov/docket?D=FMCSA-2015-0320* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

B. 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.transportation.gov/privacy.*

II. Background

On January 27, 2020, FMCSA published a notice announcing its decision to renew exemptions for seven individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (85 FR 4760). The public comment period ended on February 26, 2020, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received one comment in this proceeding. This comment supported granting these exemptions.

IV. Conclusion

Based on its evaluation of the seven renewal exemption applications and comment received, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

As of January 21, 2022, and in accordance with 49 U.S.C. 31136(e) and

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (85 FR 4760):

Thomas DeAngelo (IL)
Nathan Dermer (AK)
Toriano Mitchell (OH)
Tyler Schaefer (ME)
Stephen Stawinsky (PA)
Alvin Strite (PA)
Thomas Vivirito (PA)

The drivers were included in docket numbers FMCSA–2013–0107; FMCSA–2015–0119; and FMCSA–2015–0320. Their exemptions are applicable as of January 21, 2020, and will expire on January 21, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–07123 Filed 4–3–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Retail Foreign Exchange Transactions

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of an information collection as required by the Paperwork Reduction Act of 1995 (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 OCC is soliciting comment concerning renewal of an information collection titled, ''Retail Foreign Exchange Transactions,'' which is currently an approved collection. The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be submitted on or before May 6, 2020.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, 1557–0250, 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 ''1557–0250'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *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.

You may review comments and other related materials that pertain to this information collection [1] following the close of the 30-day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0250'' or ''Retail Foreign Exchange Transactions.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.
- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks that OMB extend its approval of the collection in this notice.

Title: Retail Foreign Exchange Transactions.

OMB Control No.: 1557–0250.

Type of Review: Regular.

Frequency of Response: On occasion.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 15.

Total Annual Burden: 22,418 hours.

Description:

Background

The OCC's retail forex rule (12 CFR part 48) allows national banks and Federal savings associations to offer or enter into retail foreign exchange transactions. In order to engage in these transactions, institutions must comply with various reporting, disclosure, and recordkeeping requirements included in that rule.

[1] On January 10, 2020 the OCC published a 60-day notice for this information collection, 85 FR 1373.

Reporting Requirements

The reporting requirements in 12 CFR 48.4 state that, prior to initiating a retail forex business, a national bank or Federal savings association must provide the OCC with prior notice and obtain a written supervisory no-objection letter. In order to obtain a supervisory no-objection letter, a national bank or Federal savings association must have written policies, procedures, and risk measurement and management systems and controls in place to ensure that retail forex transactions are conducted in a safe and sound manner. The national bank or Federal savings association also must provide other information required by the OCC, such as documentation of customer due diligence, new product approvals, and haircuts applied to noncash margins.

Disclosure Requirements

Under 12 CFR 48.5, a national bank or Federal savings association must promptly provide the customer with a statement reflecting the financial result of the transactions and the name of any introducing broker to the account. The institution must follow the customer's specific instructions on how the offsetting transaction should be applied.

Twelve CFR 48.6 requires that a national bank or Federal savings association furnish a retail forex customer with a written disclosure before opening an account through which the customer will engage in retail forex transactions. It further requires a national bank or Federal savings association to secure an acknowledgment from the customer that the disclosure was received and understood. Finally, the section requires the disclosure by a national bank or Federal savings association of its profitable accounts ratio and its fees and other charges.

Twelve CFR 48.10 requires a national bank or Federal savings association to issue monthly statements to each retail forex customer and send confirmation statements following transactions.

Twelve CFR 48.13(c) prohibits a national bank or Federal savings association engaging in retail forex transactions from knowingly handling the account of any related person of another retail forex counterparty unless it receives proper written authorization, promptly prepares a written record of the order, and transmits to the counterparty copies of all statements and written records. Twelve CFR 48.13(d) prohibits a related person of a national bank or Federal savings association engaging in retail forex transactions from having an account with another retail forex counterparty unless it receives proper written authorization and copies of all statements and written records for such accounts are transmitted to the counterparty.

Twelve CFR 48.15 requires a national bank or Federal savings association to provide a retail forex customer with 30 days prior notice of any assignment of any position or transfer of any account of the retail forex customer. It also requires a national bank or Federal savings association to which retail forex accounts or positions are assigned or transferred to provide the affected customers with risk disclosure statements and forms of acknowledgment and obtain the signed acknowledgments within 60 days.

The customer dispute resolution provisions in 12 CFR 48.16 require certain endorsements, acknowledgments, and signatures. The section also requires that a national bank or Federal savings association, within 10 days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, provide the customer with a list of persons qualified in the dispute resolution.

Policies and Procedures; Recordkeeping

Twelve CFR 48.7 and 48.13 require that a national bank or Federal savings association engaging in retail forex transactions keep full, complete, and systematic records and to establish and implement internal rules, procedures, and controls. Section 48.7 also requires that a national bank or Federal savings association keep account, financial ledger, transaction, and daily records, as well as memorandum orders, post-execution allocation of bunched orders, records regarding its ratio of profitable accounts, possible violations of law, records for noncash margin, and monthly statements and confirmations. Twelve CFR 48.9 requires policies and procedures for haircuts for noncash margin collected under the rule's margin requirements and annual evaluations and modifications of the haircuts.

On January 10, 2020, the OCC issued a notice for 60 days of comment concerning this collection, 85 FR 1373. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the information collection;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2020–07125 Filed 4–3–20; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL REGISTER

Vol. 85 Monday,

No. 66 April 6, 2020

Part II

Department of Health and Human Services

Centers for Medicare and Medicaid

42 CFR Parts 400, 405, 409, et al.

Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency; Interim Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 400, 405, 409, 410, 412, 414, 415, 417, 418, 421, 422, 423, 425, 440, 482, and 510

[CMS–1744–IFC]

RIN 0938–AU31

Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period (IFC) gives individuals and entities that provide services to Medicare beneficiaries needed flexibilities to respond effectively to the serious public health threats posed by the spread of the 2019 Novel Coronavirus (COVID–19). Recognizing the urgency of this situation, and understanding that some pre-existing Medicare payment rules may inhibit innovative uses of technology and capacity that might otherwise be effective in the efforts to mitigate the impact of the pandemic on Medicare beneficiaries and the American public, we are changing Medicare payment rules during the Public Health Emergency (PHE) for the COVID–19 pandemic so that physicians and other practitioners, home health and hospice providers, inpatient rehabilitation facilities, rural health clinics (RHCs), and federally qualified health centers (FQHCs) are allowed broad flexibilities to furnish services using remote communications technology to avoid exposure risks to health care providers, patients, and the community. We are also altering the applicable payment policies to provide specimen collection fees for independent laboratories collecting specimens from beneficiaries who are homebound or inpatients (not in a hospital) for COVID–19 testing. We are also expanding, on an interim basis, the list of destinations for which Medicare covers ambulance transports under Medicare Part B. In addition, we are making programmatic changes to the Medicare Diabetes Prevention Program (MDPP) and the Comprehensive Care for Joint Replacement (CJR) Model in light of the PHE, and program-specific requirements for the Quality Payment Program to avoid inadvertently creating incentives to place cost considerations above patient safety. This IFC will modify the calculation of the 2021 and 2022 Part C and D Star Ratings to address the expected disruption to data collection and measure scores posed by the COVID–19 pandemic and also to avoid inadvertently creating incentives to place cost considerations above patient safety. This rule also amends the Medicaid home health regulations to allow other licensed practitioners to order home health services, for the period of this PHE for the COVID–19 pandemic in accordance with state scope of practice laws. We are also modifying our under arrangements policy during the PHE for the COVID–19 pandemic so that hospitals are allowed broader flexibilities to furnish inpatient services, including routine services outside the hospital.

DATES:

Effective date: These regulations are effective on March 31, 2020.

Applicability date: These regulations are applicable beginning on March 1, 2020.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 1, 2020.

ADDRESSES: In commenting, please refer to file code CMS–1744–IFC. Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1744–IFC, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1744–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Jamie Hermansen, (410) 786–2064, for general information, contact one of the following:

HAPG_COVID-19@cms.hhs.gov, for issues related to telehealth services, and communication technology-based services; frequency limits on subsequent care services in inpatient and non-facility settings, critical care consultations, required ''hands-on'' visits for ESRD monthly capitation payments; removal of restrictions on technology, and supervision of interactive telecommunications technology; clinical laboratory fee schedule; services furnished by opioid treatment programs; payment under Medicare Part B for teaching physician services and resident moonlighting; remote physiologic monitoring; physician supervision flexibility for outpatient hospital services; payment for office/outpatient evaluation and management visits; counting of resident time at alternate locations; Ambulance Fee Schedule; rural health clinic services; federally qualified health center services; and inpatient hospital services furnished under arrangements outside of the hospital. (Note this email address has an underscore ''_'' between ''HAPG'' and ''COVID–19''.)

IRFCoverage@cms.hhs.gov, for issues related to the Medicare inpatient rehabilitation facility benefits.

NCDsPublicHealthEmergency@cms.hhs.gov, for issues related to national coverage determination and local coverage determination requirements.

PartCandDStarRatings@cms.hhs.gov, for issues related to Medicare Parts C and D quality rating system.

MedicaidHomeHealthRule@cms.hhs.gov, for issues related to Medicaid home health provider flexibility.

Hillary Loeffler, (410) 786–0456, *HomeHealthPolicy@cms.hhs.gov,* or *HospicePolicy@cms.hhs.gov,* for issues related to the Medicare home health and hospice benefits.

Megan Hyde, (410) 786–3247, and Rebecca Cole, (410) 786–1589, for issues related to Innovation Center Models, and alternative payment model treatment under the Quality Payment Program.

Kim Spalding Bush, (410) 786–3232, and Fiona Larbi, (410) 786–7224, for issues related to the Medicare Shared Savings Program.

Molly MacHarris, (410) 786–4461, for issues related to the Merit-based Incentive Payment System (MIPS).

Heather Holsey, (410) 786–0028, for Comprehensive Care for Joint Replacement model.

Amanda Rhee, (410) 786–3888, and Elizabeth Matthews, (410) 786–5433, for Medicare Diabetes Prevention Program expanded model.

Brittany LaCouture, (410) 786–0481, for Alternative Payment Model provisions of the Quality Payment Program.

CAPT Scott Cooper, USPHS, (410) 786–9496, for issues related to special requirements for psychiatric hospitals.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that website to view public comments.

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Addenda Available Only Through the Internet on the CMS Website

The Addenda along with other supporting documents and tables referenced in this interim final rule with comment period (IFC) are available through the internet on the CMS website at *https://www.cms.gov/.* For this IFC, refer to item CMS–1744–IFC. Readers who experience any problems accessing any of the Addenda or other documents referenced in this IFC and posted on the CMS website identified above should contact *HAPG_COVID-19@cms.hhs.gov.*

CPT (Current Procedural Terminology) Copyright Notice

Throughout this IFC, we use CPT codes and descriptions to refer to a variety of services. We note that CPT codes and descriptions are copyright 2019 American Medical Association. All Rights Reserved. CPT is a registered trademark of the American Medical Association (AMA). Applicable Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulations (DFAR) apply.

I. Background

The United States is responding to an outbreak of respiratory disease caused by a novel (new) coronavirus that was first detected in China and which has now been detected in more than 190 locations internationally, including in all 50 States and the District of Columbia. The virus has been named ''SARS–CoV–2'' and the disease it causes has been named ''coronavirus disease 2019'' (abbreviated ''COVID–19'').

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) declared the outbreak a ''Public Health Emergency of international concern'' (PHEIC). On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a PHE for the United States to aid the nation's healthcare community in responding to COVID–19 (hereafter referred to as the PHE for the COVID–19 pandemic). On March 11, 2020, the WHO publicly characterized COVID–19 as a pandemic. On March 13, 2020 the President of the United States declared the COVID–19 outbreak a national emergency.

Coronaviruses are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then spread between people such as with MERS-CoV, SARS-CoV, and now with this new virus (COVID–19).

The complete clinical picture with regard to COVID–19 is not fully known. Reported illnesses have ranged from very mild (including some with no reported symptoms) to severe, including illness resulting in death. While information so far suggests that most COVID–19 illness is mild, a report out of China suggests serious illness occurs in 16 percent of cases. Older people and people of all ages with severe chronic medical conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID–19 illness.[1]

A pandemic is a global outbreak of disease. Pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing

[1] *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.*

immunity against the new virus, it spreads worldwide. The virus that causes COVID–19 is infecting people and spreading easily from person-to-person. This is the first pandemic known to be caused by the emergence of a new coronavirus.[2]

People in places where ongoing community spread of the virus that causes COVID–19 has been reported are at elevated risk of exposure, with the level of risk dependent on the location. Healthcare workers caring for patients with COVID–19 are at elevated risk of exposure. Close contacts of persons with COVID–19 also are at elevated risk of exposure.

Early information out of China, where COVID–19 first started, shows that some people are at higher risk of getting very sick from this illness. This includes:

- Older adults, with risk increasing by age.
- People who have serious chronic medical conditions like:
  - ++ Heart disease.
  - ++ Diabetes.
  - ++ Lung disease.

The Centers for Disease Control and Prevention (CDC) has developed guidance to help in the risk assessment and management of people with potential exposures to COVID–19, including recommending that health care professionals make every effort to interview a person under investigation for infection by telephone, text monitoring system, or video conference.[3]

As the healthcare community works to implement and establish recommended infection prevention and control practices, regulatory agencies under appropriate waiver authority granted by the PHE for the COVID–19 pandemic declaration are also working to revise and implement regulations that work in concert with healthcare community infection prevention and treatment practices. Based on the current and projected increase in rate of incidence of the COVID–19 disease in the US population, and observed fatalities in the elderly population, who are particularly vulnerable due to age and co-morbidities, and additionally, impact on health workers that are at increased risk due to treating the population, we believe that certain Medicare and Medicaid regulations that may offer providers flexibilities in furnishing services to combat the COVID–19 pandemic should be reviewed and revised as appropriate. We are addressing some of these regulations in this interim final rule with comment period (IFC) to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in the programs under Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act (the Act).

In this extraordinary circumstance, we recognize that public exposure greatly increases the overall risk to public health. We believe that this increased risk produces an immediate change, not only in the circumstances under which services can safely occur, but also results in an immediate change to the business relationships between providers, suppliers, and practitioners. By increasing access to services delivered using telecommunications technology, increasing access to testing in a patient's home, and improving infection control, this IFC will provide the necessary flexibility for Medicare beneficiaries to be able to receive medically necessary services without jeopardizing their health or the health of those who are providing those services, while minimizing the overall risk to public health.

II. Provisions of the Interim Final Rule

In this IFC, we are defining the term, ''Public Health Emergency,'' in the regulation at 42 CFR 400.200, which contains definitions that apply under the entirety of chapter 400 of title 42 of the CFR. The definition identifies the PHE determined to exist nationwide by the Secretary of Health and Human services under section 319 of the Public Health Service Act on January 31, 2020, as a result of confirmed cases of COVID–19, including any subsequent renewals.

A. Payment for Medicare Telehealth Services Under Section 1834(m) of the Act

Section 1834(m) of the Act specifies the payment amounts and circumstances under which Medicare makes payment for a discrete set of services, all of which must ordinarily be furnished in-person, when they are instead furnished using interactive, real-time telecommunication technology. When furnished under the telehealth rules, many of these specified Medicare telehealth services are still reported using codes that describe ''face-to-face'' services but are furnished using audio/video, real-time communication technology instead of in-person. The list of these eligible telehealth services is published on the CMS website at *https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/index.html.*

In contrast, Medicare pays separately for other professional services that are commonly furnished remotely using telecommunications technology, but that do not usually require the patient to be present in-person with the practitioner when they are furnished. These services, including remote physician interpretation of diagnostic tests, care management services and virtual check-ins among many others, are considered physicians' services in the same way as services that are furnished in-person without the use of telecommunications technology. They are covered and paid in the same way as services delivered without the use of telecommunications technology, but are not considered Medicare telehealth services and are not subject to the conditions of payment under section 1834(m) of the Act.

On March 17, 2020, we announced the expansion of telehealth services on a temporary and emergency basis pursuant to waiver authority added under section 1135(b)(8) of the Act by the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (Pub. L. 116–123, March 6, 2020). Starting on March 6, 2020, Medicare can pay for telehealth services, including office, hospital, and other visits furnished by physicians and other practitioners to patients located anywhere in the country, including in a patient's place of residence. In the context of the PHE for the COVID–19 pandemic, we recognize that physicians and other health care professionals are faced with new challenges regarding potential exposure risks, for people with Medicare, for health care providers, and for members of the community at large. For example, the CDC has urged health care professionals to make every effort to interview persons under investigation for infection by telephone, text messaging system, or video conference instead of in-person. To facilitate the use of telecommunications technology as a safe substitute for in-person services, we are, on an interim basis, adding many services to the list of eligible Medicare telehealth services, eliminating frequency limitations and other requirements associated with particular services furnished via telehealth, and clarifying several payment rules that apply to other services that are furnished using telecommunications technologies that can reduce exposure risks.

As discussed in this IFC and in prior rulemaking, several conditions must be met for Medicare to make payment for telehealth services under the Physician Fee Schedule (PFS). For further details, see the full discussion of the scope of

[2] *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.*

[3] *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.*

Medicare telehealth services in the ''Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2018; Medicare Shared Savings Program Requirements; and Medicare Diabetes Prevention Program'' final rule (82 FR 53006, November 17, 2017) (hereinafter referred to as the CY 2018 PFS final rule) and in our regulations at 42 CFR 410.78 and 414.65.

1. Site of Service Differential for Medicare Telehealth Services

Under the PFS, there are two payment rates for many physicians' services: The facility rate; and the non-facility, or office, rate. The PFS non-facility rate is the single amount paid to a physician or other practitioner for services furnished in their office. The PFS facility rate is the amount generally paid to a professional when a service is furnished in a setting of care, like a hospital, where Medicare is making a separate payment to an entity in addition to the payment to the billing physician or practitioner. This separate payment, often referred to as a ''facility fee'' reflects the facility's costs associated with the service (clinical staff, supplies and equipment) and is paid in addition to what is paid to the professional through the PFS.

We note that, in accordance with section 1834(m)(2)(B) of the Act, a facility fee is, in most cases, paid to the ''originating site'' where the beneficiary is located at the time a telehealth service is furnished. The payment amount for the telehealth originating site facility fee is a nationally applicable flat fee, paid without geographic or site of service adjustments that generally apply to payments for different kinds of services furnished by Medicare providers and suppliers.

For Medicare telehealth services, we currently make payment to the billing physician or practitioner at the PFS facility rate since the facility costs (clinical staff, supplies, and equipment) associated with furnishing the service would generally be incurred by the originating site, where the patient is located, and not by the practitioner at the distant site; and because the statute requires Medicare to pay an originating site facility fee to the site that hosts the patient.

When a physician or practitioner submits a claim for their services, including claims for telehealth services, they include a place of service (POS) code that is used to determine whether a service is paid using the facility or non-facility rate. Currently, CMS requires that claims for Medicare telehealth services include the POS code 02, which is specific to telehealth services.

Under the waiver authority exercised by the Secretary in response to the PHE for the COVID–19 pandemic, Medicare telehealth services can be furnished to patients wherever they are located, including in the patient's home. As provided by the amendments to section 1135(b)(8) of the Act, when telehealth services are furnished under the waiver to beneficiaries located in places that are not identified as permissible originating sites in section 1834(m)(4)(C)(ii)(I) through (IX) of the Act, no originating site facility fee is paid. We also recognize that as physician practices suddenly transition a potentially significant portion of their services from in-person to telehealth visits in the context of the PHE for the COVID–19 pandemic, the relative resource costs of furnishing these services via telehealth may not significantly differ from the resource costs involved when these services are furnished in person. For example, we expect that physician offices will continue to employ nursing staff to engage with patients during telehealth visits or to coordinate pre- or post-visit care, regardless of whether or not the visit takes place in person, as it would have outside of the PHE for the COVID–19 pandemic, or through telehealth in the context of the PHE for the COVID–19 pandemic. Consequently, the assumptions that have supported payment of telehealth services at the PFS facility rate would not apply in many circumstances for services furnished during the PHE for the COVID–19 pandemic. Instead, we believe that, as more telehealth services are furnished to patients wherever they are located rather than in statutory originating sites, it would be appropriate to assume that the relative resource costs of services furnished through telehealth should be reflected in the payment to the furnishing physician or practitioner as if they furnished the services in person, and to assign the payment rate that ordinarily would have been paid under the PFS were the services furnished in-person. For example, a physician practicing in an office setting who, under the PHE for the COVID–19 pandemic, sees patients via telehealth instead of in person would be paid at the non-facility, or office, rate for these services. Similarly, a physician who typically sees patients in an outpatient provider-based clinic of a hospital would be paid the facility rate for services newly furnished via telehealth.

To implement this change on an interim basis, we are instructing physicians and practitioners who bill for Medicare telehealth services to report the POS code that would have been reported had the service been furnished in person. This will allow our systems to make appropriate payment for services furnished via Medicare telehealth which, if not for the PHE for the COVID–19 pandemic, would have been furnished in person, at the same rate they would have been paid if the services were furnished in person. Given the potential importance of using telehealth services as means of minimizing exposure risks for patients, practitioners, and the community at large, we believe this interim change will maintain overall relativity under the PFS for similar services and eliminate potential financial deterrents to the clinically appropriate use of telehealth. Because we currently use the POS code on the claim to identify Medicare telehealth services, we are finalizing on an interim basis the use of the CPT telehealth modifier, modifier 95, which should be applied to claim lines that describe services furnished via telehealth. We note that we are maintaining the facility payment rate for services billed using the general telehealth POS code 02, should practitioners choose, for whatever reason, to maintain their current billing practices for Medicare telehealth during the PHE for the COVID–19 pandemic.

2. Adding Services to the List of Medicare Telehealth Services

In the ''Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2003 and Inclusion of Registered Nurses in the Personnel Provision of the Critical Access Hospital Emergency Services Requirement for Frontier Areas and Remote Locations'' final rule with comment period (67 FR 79988, December 31, 2002) (hereinafter referred to the CY 2003 PFS final rule with comment period), we established a process for adding services to or deleting services from the list of Medicare telehealth services in accordance with section 1834(m)(4)(F)(ii) of the Act. This process provides the public with an ongoing opportunity to submit requests for adding services, which we then review. We have also routinely reviewed potential services for addition to the list of telehealth services and sought comment on any such proposed additions. Under this process, we assign any potential addition to the list of telehealth services to one of the following two categories:

• *Category 1:* Services that are similar to professional consultations, office visits, and office psychiatry services that are currently on the list of telehealth services. In reviewing these requests, we look for similarities between the requested and existing telehealth services for the roles of, and interactions among, the beneficiary, the physician (or other practitioner) at the distant site and, if necessary, the telepresenter, a practitioner who is present with the beneficiary in the originating site. We also look for similarities in the telecommunications system used to deliver the service; for example, the use of interactive audio and video equipment.

• *Category 2:* Services that are not similar to those on the current list of telehealth services. Our review of these requests includes an assessment of whether the service is accurately described by the corresponding code when furnished via telehealth and whether the use of a telecommunications system to furnish the service produces demonstrated clinical benefit to the patient. Submitted evidence should include both a description of relevant clinical studies that demonstrate the service furnished by telehealth to a Medicare beneficiary improves the diagnosis or treatment of an illness or injury or improves the functioning of a malformed body part, including dates and findings, and a list and copies of published peer reviewed articles relevant to the service when furnished via telehealth. Our evidentiary standard of clinical benefit does not include minor or incidental benefits.

Some examples of clinical benefit include the following:

• Ability to diagnose a medical condition in a patient population without access to clinically appropriate in-person diagnostic services.

• Treatment option for a patient population without access to clinically appropriate in-person treatment options.

• Reduced rate of complications.

• Decreased rate of subsequent diagnostic or therapeutic interventions (for example, due to reduced rate of recurrence of the disease process).

• Decreased number of future hospitalizations or physician visits.

• More rapid beneficial resolution of the disease process treatment.

• Decreased pain, bleeding, or other quantifiable symptom.

• Reduced recovery time.

The list of telehealth services, including the additions described later in this section, can be located on the CMS website at *https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/index.html.*

On an interim basis, we are adding the following services to the Medicare telehealth list on a Category 2 basis for the duration of this PHE for the COVID–19 pandemic, for telehealth services with dates of service beginning March 1, 2020 through the end of the declared PHE including any subsequent renewals. When we previously considered adding these services to the list of telehealth services, either through a public request or through our own internal review, we considered whether or not these services met the category 1 or category 2 criteria. In many cases we reviewed requests to add these services on a category 1 basis but did not receive or identify information that allowed us to review the services on a category 2 basis. While we do not believe the context of this PHE for the COVID–19 pandemic changes the assessment of these services as category 1, we have reassessed all of these services on a category 2 basis in the context of the widespread presence of COVID–19 in the community. Given the exposure risks for beneficiaries, the health care work force, and the community at large, in-person interaction between professionals and patients poses an immediate potential risk that would not have been present when we previously reviewed these services. This new risk creates a unique circumstance where health care professionals need to weigh the risks associated with disease exposure so they can bill Medicare for the service. For example, certain persons, especially older adults who are particularly vulnerable to this specific virus, those considered at risk because of underlying health conditions, and those known to be recently exposed or diagnosed, and therefore, likely to spread the virus to others, are often being directed by local public health officials to self-isolate as much as possible. At the same time, we note that the risks to medical professionals treating patients is high and we consider it likely that medical professionals will try to treat patients as effectively as possible without exposing themselves or their patients unnecessarily. In some cases, use of telecommunication technology could mitigate the exposure risk, and in such cases, there is a clear clinical benefit of using such technology in furnishing the service. In other words, patients who should not be seen by a professional in-person due to the exposure risk are highly likely to be without access to clinically appropriate treatment or diagnostic options unless they have access to services furnished through interactive communication technology. Therefore, in the context of the PHE for the COVID–19 pandemic, we believe all of the following services meet the category 2 criteria to be added to the list of telehealth services on the basis that there is a patient population that would otherwise not have access to clinically appropriate treatment. We note that, as with other services on the Medicare telehealth list, it may not be clinically appropriate or possible to use telecommunications technology to furnish these particular services to every person or in every circumstance. However, in the context of the PHE for the COVID–19 pandemic with specific regard to the exposure risks noted above, we recognize the clinical benefit of access to medically reasonable and necessary services furnished using telecommunications technology as opposed to the potential lack of access that could occur to mitigate the risk of disease exposure. In light of the PHE for the COVID–19 pandemic, the demand for physicians in areas heavily impacted by COVID–19 or under served by clinicians may intensify, resulting in a need for critical care services for patients with suspected or diagnosed COVID–19 and those who are in acute care settings due to other conditions. These practitioners may be working with nurses, consulting with other healthcare professionals, writing orders, looking at images, communicating with family members for patients with a number of acute conditions. The CPT codes describing E/M services reflect an assumption that the nature of the work involved in evaluation and management visits varies, in part, based on the setting of care and the patient's status. Consequently, there are separate sets of E/M codes for different settings of care, such as office/outpatient codes, nursing facility codes, or emergency department codes. We expect physicians and other practitioners to use the E/M code that best describes the nature of the care they are providing, regardless of the physical location or status of the patient. Under ordinary circumstances, we would expect the kind of E/M code reported to generally align with the physical location or status of the patient. In the context of the PHE, we recognize that the relationship among the setting of care, patient status, and kind of E/M code reported may depend on the needs of local communities and the capacity of local health care institutions. Consequently, we are reiterating that practitioners should report the E/M code that best describes the nature of the care they are providing.

We are adding the following codes to the existing list of telehealth services on a Category 2 basis for the PHE for the COVID–19 pandemic:

3. Emergency Department Visits: CPT Codes

• 99281 (*Emergency department visit for the evaluation and management of a patient, which requires these 3 key components: A problem focused history; A problem focused examination; and Straightforward medical decision making. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are self limited or minor.*)

• 99282 (*Emergency department visit for the evaluation and management of a patient, which requires these 3 key components: An expanded problem focused history; An expanded problem focused examination; and Medical decision making of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of low to moderate severity.*)

• 99283 (*Emergency department visit for the evaluation and management of a patient, which requires these 3 key components: An expanded problem focused history; An expanded problem focused examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate severity.*)

• 99284 (*Emergency department visit for the evaluation and management of a patient, which requires these 3 key components: A detailed history; A detailed examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of high severity, and require urgent evaluation by the physician, or other qualified health care professionals but do not pose an immediate significant threat to life or physiologic function.*)

• 99285 (*Emergency department visit for the evaluation and management of a patient, which requires these 3 key components within the constraints imposed by the urgency of the patient's clinical condition and/or mental status: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of high severity and pose an immediate significant threat to life or physiologic function.*)

4. Initial and Subsequent Observation, and Observation Discharge Day Management: CPT Codes

• 99217 (*Observation care discharge day management (This code is to be utilized to report all services provided to a patient on discharge from outpatient hospital ''observation status'' if the discharge is on other than the initial date of ''observation status.'' To report services to a patient designated as ''observation status'' or ''inpatient status'' and discharged on the same date, use the codes for Observation or Inpatient Care Services [including Admission and Discharge Services, 99234–99236 as appropriate.]*)

• 99218 (*Initial observation care, per day, for the evaluation and management of a patient which requires these 3 key components: A detailed or comprehensive history; A detailed or comprehensive examination; and Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission to outpatient hospital ''observation status'' are of low severity. Typically, 30 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

• 99219 (*Initial observation care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission to outpatient hospital ''observation status'' are of moderate severity. Typically, 50 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

• 99220 (*Initial observation care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission to outpatient hospital ''observation status'' are of high severity. Typically, 70 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

• 99224 (*Subsequent observation care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: Problem focused interval history; Problem focused examination; Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is stable, recovering, or improving. Typically, 15 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

• 99225 (*Subsequent observation care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is responding inadequately to therapy or has developed a minor complication. Typically, 25 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

• 99226 (*Subsequent observation care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A detailed interval history; A detailed examination; Medical*

decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is unstable or has developed a significant complication or a significant new problem. Typically, 35 minutes are spent at the bedside and on the patient's hospital floor or unit.)

- 99234 (*Observation or inpatient hospital care, for the evaluation and management of a patient including admission and discharge on the same date, which requires these 3 key components: A detailed or comprehensive history; A detailed or comprehensive examination; and Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually the presenting problem(s) requiring admission are of low severity. Typically, 40 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99235 (*Observation or inpatient hospital care, for the evaluation and management of a patient including admission and discharge on the same date, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually the presenting problem(s) requiring admission are of moderate severity. Typically, 50 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99236 (*Observation or inpatient hospital care, for the evaluation and management of a patient including admission and discharge on the same date, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually the presenting problem(s) requiring admission are of high severity. Typically, 55 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

5. Initial Hospital Care and Hospital Discharge Day Management: CPT Codes

- 99221 (*Initial hospital care, per day, for the evaluation and management of a patient, which requires these 3 key components: A detailed or comprehensive history; A detailed or comprehensive examination; and Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of low severity. Typically, 30 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99222 (*Initial hospital care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of moderate severity. Typically, 50 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99223 (*Initial hospital care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of high severity. Typically, 70 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99238 (*Hospital discharge day management; 30 minutes or less*)
- 99239 (*Hospital discharge day management; more than 30 minutes*)

6. Initial Nursing Facility Visits and Nursing Facility Discharge Day Management: CPT Codes

- 99304 (*Initial nursing facility care, per day, for the evaluation and management of a patient, which requires these 3 key components: A detailed or comprehensive history; A detailed or comprehensive examination; and Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of low severity. Typically, 25 minutes are spent at the bedside and on the patient's facility floor or unit.*)
- 99305 (*Initial nursing facility care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of moderate severity. Typically, 35 minutes are spent at the bedside and on the patient's facility floor or unit.*)
- 99306 (*Initial nursing facility care, per day, for the evaluation and management of a patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the problem(s) requiring admission are of high severity. Typically, 45 minutes are spent at the bedside and on the patient's facility floor or unit.*)
- 99315 (*Nursing facility discharge day management; 30 minutes or less*)
- 99316 (*Nursing facility discharge day management; more than 30 minutes*)

7. Critical Care Services: CPT Codes

- 99291 (*Critical care, evaluation and management of the critically ill or critically injured patient; first 30–74 minutes*)
- 99292 (*Critical care, evaluation and management of the critically ill or critically injured patient; each additional 30 minutes (List separately in addition to code for primary service)*)

8. Domiciliary, Rest Home, or Custodial Care Services: CPT Codes

• 99327 (*Domiciliary or rest home visit for the evaluation and management of a new patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of high severity. Typically, 60 minutes are spent with the patient and/or family or caregiver.*)

• 99328 (*Domiciliary or rest home visit for the evaluation and management of a new patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is unstable or has developed a significant new problem requiring immediate physician attention. Typically, 75 minutes are spent with the patient and/or family or caregiver.*)

• 99334 (*Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A problem focused interval history; A problem focused examination; Straightforward medical decision making. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are self-limited or minor. Typically, 15 minutes are spent with the patient and/or family or caregiver.*)

• 99335 (*Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of low to moderate severity. Typically, 25 minutes are spent with the patient and/or family or caregiver.*)

• 99336 (*Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A detailed interval history; A detailed examination; Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Typically, 40 minutes are spent with the patient and/or family or caregiver.*)

• 99337 (*Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A comprehensive interval history; A comprehensive examination; Medical decision making of moderate to high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. The patient may be unstable or may have developed a significant new problem requiring immediate physician attention. Typically, 60 minutes are spent with the patient and/or family or caregiver.*)

9. Home Visits: CPT Codes

• 99341 (*Home visit for the evaluation and management of a new patient, which requires these 3 key components: A problem focused history; A problem focused examination; and Straightforward medical decision making. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of low severity. Typically, 20 minutes are spent face-to-face with the patient and/or family.*)

• 99342 (*Home visit for the evaluation and management of a new patient, which requires these 3 key components: An expanded problem focused history; An expanded problem focused examination; and Medical decision making of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate severity. Typically, 30 minutes are spent face-to-face with the patient and/or family.*)

• 99343 (*Home visit for the evaluation and management of a new patient, which requires these 3 key components: A detailed history; A detailed examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Typically, 45 minutes are spent face-to-face with the patient and/or family.*)

• 99344 (*Home visit for the evaluation and management of a new patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of high severity. Typically, 60 minutes are spent face-to-face with the patient and/or family.*)

• 99345 (*Home visit for the evaluation and management of a new patient, which requires these 3 key components: A comprehensive history; A comprehensive examination; and Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is unstable or has developed a significant new problem requiring immediate physician attention. Typically, 75 minutes are spent face-to-face with the patient and/or family.*)

• 99347 (*Home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A problem focused interval history; A problem focused examination; Straightforward medical decision making. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided*

consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are self limited or minor. Typically, 15 minutes are spent face-to-face with the patient and/or family.)

• 99348 (*Home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of low to moderate severity. Typically, 25 minutes are spent face-to-face with the patient and/or family.*)

• 99349 (*Home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A detailed interval history; A detailed examination; Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are moderate to high severity. Typically, 40 minutes are spent face-to-face with the patient and/or family.*)

• 99350 (*Home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A comprehensive interval history; A comprehensive examination; Medical decision making of moderate to high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. The patient may be unstable or may have developed a significant new problem requiring immediate physician attention. Typically, 60 minutes are spent face-to-face with the patient and/or family.*)

10. Inpatient Neonatal and Pediatric Critical Care: CPT Codes

• 99468 (*Initial inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger*)

• 99469 (*Subsequent inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger*)

• 99471 (*Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age*)

• 99472 (*Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age*)

• 99473 (*Self-measured blood pressure using a device validated for clinical accuracy; patient education/training and device calibration*)

• 99475 (*Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age*)

• 99476 (*Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age*)

11. Initial and Continuing Intensive Care Services: CPT Codes

• 99477 (*Initial hospital care, per day, for the evaluation and management of the neonate, 28 days of age or younger, who requires intensive observation, frequent interventions, and other intensive care services*)

• 99478 (*Subsequent intensive care, per day, for the evaluation and management of the recovering very low birth weight infant (present body weight less than 1500 grams)*)

• 99479 (*Subsequent intensive care, per day, for the evaluation and management of the recovering low birth weight infant (present body weight of 1500–2500 grams)*)

• 99480 (*Subsequent intensive care, per day, for the evaluation and management of the recovering infant (present body weight of 2501–5000 grams)*)

12. Care Planning for Patients With Cognitive Impairment: CPT Code

• 99483 (*Assessment of and care planning for a patient with cognitive impairment, requiring an independent historian, in the office or other outpatient, home or domiciliary or rest home, with all of the following required elements: Cognition-focused evaluation including a pertinent history and examination; Medical decision making of moderate or high complexity; Functional assessment (eg, basic and instrumental activities of daily living), including decision-making capacity; Use of standardized instruments for staging of dementia (eg, functional assessment staging test [FAST], clinical dementia rating [CDR]); Medication reconciliation and review for high-risk medications; Evaluation for neuropsychiatric and behavioral symptoms, including depression, including use of standardized screening instrument(s); Evaluation of safety (eg, home), including motor vehicle operation; Identification of caregiver(s), caregiver knowledge, caregiver needs, social supports, and the willingness of caregiver to take on caregiving tasks; Development, updating or revision, or review of an Advance Care Plan; Creation of a written care plan, including initial plans to address any neuropsychiatric symptoms, neuro-cognitive symptoms, functional limitations, and referral to community resources as needed (eg, rehabilitation services, adult day programs, support groups) shared with the patient and/or caregiver with initial education and support. Typically, 50 minutes are spent face-to-face with the patient and/or family or caregiver.*)

13. Group Psychotherapy: CPT Code

• 90853 (*Group psychotherapy (other than of a multiple-family group)*)

14. End-Stage Renal Disease (ESRD) Services: CPT Codes

• 90952 (*End-stage renal disease (ESRD) related services monthly, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 2–3 face-to-face visits by a physician or other qualified health care professional per month*)

• 90953 (*End-stage renal disease (ESRD) related services monthly, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 1 face-to-face visit by a physician or other qualified health care professional per month*)

• 90959 (*End-stage renal disease (ESRD) related services monthly, for patients 12–19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 1 face-to-face visit by a physician or other qualified health care professional per month*)

• 90962 (*End-stage renal disease (ESRD) related services monthly, for patients 20 years of age and older; with 1 face-to-face visit by a physician or other qualified health care professional per month*)

15. Psychological and Neuropsychological Testing: CPT Codes

• 96130 (*Psychological testing evaluation services by physician or other qualified health care professional, including integration of patient data, interpretation of standardized test results and clinical data, clinical decision making, treatment planning and report, and interactive feedback to the patient, family member(s) or caregiver(s), when performed; first hour*)

• 96131 (*Psychological testing evaluation services by physician or other qualified health care professional, including integration of patient data, interpretation of standardized test results and clinical data, clinical decision making, treatment planning and report, and interactive feedback to the patient, family member(s) or caregiver(s), when performed; each additional hour (List separately in addition to code for primary procedure)*)

• 96132 (*Neuropsychological testing evaluation services by physician or other qualified health care professional, including integration of patient data, interpretation of standardized test results and clinical data, clinical decision making, treatment planning and report, and interactive feedback to the patient, family member(s) or caregiver(s), when performed; first hour*)

• 96133 (*Neuropsychological testing evaluation services by physician or other qualified health care professional, including integration of patient data, interpretation of standardized test results and clinical data, clinical decision making, treatment planning and report, and interactive feedback to the patient, family member(s) or caregiver(s), when performed; each additional hour (List separately in addition to code for primary procedure)*)

• 96136 (*Psychological or neuropsychological test administration and scoring by physician or other qualified health care professional, two or more tests, any method; first 30 minutes*)

• 96137 (*Psychological or neuropsychological test administration and scoring by physician or other qualified health care professional, two or more tests, any method; each additional 30 minutes (List separately in addition to code for primary procedure)*)

• 96138 (*Psychological or neuropsychological test administration and scoring by technician, two or more tests, any method; first 30 minutes*)

• 96139 (*Psychological or neuropsychological test administration and scoring by technician, two or more tests, any method; each additional 30 minutes (List separately in addition to code for primary procedure)*)

16. Therapy Services

We have received a number of requests, most recently for CY 2018 PFS rulemaking, that we add therapy services to the Medicare telehealth list. In the CY 2018 PFS final rule, we noted that section 1834(m)(4)(E) of the Act specifies the types of practitioners who may furnish and bill for Medicare telehealth services as those practitioners under section 1842(b)(18)(C) of the Act. Physical therapists, occupational therapists and speech-language pathologists are not among the practitioners identified in section 1842(b)(18)(C) of the Act. We stated in the Medicare Program; Revisions to Payment Policies under the Physician Fee Schedule and Other Revisions to Part B for CY 2017; Medicare Advantage Bid Pricing Data Release; Medicare Advantage and Part D Medical Loss Ratio Data Release; Medicare Advantage Provider Network Requirements; Expansion of Medicare Diabetes Prevention Program Model; Medicare Shared Savings Program Requirements'' final rule (81 FR 80198, November 15, 2016) (hereinafter referred to as the CY 2017 PFS final rule) that because these services are predominantly furnished by physical therapists, occupational therapists and speech-language pathologists, we did not believe it would be appropriate to add them to the list of telehealth services at this time. In a subsequent request to consider adding these services for 2018, the original requester suggested that we might propose these services to be added to the list so that they can be furnished via telehealth when furnished by eligible distant site practitioners. Since the majority of the codes are furnished over 90 percent of the time by therapy professionals, who are not included on the statutory list of eligible distant site practitioners, we stated that we believed that adding therapy services to the telehealth list could result in confusion about who is authorized to furnish and bill for these services when furnished via telehealth.

In light of the PHE for the COVID–19 pandemic, we believe that the risks associated with confusion are outweighed by the potential benefits for circumstances when these services might be furnished via telehealth by eligible distant site practitioners. We believe this is sufficient clinical evidence to support the addition of therapy services to the Medicare telehealth list on a category 2 basis. However, we note that the statutory definition of distant site practitioners under section 1834(m) of the Act does not include physical therapists, occupational therapists, or speech-language pathologists, meaning that it does not provide for payment for these services as Medicare telehealth services when furnished by physical therapists, occupational therapists, or speech-language pathologists.

CPT codes:

• 97161 (*Physical therapy evaluation: low complexity, requiring these components: A history with no personal factors and/or comorbidities that impact the plan of care; An examination of body system(s) using standardized tests and measures addressing 1–2 elements from any of the following: body structures and functions, activity limitations, and/or participation restrictions; A clinical presentation with stable and/or uncomplicated characteristics; and Clinical decision making of low complexity using standardized patient assessment instrument and/or measurable assessment of functional outcome. Typically, 20 minutes are spent face-to-face with the patient and/or family.*)

• 97162 (*Physical therapy evaluation: moderate complexity, requiring these components: A history of present problem with 1–2 personal factors and/or comorbidities that impact the plan of care; An examination of body systems using standardized tests and measures in addressing a total of 3 or more elements from any of the following: body structures and functions, activity limitations, and/or participation restrictions; An evolving clinical presentation with changing characteristics; and Clinical decision making of moderate complexity using standardized patient assessment instrument and/or measurable assessment of functional outcome. Typically, 30 minutes are spent face-to-face with the patient and/or family.*)

• 97163 (*Physical therapy evaluation: high complexity, requiring these components: A history of present problem with 3 or more personal factors and/or comorbidities that impact the plan of care; An examination of body systems using standardized tests and measures addressing a total of 4 or more elements from any of the following: body structures and functions, activity limitations, and/or participation restrictions; A clinical presentation with unstable and unpredictable characteristics; and Clinical decision making of high complexity using standardized patient assessment instrument and/or measurable assessment of functional outcome. Typically, 45 minutes are spent face-to-face with the patient and/or family.*)

• 97164 (*Re-evaluation of physical therapy established plan of care,*

requiring these components: An examination including a review of history and use of standardized tests and measures is required; and Revised plan of care using a standardized patient assessment instrument and/or measurable assessment of functional outcome. Typically, 20 minutes are spent face-to-face with the patient and/or family.)

- 97165 (*Occupational therapy evaluation, low complexity, requiring these components: An occupational profile and medical and therapy history, which includes a brief history including review of medical and/or therapy records relating to the presenting problem; An assessment(s) that identifies 1–3 performance deficits (ie, relating to physical, cognitive, or psychosocial skills) that result in activity limitations and/or participation restrictions; and Clinical decision making of low complexity, which includes an analysis of the occupational profile, analysis of data from problem-focused assessment(s), and consideration of a limited number of treatment options. Patient presents with no comorbidities that affect occupational performance. Modification of tasks or assistance (eg, physical or verbal) with assessment(s) is not necessary to enable completion of evaluation component. Typically, 30 minutes are spent face-to-face with the patient and/or family.*)
- 97166 (*Occupational therapy evaluation, moderate complexity, requiring these components: An occupational profile and medical and therapy history, which includes an expanded review of medical and/or therapy records and additional review of physical, cognitive, or psychosocial history related to current functional performance; An assessment(s) that identifies 3–5 performance deficits (ie, relating to physical, cognitive, or psychosocial skills) that result in activity limitations and/or participation restrictions; and Clinical decision making of moderate analytic complexity, which includes an analysis of the occupational profile, analysis of data from detailed assessment(s), and consideration of several treatment options. Patient may present with comorbidities that affect occupational performance. Minimal to moderate modification of tasks or assistance (eg, physical or verbal) with assessment(s) is necessary to enable patient to complete evaluation component. Typically, 45 minutes are spent face-to-face with the patient and/or family.*)
- 97167 (*Occupational therapy evaluation, high complexity, requiring these components: An occupational profile and medical and therapy history, which includes review of medical and/or therapy records and extensive additional review of physical, cognitive, or psychosocial history related to current functional performance; An assessment(s) that identifies 5 or more performance deficits (ie, relating to physical, cognitive, or psychosocial skills) that result in activity limitations and/or participation restrictions; and Clinical decision making of high analytic complexity, which includes an analysis of the patient profile, analysis of data from comprehensive assessment(s), and consideration of multiple treatment options. Patient presents with comorbidities that affect occupational performance. Significant modification of tasks or assistance (eg, physical or verbal) with assessment(s) is necessary to enable patient to complete evaluation component. Typically, 60 minutes are spent face-to-face with the patient and/or family.*)
- 97168 (*Re-evaluation of occupational therapy established plan of care, requiring these components: An assessment of changes in patient functional or medical status with revised plan of care; An update to the initial occupational profile to reflect changes in condition or environment that affect future interventions and/or goals; and A revised plan of care. A formal reevaluation is performed when there is a documented change in functional status or a significant change to the plan of care is required. Typically, 30 minutes are spent face-to-face with the patient and/or family.*)
- 97110 (*Therapeutic procedure, 1 or more areas, each 15 minutes; therapeutic exercises to develop strength and endurance, range of motion and flexibility*)
- 97112 (*Therapeutic procedure, 1 or more areas, each 15 minutes; neuromuscular reeducation of movement, balance, coordination, kinesthetic sense, posture, and/or proprioception for sitting and/or standing activities*)
- 97116 (*Therapeutic procedure, 1 or more areas, each 15 minutes; gait training (includes stair climbing*)
- 97535 (*Self-care/home management training (eg, activities of daily living (ADL) and compensatory training, meal preparation, safety procedures, and instructions in use of assistive technology devices/adaptive equipment) direct one-on-one contact, each 15 minutes*)
- 97750 (*Physical performance test or measurement (eg, musculoskeletal, functional capacity), with written report, each 15 minutes*)
- 97755 (*Assistive technology assessment (e.g., to restore, augment or compensate for existing function, optimize functional tasks and/or maximize environmental accessibility), direct one-on-one contact, with written report, each 15 minutes*)
- 97760 (*Orthotic(s) management and training (including assessment and fitting when not otherwise reported), upper extremity(ies), lower extremity(ies) and/or trunk, initial orthotic(s) encounter, each 15 minutes*)
- 97761 (*Prosthetic(s) training, upper and/or lower extremity(ies), initial prosthetic(s) encounter, each 15 minutes*)
- 92521 (*Evaluation of speech fluency (eg, stuttering, cluttering*)
- 92522 (*Evaluation of speech sound production (eg, articulation, phonological process, apraxia, dysarthria*)
- 92523 (*Evaluation of speech sound production (eg, articulation, phonological process, apraxia, dysarthria); with evaluation of language comprehension and expression (eg, receptive and expressive language*)
- 92524 (*Behavioral and qualitative analysis of voice and resonance*)
- 92507 (*Treatment of speech, language, voice, communication, and/or auditory processing disorder; individual*)

17. Radiation Treatment Management Services

The code used to report radiation treatment management services includes several components, including reviewing the radiation dose and various treatment parameters, as well as weekly face-to-face visits with the patient to assess the patient's response to treatment and manage any symptoms the patient may be experiencing. We believe that in the context of the PHE for the COVID–19 pandemic, the weekly face-to-face visit component of this service could be conducted via telehealth when the billing practitioner weighs the exposure risks against the value of in-person assessment on a case-by-case basis. Therefore, we are adding CPT code 77427 *(Radiation treatment management, 5 treatments)* to the telehealth list so that the required face-to-face visit can be furnished via telehealth.

We believe that allowing the services listed above to be furnished as Medicare telehealth services will significantly increase the ability of Medicare physicians and practitioners to work without increasing exposure risk to themselves, their patients, and the broader community. Given widespread concerns regarding the health and safety

of our beneficiaries and health care providers during the PHE for the COVID–19 pandemic, we seek input on whether there are other services where the use of telecommunications technology could mitigate the exposure risk, and where there is clear clinical benefit to using such technology in furnishing the service.

We note that the inclusion of this code on the telehealth list to ensure that the included visits can be furnished via telehealth is similar to the inclusion of the transitional care management codes on the telehealth list. In both of these cases, the non-face-to-face portions of the service are not considered telehealth services that are subject to any of the payment provisions specific to telehealth services under section 1834(m) of the Act.

- CPT code 77427 (*Radiation treatment management, 5 treatments*)

As we noted above, we have previously considered adding many of these services to the Medicare telehealth list in prior rulemaking and declined, in many cases citing concerns over patient acuity and the feasibility of fulfilling all of the required elements of a service via communication technology. However, in the context of the PHE for the COVID–19 pandemic with specific regard to the exposure risks noted above, we recognize the clinical benefit of access to medically reasonable and necessary services furnished using telecommunications technology as opposed to the potential lack of access that could occur to mitigate the risk of disease exposure. We are also interested in learning of any potential negative consequences of adding these CPT codes to the list of telehealth services on an interim basis.

B. Frequency Limitations on Subsequent Care Services in Inpatient and Nursing Facility Settings, and Critical Care Consultations and Required ''Hands-On'' Visits for ESRD Monthly Capitation Payments

In adding some services to the Medicare telehealth list, we have done so while including certain restrictions on how frequently a service may be furnished via Medicare telehealth to ensure that the services met the category 1 or 2 criteria. For example, in the CY 2011 PFS final rule (75 FR 73317 through 73318), we added the subsequent hospital care services to the Medicare telehealth list. We stated that, because of our concerns regarding the potential acuity of hospital inpatients, we would limit the provision of subsequent hospital care services through telehealth to once every 3 days. Similarly, when we added subsequent nursing facility visits to the Medicare telehealth list, we stated our concerns regarding the potential acuity and complexity of nursing facility (NF) patients, we would limit the provision of subsequent nursing facility care services furnished through telehealth to once every 30 days.

Given our assessment that under the PHE for the COVID–19 pandemic, there is a patient population that would otherwise not have access to clinically appropriate in-person treatment, we do not believe these frequency limitations are appropriate or necessary. In our prior analysis, for example, we were concerned that patients might not receive the necessary in-person services for nursing facility or hospital inpatient services. Since in the context of this PHE, telehealth visits mitigate exposure risk, fewer in-person visits may reflect the most appropriate care, depending on the needs of individual patients. Consequently, on an interim basis, we are removing the frequency restrictions for each of the following listed codes for subsequent inpatient visits and subsequent NF visits furnished via Medicare telehealth for the duration of the PHE for the COVID–19 pandemic. Similarly, we note that we previously limited critical care consultations through telehealth to only once per day, given the patient acuity involved in critical care. However, we also understand that critical care patients have significant exposure risks such that more frequent services furnished via telehealth may reflect the best available care in the context and for the duration of the PHE for the COVID–19 pandemic. For this reason, we are also removing the restriction that critical care consultation codes may only be furnished to a Medicare beneficiary once per day. These restrictions were established through rulemaking and implemented through systems edits.

1. Subsequent Inpatient Visits: CPT Codes

- 99231 (*Subsequent hospital care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A problem focused interval history; A problem focused examination; Medical decision making that is straightforward or of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is stable, recovering or improving. Typically, 15 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99232 (*Subsequent hospital care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is responding inadequately to therapy or has developed a minor complication. Typically, 25 minutes are spent at the bedside and on the patient's hospital floor or unit.*)
- 99233 (*Subsequent hospital care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A detailed interval history; A detailed examination; Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is unstable or has developed a significant complication or a significant new problem. Typically, 35 minutes are spent at the bedside and on the patient's hospital floor or unit.*)

2. Subsequent Nursing Facility Visits: CPT Codes

- 99307 (*Subsequent nursing facility care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A problem focused interval history; A problem focused examination; Straightforward medical decision making. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is stable, recovering, or improving. Typically, 10 minutes are spent at the bedside and on the patient's facility floor or unit.*)
- 99308 (*Subsequent nursing facility care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of low complexity.*

Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient is responding inadequately to therapy or has developed a minor complication. Typically, 15 minutes are spent at the bedside and on the patient's facility floor or unit.)

- 99309 (*Subsequent nursing facility care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A detailed interval history; A detailed examination; Medical decision making of moderate complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the patient has developed a significant complication or a significant new problem. Typically, 25 minutes are spent at the bedside and on the patient's facility floor or unit.*)
- 99310 (*Subsequent nursing facility care, per day, for the evaluation and management of a patient, which requires at least 2 of these 3 key components: A comprehensive interval history; A comprehensive examination; Medical decision making of high complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. The patient may be unstable or may have developed a significant new problem requiring immediate physician attention. Typically, 35 minutes are spent at the bedside and on the patient's facility floor or unit.*)

3. Critical Care Consultation Services: HCPCS Codes

- G0508 (*Telehealth consultation, critical care, initial, physicians typically spend 60 minutes communicating with the patient and providers via telehealth.*)
- G0509 (*Telehealth consultation, critical care, subsequent, physicians typically spend 50 minutes communicating with the patient and providers via telehealth.*)

We are seeking information on how these services are furnished via telecommunications technology to ensure that patients are safe and receiving adequate care.

4. Required ''Hands-On'' Visits for ESRD Monthly Capitation Payments

In the ''Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2005'' final rule with comment period (69 FR 66236, November 15, 2004) (hereinafter referred to the CY 2005 PFS final rule with comment period), we added ESRD related services to the Medicare telehealth list; however, we specified that the required clinical examination of the vascular access site must be furnished face-to-face ''hands on'' (without the use of an interactive telecommunications system) by physician, clinical nurse specialist (CNS), nurse practitioner (NP), or physician assistant (PA) (69 FR 66278). On an interim basis in light of the PHE for the COVID–19 pandemic, we are instead permitting the required clinical examination to be furnished as a Medicare telehealth service during the PHE for the COVID–19 pandemic. We note that sections 1881(b)(3) and 1834(m) of the Act allow an individual determined to have ESRD receiving home dialysis to choose to receive certain monthly ESRD-related clinical assessments via telehealth on or after January 1, 2019. The Bipartisan Budget Act of 2018 (Pub. L. 115–123, enacted on February 9, 2018) (BBA of 2018) amended section 1881(b)(3)(B) of the Act to require that such an individual must receive a face-to-face visit, without the use of telehealth, at least monthly in the case of the initial 3 months of home dialysis and at least once every 3 consecutive months after the initial 3 months. Due to the conditions presented by the PHE, we are also exercising enforcement discretion on an interim basis to relax enforcement in connection with the requirements under section 1881(b)(3)(B) of the Act that certain visits be furnished without the use of telehealth for services furnished during the PHE. Specifically, CMS will not conduct review to consider whether those visits were conducted face-to-face, without the use of telehealth. The following CPT codes, when furnished via Medicare telehealth, are impacted by these policies:

- 90951 (*End-stage renal disease (ESRD) related services monthly, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 4 or more face-to-face visits by a physician or other qualified health care professional per month*)
- 90952 (*End-stage renal disease (ESRD) related services monthly, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 2–3 face-to-face visits by a physician or other qualified health care professional per month*)
- 90953 (*End-stage renal disease (ESRD) related services monthly, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 1 face-to-face visit by a physician or other qualified health care professional per month*)
- 90954 (*End-stage renal disease (ESRD) related services monthly, for patients 2–11 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 4 or more face-to-face visits by a physician or other qualified health care professional per month*)
- 90955 (*End-stage renal disease (ESRD) related services monthly, for patients 2–11 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 2–3 face-to-face visits by a physician or other qualified health care professional per month*)
- 90957 (*End-stage renal disease (ESRD) related services monthly, for patients 12–19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 4 or more face-to-face visits by a physician or other qualified health care professional per month*)
- 90958 (*End-stage renal disease (ESRD) related services monthly, for patients 12–19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 2–3 face-to-face visits by a physician or other qualified health care professional per month*)
- 90959 (*End-stage renal disease (ESRD) related services monthly, for patients 12–19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents; with 1 face-to-face visit by a physician or other qualified health care professional per month*)
- 90960 (*End-stage renal disease (ESRD) related services monthly, for patients 20 years of age and older; with 4 or more face-to-face visits by a physician or other qualified health care professional per month*)
- 90961 (*End-stage renal disease (ESRD) related services monthly, for patients 20 years of age and older; with*

2–3 face-to-face visits by a physician or other qualified health care professional per month)

• 90962 (*End-stage renal disease (ESRD) related services monthly, for patients 20 years of age and older; with 1 face-to-face visit by a physician or other qualified health care professional per month*)

• 90963 (*End-stage renal disease (ESRD) related services for home dialysis per full month, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents*)

• 90964 (*End-stage renal disease (ESRD) related services for home dialysis per full month, for patients 2–11 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents*)

• 90965 (*End-stage renal disease (ESRD) related services for home dialysis per full month, for patients 12–19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents*)

• 90966 (*End-stage renal disease (ESRD) related services for home dialysis per full month, for patients 20 years of age and older*)

• 90967 (*End-stage renal disease (ESRD) related services for dialysis less than a full month of service, per day; for patients younger than 2 years of age*)

• 90968 (*End-stage renal disease (ESRD) related services for dialysis less than a full month of service, per day; for patients 2–11 years of age*)

• 90969 (*End-stage renal disease (ESRD) related services for dialysis less than a full month of service, per day; for patients 12–19 years of age*)

• 90970 (*End-stage renal disease (ESRD) related services for dialysis less than a full month of service, per day; for patients 20 years of age and older*)

C. Telehealth Modalities and Cost-Sharing

1. Clarifying Telehealth Technology Requirements

Our regulation at § 410.78(a)(3) states that telephones, facsimile machines, and electronic mail systems do not meet the definition of an interactive telecommunications systems for purposes of Medicare telehealth services. As we interpret it, this regulation does not apply to mobile computing devices that include audio and video real-time interactive capabilities, even though such devices are now referred to colloquially as ''phones'' since they can also be used for audio-only telecommunications. In light of the PHE for the COVID–19 pandemic, we believe it is important to avoid the potential perception that this language might prohibit use of any device that could otherwise meet the interactive requirements for Medicare telehealth, especially given that leveraging use of such readily available technology may be of critical importance.

Therefore, we are revising § 410.78(a)(3) to add an exception to this language on an interim basis for the duration of the PHE for the COVID–19 pandemic providing that for the duration of the public health emergency as defined in § 400.200, ''interactive telecommunications system'' means multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site physician or practitioner.

In addition, the HHS Office for Civil Rights (OCR) is exercising enforcement discretion and waiving penalties for HIPAA [4] violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the PHE for the COVID–19 pandemic. For more information, see *https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html.* While OCR is not imposing penalties for noncompliance with the regulatory requirements under HIPAA against covered providers in connection with the good faith provision of telehealth during the PHE for the COVID–19 pandemic, HHS, OIG, and DOJ continue to actively monitor for any healthcare fraud and abuse, including potential Medicare coronavirus scams.

2. Beneficiary Cost-Sharing

In response to the unique circumstances resulting from the outbreak of COVID–19 and the Secretary's January 31, 2020 determination under section 319 of the Public Health Service Act that a PHE exists and has existed since January 27, 2020 (COVID–19 Declaration), the Office of Inspector General (OIG) issued a Policy Statement [5] to notify physicians and other practitioners that they will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services furnished consistent with the then applicable coverage and payment rules. OIG's Policy Statement is not limited to the services governed by § 410.78 but applies to a broad category of non-face-to-face services furnished through various modalities, including telehealth visits, virtual check-in services, e-visits, monthly remote care management, and monthly remote patient monitoring. The Policy Statement applies to a physician or other practitioner billing for services provided remotely through information or communication technology or a hospital or other eligible individual or entity billing on behalf of the physician or practitioner for such services when the physician or other practitioner has reassigned his or her right to receive payments to such individual or entity.

D. Communication Technology-Based Services (CTBS)

In the ''Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2019; Medicare Shared Savings Program Requirements; Quality Payment Program; Medicaid Promoting Interoperability Program; Quality Payment Program-Extreme and Uncontrollable Circumstance Policy for the 2019 MIPS Payment Year; Provisions From the Medicare Shared Savings Program-Accountable Care Organizations-Pathways to Success; and Expanding the Use of Telehealth Services for the Treatment of Opioid Use Disorder Under the Substance Use-Disorder Prevention That Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act'' final rule (83 FR 59452 through 60303) (hereinafter referred to as the CY 2019 PFS final rule), we noted that under current PFS payment rules, Medicare routinely pays for many kinds of services that are furnished via telecommunications technology (83 FR 59482), but are not considered Medicare telehealth services. These communication technology-based services (CTBS) include, for example, certain kinds of remote patient monitoring (either as separate services or as parts of bundled services), and interpretations of diagnostic tests when furnished remotely. These services are different than the kinds of services specified in section 1834(m) of the Act, in that they are not the kind of services that are ordinarily furnished in person but are routinely furnished using a telecommunications system.

In the CY 2019 PFS final rule, we finalized separate payment for a number

[4] Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted August 21, 1996).

[5] *https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf.*

of services that could be furnished via telecommunications technology, but that are not Medicare telehealth services. Specifically, we finalized Healthcare Common Procedure Coding System (HCPCS) code G2010 (*Remote evaluation of recorded video and/or images submitted by an established patient (e.g., store and forward), including interpretation with follow-up with the patient within 24 business hours, not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment*), and HCPCS code G2012 (*Brief communication technology-based service, e.g. virtual check-in, by a physician or other qualified health care professional who can report evaluation and management services, provided to an established patient, not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment; 5–10 minutes of medical discussion*). We finalized these codes as part of the set of codes that is only reportable by the physicians and practitioners who can furnish evaluation and management (E/M) services. We stated that we believed this was appropriate since the service describes a check-in directly with the billing practitioner to assess whether an office visit is needed. However, we did note that similar check-ins provided by nurses and other clinical staff can be important aspects of coordinated patient care (83 FR 59486).

We also finalized that these services be limited to established patients, and that beneficiary consent must be documented in the patient's medical record for each service (83 FR 59487). This latter provision was amended in the CY PFS 2020 final rule to allow for a single beneficiary consent to be obtained annually (84 FR 62699). These requirements also apply to monthly care management and remote patient monitoring services.

In the context of the PHE for the COVID–19 pandemic, when brief communications with practitioners and other non-face-to-face services might mitigate the need for an in-person visit that could represent an exposure risk for vulnerable patients, we believe that these services should be available to as large a population of Medicare beneficiaries as possible. In some cases, use of telecommunication technology could mitigate the exposure risk, and in such cases, the clinical benefit of using technology to furnish the service is self-apparent. This would be especially true should a significant increase in the number of people or health care professionals needing treatment or isolation occur in a way that would limit access to brief communications with established providers. Therefore, on an interim basis, during the PHE for the COVID–19 pandemic, we are finalizing that these services, which may only be reported if they do not result in a visit, including a telehealth visit, can be furnished to both new and established patients. We are also making clear that the consent to receive these services can be documented by auxiliary staff under general supervision. While we continue to believe that beneficiary consent is necessary so that the beneficiary is notified of any applicable cost sharing, we do not believe that the timing or manner in which beneficiary consent is acquired should interfere with the provision of one of these services. Therefore, we are finalizing on an interim basis during the PHE for the COVID–19 pandemic that, while consent to receive these services must be obtained annually, it may be obtained at the same time that a service is furnished. We are also re-emphasizing that this consent may be obtained by auxiliary staff under general supervision, as well as by the billing practitioner. We are retaining the requirement that in instances when the brief communication technology-based service originates from a related E/M service (including one furnished as a telehealth service) provided within the previous 7 days by the same physician or other qualified health care professional, that this service would be considered bundled into that previous E/M service and would not be separately billable.

In the ''Medicare Program; CY 2020 Revisions to Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; Medicaid Promoting Interoperability Program Requirements for Eligible Professionals; Establishment of an Ambulance Data Collection System; Updates to the Quality Payment Program; Medicare Enrollment of Opioid Treatment Programs and Enhancements to Provider Enrollment Regulations Concerning Improper Prescribing and Patient Harm; and Amendments to Physician Self-Referral Law Advisory Opinion Regulations Final Rule'' (84 FR 62568, November 15, 2019) (hereinafter referred to as the CY 2020 PFS final rule), we finalized separate payment for CPT codes 99421 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 5–10 minutes*), 99422 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 11–20 minutes*), and 99423 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 21 or more minutes*). We also finalized separate payment for HCPCS codes G2061 (*Qualified nonphysician healthcare professional online assessment and management, for an established patient, for up to seven days, cumulative time during the 7 days; 5–10 minutes*), G2062 (*Qualified nonphysician healthcare professional online assessment and management service, for an established patient, for up to seven days, cumulative time during the 7 days; 11–20 minutes*), and G2063 (*Qualified nonphysician qualified healthcare professional assessment and management service, for an established patient, for up to seven days, cumulative time during the 7 days; 21 or more minutes*) (84 FR 62796).

In the context of the PHE for the COVID–19 pandemic, where communications with practitioners might mitigate the need for an in-person visit that could represent an exposure risk for vulnerable patients, we do not believe the limitation of these services to established patients is warranted. While some of the code descriptors refer to ''established patient,'' during the PHE, we are exercising enforcement discretion on an interim basis to relax enforcement of this aspect of the code descriptors. Specifically, we will not conduct review to consider whether those services were furnished to established patients.

Additionally, in the CY 2020 PFS final rule (84 FR 62796), we stated that HCPCS codes G2061–G2063, specific to practitioners who do not report E/M codes, may describe services outside the scope of current Medicare benefit categories and as such, may not be eligible for Medicare payment. We have received a number of questions regarding which benefit categories HCPCS codes G2061–G2063 fall under. In response to these requests, we are clarifying here that there are several types of practitioners who could bill for these service. For example, the services described by these codes could be furnished as licensed clinical social worker services, clinical psychologist services, physical therapist services, occupational therapist services, or speech language pathologist services, so practitioners that report services in

those benefit categories could also report these online assessment and management services.

On an interim basis, during the PHE for the COVID–19 pandemic, we are also broadening the availability of HCPCS codes G2010 and G2012 that describe remote evaluation of patient images/video and virtual check-ins. We recognize that in the context of the PHE for the COVID–19 pandemic, practitioners such as licensed clinical social workers, clinical psychologists, physical therapists, occupational therapists, and speech-language pathologists might also utilize virtual check-ins and remote evaluations instead of other, in-person services within the relevant Medicare benefit to facilitate the best available appropriate care while mitigating exposure risks. We note that this is not an exhaustive list and we are seeking input on other kinds of practitioners who might be furnishing these kinds of services as part of the Medicare services they furnish in the context of the PHE for the COVID–19 pandemic.

Further, to facilitate billing of the CTBS services by therapists for the reasons described above, we are designating HCPCS codes G2010, G2012, G2061, G2062, or G2063 as CTBS ''sometimes therapy'' services that would require the private practice occupational therapist, physical therapist, and speech-language pathologist to include the corresponding GO, GP, or GN therapy modifier on claims for these services. CTBS therapy services include those furnished to a new or established patients that the occupational therapist, physical therapist, and speech-language pathologist practitioner is currently treating under a plan of care.

E. Direct Supervision by Interactive Telecommunications Technology

Many services paid under the PFS can be paid when provided under a level of physician or nonphysician practitioner (NPP) supervision rather than personal performance. In many cases, the supervision requirements in physician office settings necessitate the presence of the physician or NPP in a particular location, usually in the same location as the beneficiary when the service is provided. For example, as described at § 410.26, services incident to a physicians' service usually require the direct supervision of a physician. As currently defined in § 410.32(b)(3)(ii), direct supervision means that the physician must be present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed.

Given the circumstances of the PHE for the COVID–19 pandemic, we recognize that in some cases, the physical proximity of the physician or practitioner might present additional exposure risks, especially for high risk patients isolated for their own protection or cases where the practitioner has been exposed to the virus but could otherwise safely supervise from another location using telecommunications technology. In these cases, we believe that the current requirement would necessarily limit access to procedures and tests that could be appropriately supervised by a physician isolated for purposes of limiting exposure to COVID–19. For example, we consider the possibility that patients routinely receiving medically necessary physician-administered drugs at the office of a physician may lose access to the provision of that drug should the physician who regularly supervises the provision of that drug be isolated for purposes of minimizing exposure risks. Likewise, should that same patient need to be isolated for purposes of exposure risk based on presumed or confirmed COVID–19 infection, administering such a drug in the patient's home would require the billing professional to accompany the clinical staff to the patient's home, presumably with the necessary personal protective equipment (PPE) available to both the physician and the clinical staff.

In some cases, depending upon the unique circumstances of individual patients and billing physicians, we believe that telecommunications technology could be used in a manner that would facilitate the physician's immediate availability to furnish assistance and direction without necessarily requiring the physician's physical presence in the location where the service is being furnished, such as the office suite or the patient's home. For example, we believe that use of real-time, audio and video telecommunications technology allows for a billing practitioner to observe the patient interacting with or responding to the in-person clinical staff through virtual means, and thus, their availability to furnish assistance and direction could be met without requiring the physician's physical presence in that location. We note that to be covered under Part B, drugs furnished ''incident to'' are typically injectable drugs that are bought by the physician, in ordinary circumstances are administered in the physician's office, and then billed by the physician to the Medicare Administrative Contractor (MAC). By definition, ''incident to a physician's professional service'' requires the item or service to be billed by the physician. We also note that the supervision requirements that apply to both services incident to a physicians' service and diagnostic tests do not necessarily reflect the appropriate level of supervision for particular patients, services, and health care workers. Instead, we view these levels as the minimum possible requirement for provision of the service for purposes of Medicare payment. Likewise, even in the context of the PHE for the COVID–19 pandemic and the inherent exposure risks for Medicare beneficiaries, physicians and other health care providers, we believe that in many cases furnishing services without the physical presence of the physician in the same location would not be appropriate. However, we recognize that in some cases, technology would allow appropriate supervision without the physical presence of a physician. In the context of the PHE for the COVID–19 pandemic, given the risks of exposure, the immediate potential risk to needed medical care, the increased demand for health care professionals in the context of the PHE for the COVID–19 pandemic, and the widespread use of telecommunications technology, we believe that individual practitioners are in the best position to make decisions based on their clinical judgement in particular circumstances. Consequently, we are revising the definition of direct supervision to allow, for the duration of the PHE for the COVID–19 pandemic, direct supervision to be provided using real-time interactive audio and video technology. We are seeking information from commenters as to whether there should be any guardrails and what kind of risk might this policy introduce for beneficiaries while reducing risk of COVID–19 spread. We note that this change is limited to only the manner in which the supervision requirement can be met, and does not change the underlying payment or coverage policies related to the scope of Medicare benefits, including Part B drugs. We also note that any and all applicable rules regarding safe transportation and proper waste disposal continue to apply.

We note that in specifying that direct supervision includes virtual presence through audio/video real-time communications technology during the PHE for the COVID–19 pandemic, this can include instances where the physician enters into a contractual arrangement for auxiliary personnel as

defined in § 410.26(a)(1), to leverage additional staff and technology necessary to provide care that would ordinarily be provided incident to a physicians' service (including services that are allowed to be performed via telehealth). For example, physicians may enter into contractual arrangements with a home health agency (defined under section 1861(o) of the Act), a qualified infusion therapy supplier (defined under section 1861(iii)(3)(D) of the Act), or entities that furnish ambulance services in order to utilize their nurses or other clinical staff as auxiliary personnel under leased employment (§ 410.26(a)(5)). In such instances, the provider/supplier would seek payment for any services they provided from the billing practitioner and would not submit claims to Medicare for such services. For telehealth services that need to be personally provided by a physician, such as an E/M visit, the physician would need to personally perform the E/M visit and report that service as a Medicare telehealth service. However, we acknowledge that there may be instances where the physician may want to use auxiliary personnel to be present in the home with the patient during the telehealth service, though this is not required for telehealth services under section 1834(m) of the Act. Other services, including both face-to-face and non-face-to-face services, could be provided incident to a physicians' service by a nurse or other auxiliary personnel, as long as the billing practitioner is providing appropriate supervision through audio/video real-time communications technology (or in person), when needed. We would not expect that services furnished at a patient's home incident to a physician service would usually occur during the same period as a home health episode of care, and we will be monitoring claims to ensure that services are not being inappropriately unbundled from payments under the home health PPS.

For the reasons discussed above, on an interim basis for the duration of the PHE for the COVID–19 pandemic, we are altering the definition of direct supervision at § 410.32(b)(3)(ii), to state that necessary presence of the physician for direct supervision includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider. We are revising § 410.32(b)(3)(ii) to include, during a PHE, as defined in § 400.200 of this chapter, the presence of the physician includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider.

1. Supervision Changes for Certain Hospital and CAH Diagnostic and Therapeutic Services

For all of the same reasons described above, we are adopting similar changes in the regulations at § 410.28(e)(1) with respect to the supervision of diagnostic services furnished directly or under arrangement in the hospital or in an on-campus or off-campus outpatient department of the hospital, as defined in § 413.65. We note that under current Medicare rules, most therapeutic services in the hospital require only general supervision and the supervision requirements for diagnostic services generally conform to the service-level supervision levels required for payment under the PFS. Because we have every reason to believe that potential exposure risks and limits on the availability of medical professionals could equally apply to hospital services, we are amending the definition of direct supervision for hospital services for the duration of the PHE for the COVID–19 pandemic so it continues to conform with the applicable definitions for services paid under the PFS. As stated above, we believe this change is necessary due to the circumstances of the PHE for the COVID–19 pandemic. Specifically, we recognize that in some cases, the physical proximity of the physician or practitioner might present additional exposure risks, especially for high risk patients isolated for their own protection or cases where the practitioner has been exposed to the virus but could otherwise safely supervise from another location using telecommunications technology. In these cases, we believe that the current definition would necessarily limit access to diagnostic procedures and tests that could be appropriately supervised by a physician, including one who is isolated for purposes of limiting exposure to COVID–19.

In addition, with respect to pulmonary rehabilitation, cardiac rehabilitation, and intensive cardiac rehabilitation services described in the regulations at §§ 410.47 and 410.49, respectively, we are adopting a similar change under § 410.27(a)(1)(iv)(D), for the duration of the PHE for the COVID–19 pandemic, for all the reasons described above, to specify that direct supervision for these services includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider.

F. Clarification of Homebound Status Under the Medicare Home Health Benefit

Sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act state that payment for home health services is made when a physician certifies that such services are or were required because the individual is or was confined to his home and needs or needed skilled nursing care (other than solely venipuncture for the purpose of obtaining a blood sample) on an intermittent basis or physical or speech therapy or, in the case of an individual who has been furnished home health services based on such a need and who no longer has such a need for such care or therapy, continues or continued to need occupational therapy. In addition, the physician must certify that a plan for furnishing such services to such individual has been established and is periodically reviewed by the physician and that such services are or were furnished while the individual was under the care of a physician. Also, in the case of a certification made by a physician after January 1, 2010, prior to making such certification the physician must document that the physician himself or herself, or an NP or clinical nurse specialist (CNS) (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act) as authorized by State law, or a PA (as defined in section 1861(aa)(5) of the Act) under the supervision of the physician, has had a face-to-face encounter (including through use of telehealth, subject to the requirements in section 1834(m) of the Act, and other than for encounters that are incident to services involved, as described in section II.E. of this IFC) with the individual within a reasonable timeframe as determined by the Secretary.

Most recently, we have been asked by stakeholders to provide more clarity on whether patients who are instructed to remain in their homes or are under ''self-quarantine'' are considered ''confined to the home'' or ''homebound'' for purposes of the Medicare home health benefit in the context of the PHE for the COVID–19 pandemic. Per sections 1814(a) and 1835(a) of the Act, an individual shall be considered to be ''confined to his home'' if the individual has a condition, due to an illness or injury, that restricts the ability of the individual to leave his

or her home except with the assistance of another individual or the aid of a supportive device (such as crutches, a cane, a wheelchair, or a walker), or if the individual has a condition such that leaving his or her home is medically contraindicated. While an individual does not have to be bedridden to be considered ''confined to his home'', the condition of the individual should be such that there exists a normal inability to leave home and, that leaving home requires a considerable and taxing effort by the individual.

The definition of ''confined to the home'' (that is, ''homebound'') allows patients to be considered ''homebound'' if it is medically contraindicated for the patient to leave the home. As an example for the PHE for COVID–19 pandemic, this would apply for those patients: (1) Where a physician has determined that it is medically contraindicated for a beneficiary to leave the home because he or she has a confirmed or suspected diagnosis of COVID–19; or (2) where a physician has determined that it is medically contraindicated for a beneficiary to leave the home because the patient has a condition that may make the patient more susceptible to contracting COVID–19. A patient who is exercising ''self-quarantine'' for one's own safety would not be considered ''confined to the home'' unless a physician certifies that it is medically contraindicated for the patient to leave the home. For the PHE for the COVID–19 pandemic, the CDC is currently advising that older adults and individuals with serious underlying health conditions stay home (CDC's guidance is interim and is expected to continue to be updated as warranted).[6] As such, we expect that many Medicare beneficiaries could be considered ''confined to the home''. However, determinations of whether home health services are reasonable and necessary, including whether the patient is homebound and needs skilled services, must be based on an assessment of each beneficiary's individual condition and care needs.

In cases where it is medically contraindicated for the patient to leave the home, the medical record documentation for the patient must include information as to why the individual condition of the patient is such that leaving the home is medically contraindicated. With regards to a pandemic outbreak of an infectious disease, this can include reviewing and applying any guidance on risk assessment and public health management issued by the CDC. For example, the CDC interim guidance ''Preventing the Spread of Coronavirus Disease 2019 in Homes and Residential Communities'' applies for both confirmed or suspected COVID–19 states that patients who are medically stable enough to receive care in the home must isolate at home during their illness.[7] Additionally, these guidelines state that patients should restrict activities outside the home, except for getting medical care. These restrictions include that the individual not go to work, school, or public areas, as well as avoiding use of public transportation, ride-sharing, or taxis; making it such that there exists a normal inability for an individual to leave home and leaving home would require a considerable and taxing effort.

In regards to those circumstances in which the patient does not have confirmed or suspected diagnosis of an infectious disease, such as COVID–19, but the patient's physician states that it is medically contraindicated for the patient to leave the home because the patient's condition may make the patient more susceptible to contracting a pandemic disease, the patient would be considered ''confined to the home'' or ''homebound'' for purposes of this eligibility requirement. For example, if a patient is having an exacerbation of chronic obstructive pulmonary disease (COPD) and the physician certifies that it is medically contraindicated to leave the home because the patient's compromised respiratory system makes him or her more likely to contract an infectious disease, such as COVID–19, the patient would be considered ''confined to the home'' in alignment with Medicare home health eligibility criteria. Another example of this type of scenario would be a cancer patient receiving chemotherapy treatment and where the physician states that it is medically contraindicated for the patient to leave the home because the patient may be more at risk of contracting an infectious disease because of the patient's immunocompromised state. In both examples, the medical contraindication makes it such that there exists a normal inability for an individual to leave home and leaving home safely would require a considerable and taxing effort.

In addition to being considered ''confined to the home'' or ''homebound'', the patient must meet the other Medicare home health eligibility requirements to receive Medicare home health services. That is, the beneficiary must be under the care of a physician; receiving services under a plan of care established and periodically reviewed by a physician; be in need of skilled nursing care on an intermittent basis or physical therapy or speech-language pathology; or have a continuing need for occupational therapy. Even if the patient is confined to the home because of a suspected diagnosis of an infectious disease as part of a pandemic event, a home health visit solely to obtain a nasal or throat culture would not be considered a skilled service because it would not require the skills of a nurse to obtain the culture as the specimen could be obtained by an appropriately-trained medical assistant or laboratory technician. However, a home health nurse, during an otherwise covered skilled visit, could obtain the nasal or throat culture to send to the laboratory for testing. Please see section II.M. of this IFC for further discussion about how a Medicare patient without a skilled need who is under self-quarantine may be tested at home.

We believe this clarification is not limited to the PHE for the COVID–19 pandemic, but would also apply for other outbreaks of an infectious disease and instances where the condition of a patient is such that it is medically contraindicated for the patient to leave his or her home. We solicit comments on this clarification.

G. The Use of Technology Under the Medicare Home Health Benefit During the PHE for the COVID–19 Pandemic

Section 1895 of the Act outlines the statutory parameters of the home health prospective payment system (HH PPS) that was implemented on October 1, 2000. The HH PPS provides payment for all services furnished under the Medicare home health benefit as outlined in section 1861(m) of the Act in the form of a ''bundled'' 30-day unit of payment that is adjusted for case-mix and area wage differences in accordance with section 1895(b) of the Act. Section 1895(e)(1)(A) of the Act states that nothing under section 1895 of the Act prevents a home health agency (HHA) from furnishing services via a telecommunications system, as long as such services do not: (1) Substitute for in-person home health services ordered as part of a plan of care certified by a physician; and (2) are not considered a home health visit for purposes of eligibility or payment. In the CY 2019 HH PPS proposed rule (83 FR 32425), we stated that ''remote patient monitoring'' is one type of service that can be furnished via a telecommunications system to augment a home health plan of care without

[6] *https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html.*

[7] *https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-prevent-spread.html.*

substituting for an in-person visit. In the CY 2019 HH PPS final rule with comment (83 FR 56527), for purposes of the Medicare home health benefit, we finalized the definition of ''remote patient monitoring'' in regulation at 42 CFR 409.46(e) as the collection of physiologic data (for example, ECG, blood pressure, glucose monitoring) digitally stored and/or transmitted by the patient and/or caregiver to the HHA. We also included in regulation at § 409.46(e) that the costs of remote patient monitoring are considered allowable administrative costs (operating expenses) if remote patient monitoring is used by the HHA to augment the care planning process (83 FR 56527).

We received positive feedback from the policy changes finalized in the CY 2019 HH PPS final rule with comment period. Commenters encouraged us to even go further in adopting and promoting technology use in home health. Recently, we have been asked by stakeholders to provide more clarity on how HHAs can leverage technology to keep home health clinicians and patients safe during outbreaks of an infectious disease, such as the PHE for the COVID–19 pandemic. While we remain statutorily-prohibited from paying for home health services furnished via a telecommunications system if such services substitute for in-person home health services ordered as part of a plan of care and for paying directly for such services under the home health benefit, for the duration of the PHE for the COVID–19 pandemic, we are amending the regulations at § 409.43(a) on an interim basis to provide HHAs with the flexibility, in addition to remote patient monitoring, to use various types of telecommunications systems (that is, technology) in conjunction with the provision of in-person visits. Specifically, we are amending the regulations at § 409.43(a) on an interim basis to state that the use of technology must be related to the skilled services being furnished by the nurse/therapist/therapy assistant to optimize the services furnished during the home visit or when there is a home visit. We are also amending the regulations at § 409.43(a) on an interim basis to state that the use of technology must be included on the home health plan of care along with a description of how the use of such technology will help to achieve the goals outlined on the plan of care without substituting for an in-person visit as ordered on the plan of care. As a reminder, the plan of care must be signed prior to submitting a final claim to Medicare for payment (§ 409.43(c)(2)); therefore, HHAs have flexibility on the timing in which they obtain physician signatures for changes to the plan of care when incorporating the use of technology into the patient's plan of care. In addition, HHAs may also provide services based on verbal orders in accordance with the regulations at §§ 484.60(b) and 409.43(d). Finally, on an interim basis HHAs can report the costs of telecommunications technology as allowable administrative and general (A&G) costs by identifying the costs using a subscript between line 5.01 through line 5.19.

We reiterate that by law the use of technology may not substitute for an in-person home visit ordered as part of the plan of care and services furnished via a telecommunications system cannot be considered a home health visit for purposes of eligibility or payment. However, we acknowledge that the use of such technology may result in changes to the frequency or types of visits outlined on the plan of care, especially to combat the PHE for the COVID–19 pandemic. For example, a patient recently discharged from the hospital after coronary bypass surgery was receiving home health skilled nursing visits three times a week for medication management, teaching and assessment. The patient developed a fever, cough, sore throat and moderate shortness of breath and now has a confirmed COVID–19 diagnosis, which the doctor has determined can be safely managed at home with home health services. The patient has been prescribed new medications for symptom management and oxygen therapy to support the patient's respiratory status. The patient's home health plan of care was updated to include an in-person skilled nursing visit once a week to assess the patient and to monitor for worsening symptoms. The plan of care was updated also to include a video consultation twice a week between the skilled nurse and the patient for medication management, teaching and assessment, as well as to obtain oxygen saturation readings that the patient relays to the nurse during the consultation.

With regards to payment under the HH PPS, if the primary reason for home health care is to provide care to manage the symptoms resulting from COVID–19, this 30-day period of care would be grouped into the Medication, Management, Teaching and Assessment (MMTA)—Respiratory clinical group, and it would be an early 30-day period of care with an institutional admission source. Assuming a medium functional impairment level with ''low'' comorbidities, the low-utilization payment adjustment (LUPA) threshold would be 4 visits. Regardless if the patient continued to receive the original 3 in-person skilled nursing visits per week (12 visits total in the 30-day period) rather than the once per-week in-person skilled nursing visits (4 visits total in the 30-day period) the HHA would still receive the full 30-day payment amount (rather than paying per visit if the total number of visits was below the LUPA threshold). In this example, the use of technology is not a substitute for the provision of in-person visits as ordered on the plan of care, as the plan of care was updated to reflect a change in the frequency of the in-person visits and to include ''virtual visits'' as part of the management of the home health patient.

As discussed previously in section II.E ''Direct Supervision by Interactive Telecommunications Technology'' in this IFC, there may be instances during the PHE for the COVID–19 pandemic where physicians can enter into a contractual arrangement, that meets the definition of auxiliary personnel at § 410.26, with another provider/supplier type. For example, physicians may enter into contractual arrangements with a HHA, a qualified infusion therapy supplier, or other entity to leverage auxiliary personnel under leased employment (§ 410.26(a)(5)), including nurses or other clinical staff, to provide virtual visits for patients in their homes. These virtual visits are considered provided incident to a physician's service, as long as the billing practitioner is providing appropriate supervision through audio/video real-time communications technology, when needed. Payment for such services would be made to the billing practitioner who would then make the appropriate payment to the contracted entity (for example, the HHA). This payment would be made in accordance with the PFS and would not be considered a home health service under the Medicare home health benefit. This particular flexibility can enable more patients to receive services at home via telehealth for instances in which there are no in-person visits that would trigger payment under the Medicare HH PPS. As such, we would not expect that services furnished at a patient's home incident to a physician service will usually occur during the same period as a home health episode of care, and we will be monitoring claims that practitioners are billing under arrangement to ensure appropriate

services are being billed by the practitioner and not being inappropriately unbundled from payments under the HH PPS.

The remainder of this section includes information on examples of technology that can be leveraged in providing care in the home setting, such as telemedicine, interactive clinician ''consulting'' and other patient-facing technologies; and provides a summary of the regulations text we are amending in this IFC.

In general, technology has become an integral part of medicine across the entire spectrum of healthcare. Telemedicine, in particular has the potential to play a large role in enhancing the delivery of healthcare in the home for Medicare beneficiaries, including the provision of information, education, and services provided via telecommunications systems. One of the biggest benefits of telemedicine, separate from its potential to minimize risk to clinicians and patients during an outbreak of an infectious disease, is to increase access to healthcare to geographically disadvantaged and medically underserved populations, providing an improved quality of care.[8] Telemedicine and remote monitoring can also be used to encourage patient involvement and autonomy, and to increase the tools available for the home health provider.

Recent CMS site visits with HHAs, as well as meetings with industry associations detailed the extent to which HHAs are researching and integrating technology into their care. These organizations provided examples of technology they have tested and/or are currently using, ranging from patient facing apps on cell phones to robotics. Additionally, they provided examples of patients with specific home health needs that they believe would benefit most from leveraging technology in home health care. They indicated a wide variety of uses for technology in home health including medication management and teaching, behavioral/crisis or social work counseling, post-transplant monitoring, dietary counseling, and even functional training through remote occupational or physical therapy. In particular, they highlighted certain diagnoses and conditions for which they are already utilizing telecommunications systems. For diagnoses/conditions such as COPD, congestive heart failure (CHF), sepsis, and wounds, technology can offer an efficient way of monitoring chronic respiratory and cardiovascular diseases that represent an increasingly high burden on healthcare systems.[9] We referenced some of the benefits of remote patient monitoring of chronic diseases in the CY 2019 HH PPS proposed rule (83 FR 32425), including readmission prevention and improved patient involvement and accountability.

Certain HHAs and industry groups have implemented technology that goes beyond remote patient monitoring for the treatment of chronic diseases. One such HHA utilizes two-way, interactive ''consulting'' between the nurse furnishing the home visit and a specialty clinician at the agency. The nurse furnishing the home visit can use a tablet to visually connect the patient with the specialty clinician or advanced practice nurse at the agency to assess swelling, breathing, or to review and reconcile medications. These specialty clinicians are also beneficial in treating acute conditions, such as wounds, or monitoring for the prevention of sepsis. Wound, Ostomy, and Continence Nurses (WOCNs) are being utilized for their specialized skills as consultants for the nurse in the home. The nurse furnishing the home visit can use a tablet to connect visually with the WOCN at the agency to consult on the management of the wound. If necessary, the WOCN can contact the physician or surgeon to relay progress or request a change in treatment. Specialized software can even be utilized to assess the wound with precision and accuracy, including measuring surface area and depth, to improve consistency of care.[10] Additionally, incorporating technology into home health may be beneficial in attracting these specialty clinicians, such as cardiac nurses and WOCNs, to homecare, which promotes the provision of a more advanced level of care; a benefit that will become imperative if the home health patient population, as a whole, exhibits more characteristics of an acute care population. Allowing advanced practice clinicians to consult virtually with the RN in the home may minimize transportation and labor costs and potentially improve patient access to specialty care.

Telecommunications systems are also playing a valuable role in managing patients at risk for sepsis after a hospitalization. Sepsis continues to be a top diagnosis for hospital 30-day readmission rates amongst Medicare patients.[11] Utilizing individualized software platforms to monitor appetite, mental changes, biometrics, etc., which alert care providers of any changes that may indicate a problem, can be helpful in treating the patient in the home prior to the patient requiring hospitalization. These patient-facing devices (tablets or apps) can be programmed to require the patient to perform a virtual daily ''check-in'' to monitor for potential issues. If the ''check-in'' goes beyond specified individualized parameters, an alert will signal the HHA to follow-up with the critical care team following the patient to accelerate treatment. The software can also be programmed to deliver specific care instructions and reminders regarding hygiene or medications. In addition to disease-specific monitoring, patient-facing technologies can also be integral in promoting patient involvement and compliance. Certain scheduling and communication platforms allow HHAs to interface with patients in more ways than in-person visits or telephone calls. Some devices can ''talk'' to the patient, even utilizing multiple languages. Others can provide medication reminders, daily health tips, and assist in arranging for community or caregiver support.

Overall, we have seen how technology can expand the reach of healthcare into the home, through consultation with specialized clinicians and critical care teams, as well as through the integration of devices designed to increase patient involvement and compliance. As outlined above, incorporating these various forms of technology, in addition to remote patient monitoring as defined under the home health benefit (§ 409.46(e)), can be appropriate in furnishing home health services when used in conjunction with the provision of in-person visits. In addition, technology can be used to minimize the risk of exposure to clinicians, patients, and the public during an outbreak of an infectious disease, such as the PHE for the COVID–19 pandemic. Although HHAs have the flexibility, in addition to remote patient monitoring, to use various types of technology, payment for home health services remains contingent on the furnishing of a visit. Therefore, the use of technology must be related to the skilled services being furnished by the nurse or therapist or therapy assistant to optimize the services furnished during the home visit or when there is a home visit. To be eligible for the home health benefit, beneficiaries must need intermittent

[8] Int J Environ Res Public Health. 2013 Dec; 10(12): 6472–6484. Published online 2013 Nov 28. doi: 10.3390/ijerph10126472.

[9] Breathe (Sheff). 2016 Dec; 12(4): 350–356. doi: 10.1183/20734735.014616.

[10] *https://parablehealth.com/post-acute-inpatient.*

[11] *https://www.hcup-us.ahrq.gov/reports/statbriefs/sb225-Inpatient-US-Stays-Trends.pdf.*

skilled nursing or therapy services and must be considered homebound. Covered home health services include skilled nursing, home health aide, physical therapy, speech-language pathology, occupational therapy, medical social services, and medical supplies, provided on a visiting basis in a place of residence such as the individual's home (section 1861(m) of the Act). A visit is defined at § 409.48(c) as an episode of personal contact with the beneficiary by staff of the HHA or others under arrangements with the HHA, for the purpose of providing a covered service. Generally, one visit may be covered each time an HHA employee or someone providing home health services under arrangement with the HHA enters the beneficiary's home and provides a covered service to a beneficiary.

To appropriately recognize the role of technology in furnishing services under the Medicare home health benefit, the use of such technology must be included on the plan of care. The inclusion of technology on the plan of care must continue to meet the requirements at § 484.60, and must be tied to the patient-specific needs as identified in the comprehensive assessment and the measurable outcomes that the HHA anticipates will occur as a result of implementing the plan of care. For example, if a physician orders an in-person skilled nursing visit once a week to assess the patient and to monitor for worsening symptoms and a video consultation twice a week between the skilled nurse and the patient for medication management, teaching and assessment, as well as to obtain oxygen saturation readings that the patient relays to the nurse during the consult; the plan of care could specify that the goal of the video consultation is to increase patient adherence with medication regimen and oxygen use with no worsening respiratory symptoms.

In summary, we are amending the plan of care requirements at § 409.43(a) on an interim basis, for the purposes of Medicare payment, to state that the plan of care must include any provision of remote patient monitoring or other services furnished via a telecommunications system, and that these services cannot substitute for a home visit ordered as part of the plan of care and cannot be considered a home visit for the purposes of patient eligibility or payment. The plan of care must include a description of how the use of such technology will help to achieve the goals outlined on the plan of care. We believe that this change will help to increase access to technologies, such as telemedicine and remote patient monitoring, that enable the necessary flexibility for Medicare beneficiaries to be able to receive medically necessary services without jeopardizing their health or the health of those who are providing such services, while minimizing the overall risk to public health during the PHE for the COVID–19 pandemic. As we stated above, HHAs can report the costs of telecommunications technology as allowable A&G costs on an interim basis by identifying the costs using a subscript between line 5.01 through line 5.19. We invite feedback on our interim changes to the plan of care requirements at § 409.43(a).

H. The Use of Telecommunications Technology Under the Medicare Hospice Benefit

As outlined in section II.G. of this IFC, The Use of Technology Under the Medicare Home Health Benefit, technology has become an integral part of medicine across the entire spectrum of healthcare. Telemedicine, in particular has the potential to play a large role in enhancing the delivery of healthcare in the home, including the provision of information, education, and services provided via telecommunications systems. One of the benefits of telemedicine is its potential to minimize risk to clinicians and patients during an outbreak of an infectious disease, such as the PHE for the COVID–19 pandemic. Recently, we have been asked by stakeholders to provide more clarity on how hospices can leverage technology to keep clinicians and patients safe during the PHE for the COVID–19 pandemic.

For the duration of the PHE for the COVID–19 pandemic, we are amending the hospice regulations at 42 CFR 418.204 on an interim basis to specify that when a patient is receiving routine home care, hospices may provide services via a telecommunications system if it is feasible and appropriate to do so to ensure that Medicare patients can continue receiving services that are reasonable and necessary for the palliation and management of a patients' terminal illness and related conditions without jeopardizing the patients' health or the health of those who are providing such services during the PHE for the COVID–19 pandemic. To appropriately recognize the role of technology in furnishing services under the hospice benefit, the use of such technology must be included on the plan of care. The inclusion of technology on the plan of care must continue to meet the requirements at § 418.56, and must be tied to the patient-specific needs as identified in the comprehensive assessment and the measurable outcomes that the hospice anticipates will occur as a result of implementing the plan of care. The following is an example of where it could be appropriate to furnish hospice services via a telecommunications system during the PHE for the COVID–19 pandemic:

> A terminally ill 85-year-old male with heart failure has been receiving hospice services and recently developed a fever, sore throat and cough. The patient has been diagnosed with suspected COVID–19 and his hospice plan of care now includes medications for symptom management. He is mildly short of breath but does not require supportive oxygen therapy. The patient's wife is concerned about potential for worsening cardiac and respiratory symptoms as a result of the patient's risk for increased complications due to COVID–19. The hospice plan of care has been updated to include remote patient monitoring with a telecommunications system to assess the patient's daily weight and oxygen saturation levels. The plan of care identifies the measurable goal that the patient will maintain an oxygen level above 92 percent and the patient will not gain more than 2 pounds in a 24-hour period. The plan of care identifies interventions if either of these goals are not met. The remote patient monitoring allows for more expedited modifications to the plan of care in response to the patient's changing needs.

We believe that this clarification in the regulations at § 418.204 will help to increase access to technologies, such as telemedicine and remote patient monitoring, that enable the necessary flexibility for patients to be able to receive necessary services without jeopardizing their health or the health of those who are providing those services, while minimizing the overall risk to public health during the PHE for the COVID–19 pandemic. Hospices are paid a per diem payment amount based on the level of care for each day that a patient is under a hospice election (§ 418.302). There is no payment beyond the per diem amount for the use of technology in providing services under the hospice benefit. For the purposes of the hospice claim submission, only in-person visits (with the exception of social work telephone calls) should be reported on the claim. However, hospices can report the costs of telecommunications technology used to furnish services under the routine home care level of care during the PHE for the COVID–19 pandemic as ''other patient care services'' using Worksheet A, cost center line 46, or a subscript of line 46 through 46.19, cost center code 4600 through 4619, and identifying this cost center as ''PHE for COVID–19''. We invite feedback on our changes to the

special requirements for coverage at § 418.204.

I. Telehealth and the Medicare Hospice Face-to-Face Encounter Requirement

To receive hospice services under the Medicare hospice benefit, a beneficiary must be certified as terminally ill with a medical prognosis of a life expectancy of 6 months or less if the illness runs its normal course, in accordance with section 1814(a)(7) of the Act and as codified in § 418.22. A written certification is required at the beginning of the first 90-day period of hospice care, a subsequent 90-day period and each 60-day period thereafter. The hospice must obtain written certification of terminal illness for each benefit period, even if a single election continues in effect. In accordance with section 1814(a)(7)(D)(i) of the Act, a hospice physician or hospice NP must have a face-to-face encounter with each Medicare hospice patient whose total stay across all hospices is anticipated to reach the 3rd benefit period. The face-to-face encounter must occur prior to, but no more than 30 calendar days prior to, the 3rd benefit period recertification, and every benefit period recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care.

The Medicare hospice face-to-face encounter is an administrative requirement related to certifying the terminal illness as required in section 1814(a)(7)(D)(i) of the Act. By itself, it is not billable, as it is considered administrative (see Pub. 100–04, Medicare Claims Processing Manual, chapter 11, section 40.1.1). However, if a hospice physician, or a hospice NP who is also the patient's designated attending physician, provides reasonable and necessary non-administrative patient care during the face-to-face visit, that portion of the visit would be billable under the Medicare rules. There are additional requirements for billing physician services provided by NPs (see Pub. 100–04, chapter 11, section 40.1.3.2). Therefore, if a hospice physician or the hospice NP acting as the patient's designated attending physician provides direct patient care during the course of the face-to-face encounter, the physician or NP may bill for such direct care services for Medicare beneficiaries under the PFS. As a reminder, the hospice benefit defines an ''attending physician'' as a doctor of medicine or osteopathy, an NP, or a PA designated by the individual at the time he or she elects to receive hospice care as having the most significant role in the determination and delivery of the individual's medical care (§ 418.3). However, we note that PAs are not authorized to perform the required face-to-face encounter under section 1814(a)(7)(D)(i) of the Act. In the event of a pandemic outbreak of an infectious disease, such as COVID–19, an example of direct patient care during the course of an in-person face-to-face visit for recertification for Medicare beneficiaries could be as follows:

> An 85-year-old male with a primary diagnosis of end stage heart failure with diabetes, peripheral vascular disease, and hypertension is being seen by the hospice physician for hospice recertification and has developed a fever, cough and mild shortness of breath over the last 24 hours. After discussion with his caregiver, the hospice physician discovers that the patient had a visit from his niece who was found to be COVID–19 positive. The physician washes his hands, puts on gloves and then places a mask on himself, the patient and caregiver. After examining the patient, the physician discusses with the patient and caregiver if he would like to be tested for COVID–19 and if he would like to continue to be treated at home. The patient decides that he would like to be treated at home and that he would like to be tested. The nasopharyngeal and oropharyngeal swabs are performed. The hospice physician discusses with the patient's caregiver infection control techniques, symptomatic treatment, and provides them with gloves and disposable masks. During the course of this recertification visit, the hospice physician provided direct patient care, and therefore, can bill for such services.

While we do not believe that direct patient care for Medicare hospice patients will typically be furnished via telehealth, we note that nothing in statute or regulation precludes a hospice designated attending physician from furnishing services via telehealth in accordance with section 1834(m) of the Act. In response to the PHE for the COVID–19 pandemic, The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 was signed into law on March 6, 2020. Section 102 of the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 gives the Secretary the authority to waive: (1) The telehealth originating site requirements under section 1834(m)(4)(C) of the Act (both geographic and site of service) for telehealth services furnished in an emergency area; and (2) the restriction on use of a telephone for furnishing telehealth services (in § 410.78(a)(3)), but only if the telephone has audio and video capabilities that are used for two-way, real-time interactive communication. The originating site facility fee would be paid to originating sites on the current list of permissible sites (except for the patient's home) in any geographic location. The provision established a definition of ''qualified providers'' that specifies the practitioners eligible for furnishing distant site services under the waiver. Specifically, the practitioners currently permitted to furnish distant site telehealth services under section 1834(m) of the Act—physicians (as defined in section 1861(r) of the Act) and NPPs (as defined in section 1842(b)(18)(C) of the Act)—would be eligible to furnish telehealth services under the waiver to patients with an established relationship with the practitioner or a practitioner in the same practice (defined by tax identification number (TIN)). This would be determined based on a patient for whom Medicare payment was made for an item or service furnished by the practitioner (or another practitioner within the same practice) within the previous 3 years.[12] The telehealth waiver is in effect and is limited to the PHE for the COVID–19 pandemic.

The statute is silent as to whether a face-to-face encounter solely for the purpose of Medicare hospice recertification (meaning there is no direct patient care) could be conducted via telecommunications technology by the hospice physician or NP. Given that a face-to-face visit solely for the purpose of recertification for Medicare hospice services is considered an administrative requirement related to certifying the terminal illness as required in section 1814(a)(7)(D)(i) of the Act, we believe that such visit could be performed via telecommunications technology as a result of the PHE for the COVID–19 pandemic. We recognize that public exposure during a pandemic event of an infectious disease greatly increases the overall risk to public health and terminally ill patients are exceptionally vulnerable to complications associated with COVID–19. Therefore, we are amending the regulations at § 418.22(a)(4) on an interim basis to allow the use of telecommunications technology by the hospice physician or NP for the face-to-face visit when such visit is solely for the purpose of recertifying a patient for hospice services during the PHE for the COVID–19 pandemic. By telecommunications

[12] We note that HHS will not conduct audits to ensure that such prior relationship existed for claims submitted during this PHE. Also, effective immediately, the HHS Office for Civil Rights (OCR) will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID–19 nationwide PHE.

technology, we mean the use of multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient (from home, or any other site permissible for receiving services under the hospice benefit) and distant site hospice physician or hospice NP.[13] Such encounters solely for the purpose of recertification would not be a separately billed service, but rather considered an administrative expense. We request feedback on the amendments to the face-to-face visit requirement for hospice recertification during the PHE for the COVID–19 pandemic.

J. Modification of the Inpatient Rehabilitation Facility (IRF) Face-to-Face Requirement for the PHE During the COVID–19 Pandemic

Under 42 CFR 412.622(a)(3)(iv), for an inpatient rehabilitation facility (IRF) claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, there must be a reasonable expectation at the time of the patient's admission to the IRF that the patient requires physician supervision by a rehabilitation physician, defined as a licensed physician with specialized training and experience in inpatient rehabilitation. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.

The purpose of the physician supervision requirement is to ensure that the patient's medical and functional statuses are being continuously monitored as the patient's overall plan of care is being carried out.

We continue to believe it is in the patient's best interest to be seen in person by a rehabilitation physician to assess their medical and functional statuses while at the IRF, and we encourage rehabilitation physicians to continue to visit IRF patients in person as long as all necessary precautions, including the use of PPE, are taken to ensure the health and safety of the patient and the physician. However, during the PHE for the COVID–19 pandemic, we believe that it is essential to temporarily allow the face-to-face visit requirements at §§ 412.622(a)(3)(iv) and 412.29(e) to be conducted via telehealth to safeguard the health and safety of Medicare beneficiaries and the rehabilitation physicians treating them. This allows rehabilitation physicians to use telehealth services as defined in section 1834(m)(4)(F) of the Act, to conduct the required 3 physician visits per week during the PHE for the COVID–19 pandemic. By increasing access to telehealth, this IFC will provide the necessary flexibility for Medicare beneficiaries to be able to receive medically necessary services without jeopardizing their health or the health of those who are providing those services, while minimizing the overall risk to public health.

To effectuate these changes, on an interim basis we are finalizing revisions to the regulations at §§ 412.622(a)(3)(iv) and 412.29(e) during the PHE for the COVID–19 pandemic.

In § 412.622(a)(3)(iv), we are revising this paragraph to state that physician supervision by a rehabilitation physician is required, except that during the PHE, as defined in § 400.200, such visits may be conducted using telehealth services (as defined in section 1834(m)(4)(F) of the Act). The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. The post-admission physician evaluation described in paragraph (a)(4)(ii) may count as one of the face-to-face visits.

In § 412.29(e), we are revising this paragraph to state that a procedure must be in effect to ensure that patients receive close medical supervision, as evidenced by at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process, except that during the PHE, as defined in § 400.200, such visits may be conducted using telehealth services (as defined in section 1834(m)(4)(F) of the Act).

We welcome feedback on these revisions to the regulations at §§ 412.622(a)(3)(iv) and 412.29(e) for the duration of the PHE.

K. Removal of the IRF Post-Admission Physician Evaluation Requirement for the PHE for the COVID–19 Pandemic and Clarification Regarding the ''3-Hour'' Rule

IRF care is only considered by Medicare to be reasonable and necessary under section 1862(a)(1) of the Act if the patient meets all of the IRF coverage requirements outlined in § 412.622(a)(3), (4), and (5). Failure to meet the IRF coverage criteria in a particular case results in denial of the IRF claim. Under § 412.622(a)(4)(ii), to document that each patient for whom the IRF seeks payment is reasonably expected to meet all of the requirements in § 412.622(a)(3) at the time of admission, the patient's medical record at the IRF must contain a post-admission physician evaluation that meets ALL of the following requirements:

- It is completed by the rehabilitation physician within 24 hours of the patient's admission to the IRF.
- It documents the patient's status on admission to the IRF, includes a comparison with the information noted in the preadmission screening documentation, and serves as the basis for the development of the overall individualized plan of care.
- It is retained in the patient's medical record at the IRF.

In an effort to provide rehabilitation physicians with as much flexibility as possible, we are removing the post-admission physician evaluation requirement at § 412.622(a)(4)(ii) for all IRFs during the PHE for the COVID–19 pandemic. We believe that removal of this requirement will greatly reduce the amount of time rehabilitation physicians in IRFs spend on completing paperwork requirements when a patient is admitted to the IRF, and will free up their time to focus instead on caring for patients and helping where they may be needed with the PHE for the COVID–19 pandemic. Accordingly, we are amending § 412.622(a)(4)(ii) to note that the post-admission physician evaluation is not required during the PHE for the COVID–19 pandemic. To effectuate this change, on an interim basis, we are revising § 412.622(a)(4)(ii) to specify that the post-admission physician evaluation is not required during the PHE for the COVID–19 pandemic.

We note that this does not preclude an IRF patient from being evaluated by a rehabilitation physician within the first 24 hours of admission if the IRF believes that the patient's condition warrants such an evaluation.

We invite feedback on our removal of the post-admission physician evaluation

[13] Section 410.78(a)(2) defines a ''distant site'' as the site at which the physician or practitioner delivering the service is located at the time the service is provided via a telecommunications system.

documentation requirement at § 412.622(a)(4)(ii) for all IRFs during the PHE for the COVID–19 pandemic.

In addition, we are providing clarity for all IRFs during the PHE for the COVID–19 pandemic with regard to the intensive rehabilitation therapy requirements for IRF coverage at § 412.622(a)(3)(ii), commonly known as the ''3-hour'' rule. Section 412.622(a)(3)(ii) generally requires that a beneficiary be reasonably expected to actively participate in, and benefit from, an intensive rehabilitation therapy program on admission to the IRF. Under current industry standards, this intensive rehabilitation therapy program generally consists of at least 3 hours of therapy (physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics therapy) per day at least 5 days per week. In certain well-documented cases, this intensive rehabilitation therapy program might instead consist of at least 15 hours of intensive rehabilitation therapy within a 7-consecutive day period, beginning with the date of admission to the IRF. Benefit from this intensive rehabilitation therapy program is demonstrated by measurable improvement that will be of practical value to the patient in improving the patient's functional capacity or adaptation to impairments. The required therapy treatments must begin within 36 hours from midnight of the day of admission to the IRF.

We recognize that IRFs may have difficulties in meeting these requirements because normal staffing shifts may be disrupted as staff who would conduct the therapy program may have COVID–19, be self-isolated, or be unavailable for other reasons related to the PHE. As such, while these requirements remain in place, we are clarifying that in cases where an IRF's intensive rehabilitation therapy program is impacted by the PHE for the COVID–19 pandemic (for example, due to staffing disruptions resulting from self-isolation, infection, or other circumstances related to the PHE), the IRF should not feel obligated to meet the industry standards referenced in § 412.622(a)(3)(ii), but should instead make a note to this effect in the medical record.

L. Rural Health Clinics (RHCs) and Federally Qualified Health Centers (FQHCs)

1. Expansion of Virtual Communication Services Furnished by RHCs and FQHCs

a. Background

RHC and FQHC visits are face-to-face (in-person) encounters between a patient and an RHC or FQHC practitioner during which time one or more RHC or FQHC qualifying services are furnished. RHC and FQHC practitioners are physicians, NPs, PAs, certified nurse midwives, clinical psychologists, and clinical social workers, and under certain conditions, a registered nurse (RN) or licensed practical nurse furnishing care to a homebound RHC or FQHC patient. A Transitional Care Management service can also be an RHC or FQHC visit. A Diabetes Self-Management Training (DSMT) service or a Medical Nutrition Therapy (MNT) service furnished by a certified DSMT or MNT provider may also be an FQHC visit.

RHCs are paid an all-inclusive rate (AIR) for medically-necessary, face-to-face visits with an RHC practitioner. The rate is subject to a payment limit, except for those RHCs that have an exception to the payment limit for being ''provider-based'' (see § 413.65). FQHCs are paid the lesser of their actual charges or the FQHC PPS rate for medically-necessary, face-to-face visits with an FQHC practitioner. Only medically-necessary medical, mental health, or qualified preventive health services that require the skill level of an RHC or FQHC practitioner can be RHC or FQHC billable visits.

The RHC and FQHC payment rates reflect the cost of all services and supplies that an RHC or FQHC furnishes to a patient in a single day, and are not adjusted for the complexity of the patient health care needs, the length of the visit, or the number or type of practitioners involved in the patient's care. Services furnished by auxiliary personnel (such as nurses, medical assistants, or other clinical personnel acting under the supervision of the RHC or FQHC practitioner) are considered to be incident to the visit and are included in the per-visit payment. This may include services furnished prior to or after the billable visit that occur within a medically appropriate time period, which is usually 30 days or less.

RHCs and FQHCs are also paid for care management services, including chronic care management services, general behavioral health integration services, and psychiatric Collaborative Care Model services. These are typically non-face-to-face services that do not require the skill level of an RHC or FQHC practitioner and are not included in the RHC or FQHC payment methodologies.

In the CY 2019 PFS proposed rule (83 FR 35863), we proposed separate payments to RHCs and FQHCs for certain CTBS referred to as ''Brief Communication Technology-Based Services'' for a ''virtual check-in'' and separate payment for remote evaluation of recorded video and/or images. ''Virtual check-ins'' are brief (5 to 10 minutes), non-face-to-face check ins with a patient via communication technology to assess whether the patient's condition necessitates an office visit. This service could be billed only in situations where the medical discussion was for a condition not related to an RHC or FQHC visit furnished within the previous 7 days, and does not lead to an RHC or FQHC visit within the next 24 hours or at the soonest available appointment. We also proposed payment for remote evaluation of patient-transmitted information conducted via pre-recorded ''store and forward'' video or image technology, including interpretation with verbal follow-up with the patient within 24 business hours. We had proposed that payment would be made if the remote evaluation did not originate from a related RHC or FQHC visit furnished within the previous 7 days, or lead to an RHC or FQHC visit within the next 24 hours or soonest available appointment.

In the CY 2019 PFS final rule (83 FR 59683), we finalized requirements and payment for RHCs and FQHCs furnishing Virtual Communication Services. Effective January 1, 2019, RHCs and FQHCs are paid for Virtual Communication Services HCPCS code G0071 (*Payment for communication technology-based services for 5 minutes or more of a virtual (non-face-to-face) communication between an RHC or FQHC practitioner and RHC or FQHC patient, or 5 minutes or more of remote evaluation of recorded video and/or images by an RHC or FQHC practitioner, occurring in lieu of an office visit; RHC or FQHC only*). HCPCS code G0071 is on an RHC or FQHC claim, either alone or with other payable services, and at least 5 minutes of communication technology-based or remote evaluation services are furnished by an RHC or FQHC practitioner to a patient who has had an RHC or FQHC billable visit within the previous year, and the medical discussion or remote evaluation is for a condition not related to an RHC or FQHC service provided within the previous 7 days, and does not lead to an RHC or FQHC visit within the next 24 hours or at the soonest available appointment. We added a new paragraph (e) to 42 CFR 405.2464 to reflect this payment.

HCPCS code G0071 is set at the average of the national non-facility PFS payment rates for HCPCS code G2012 (communication technology-based services) and HCPCS code G2010

(remote evaluation services) and is updated annually based on the PFS national non-facility payment rate for these codes. RHC and FQHC face-to-face requirements are waived when these services are furnished to an RHC or FQHC patient. Coinsurance and deductibles apply to RHC claims for HCPCS code G0071 and coinsurance applies to FQHC claims for HCPCS code G0071.

b. Improving Access to Care Management and Virtual Communication Services Furnished by RHCs and FQHCs

RHCs and FQHCs furnish services in rural and urban areas that have been determined to be medically underserved areas or health professional shortage areas. They are an integral component of the Nation's health care safety net, and we want to ensure that Medicare patients who are served by RHCs and FQHCs are able to communicate with their RHC or FQHC practitioner in a manner that enhances access to care, consistent with evolving medical care.

Particularly in rural areas where transportation is limited and distances may be far, we believe the use of CTBS may help some patients to determine if they need to schedule a visit at the RHC or FQHC. If it is determined that a visit is not necessary, the RHC or FQHC practitioner would be available for other patients who need their care.

In the CY 2019 PFS final rule (83 FR 59452), we finalized payment for new online digital assessment services, also referred to as ''E-Visits,'' for practitioners billing under the PFS. These are non-face-to face, patient-initiated communications using online patient portals. An online patient portal is a secure online website that gives patients 24-hour access to personal health information from anywhere with an internet connection by using a secure username and password. These digital assessment services are for established patients who require a clinical decision that otherwise typically would have been provided in the office. To minimize risks associated with exposure to COVID–19, and to provide the best care possible during the PHE for the COVID–19 pandemic, we believe that RHCs and FQHC practitioners, like many other health care providers, should explore the use of interactive communications technology in the place of services that would have otherwise been furnished in person and reported and paid under the established methodologies.

To facilitate the ability of RHCs and FQHCs to take such measures when appropriate, on an interim basis, we are expanding the services that can be included in the payment for HCPCS code G0071, and update the payment rate to reflect the addition of these services. Specifically, we are adding the following three CPT codes:

- 99421 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 5–10 minutes*)
- 99422 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 11–20 minutes*)
- 99423 (*Online digital evaluation and management service, for an established patient, for up to 7 days, cumulative time during the 7 days; 21 or more minutes*)

We are revising the payment rate for HCPCS code G0071 to include the national non-facility payment rates for these three new codes. Effective for services furnished on or after March 1, 2020 and throughout the PHE for the COVID pandemic, the payment rate for HCPCS code G0071 will be the average of the PFS national non-facility payment rate for HCPCS code G2012 (communication technology-based services), HCPCS code G2010 (remote evaluation services), CPT code 99421, CPT code 99422, and CPT code 99423. The RHC and FQHC face-to-face requirements are be waived for these services. Section 405.2464(e) establishes payment for communication technology-based and remote evaluation services, and no regulatory changes are required.

The services that are payable using HCPCS code G0071 require that the beneficiary has been seen by an RHC or FQHC practitioner during the previous 12 months. Under the current PHE for the COVID–19 pandemic, we believe that it is necessary to make these services available to beneficiaries who would otherwise not have access to clinically appropriate in-person treatment. Therefore, during the PHE for the COVID–19 pandemic, we are finalizing that all virtual communication services that are billable using HCPCS code G0071 will also be available to new patients that have not been seen in the RHC or FQHC within the previous 12 months. Also, in situations where obtaining prior beneficiary consent would interfere with the timely provision of these services, or the timely provision of the monthly care management services, during the PHE for the COVID–19 pandemic consent can obtained when the services are furnished instead of prior to the service being furnished, but must be obtained before the services are billed. We will also allow patient consent to be acquired by staff under the general supervision of the RHC or FQHC practitioner for the virtual communication and monthly care management codes during the PHE for the COVID–19 pandemic. These changes are consistent with the flexibilities were are establishing for similar services paid under the PFS as described in section II.D. of this IFC.

2. Revision of Home Health Agency Shortage Area Requirements for Furnishing Visiting Nursing Services

a. Background

Sections 1861(aa)(1)(A) and (B) of the Act describes RHC and FQHC services as services and supplies furnished by a physician, PA, NP, clinical psychologist clinical social worker; and items and services furnished incident to these services, and specifies requirements for these practitioners and services.

In the case of an RHC or FQHC that is located in an area in which there exists a shortage of HHAs, part-time or intermittent nursing care and related medical supplies (other than drugs and biologicals) are authorized under section 1861(aa)(1)(C) of the Act. These services can be furnished by a registered professional nurse or licensed practical nurse to a homebound individual under a written plan of treatment that is established and periodically reviewed by an RHC or FQHC physician, or established by a NP or PA and periodically reviewed and approved by the RHC or FQHC physician.

In § 405.2416, we specify that visiting nurse services are covered if all of the following are met:

- The RHC or FQHC is located in an area in which the Secretary has determined that there is a shortage of HHAs;
- The services are rendered to a homebound individual;
- The services are furnished by a registered professional nurse or licensed practical nurse that is employed by, or receives compensation for the services from the RHC or FQHC;
- The services are furnished under a written plan of treatment that is established and reviewed at least every 60 days by a supervising physician of the RHC or FQHC; or established by an NP, PA or certified nurse midwife (CNM); and reviewed at least every 60 days by a supervising physician. The written plan of treatment must be signed by the supervising physician, NP, PA or CNM of the RHC or FQHC.

Nursing care that is covered by this section includes services that must be

performed by a registered professional nurse or licensed practical nurse if the safety of the patient is to be assured and the medically desired results achieved; and personal care services, to the extent covered under Medicare as home health services. These services include helping the patient to bathe, to get in and out of bed, to exercise and to take medications. Household and housekeeping services or other services that would constitute custodial care are not covered.

Section 405.2416 also defines ''homebound'' as an individual who is permanently or temporarily confined to his or her place of residence because of a medical or health condition, or if the individual leaves the place of residence infrequently. It does not include a hospital or long term care facility.

In Pub. 100–02, Medicare Benefit Policy Manual, Chapter 13, section 190, we further describe RHC and FQHC visiting nursing services as skilled nursing services that require the skills of a nurse based on the complexity of the service (for example, intravenous and intramuscular injections or insertion of catheters), the condition of the patient (for example, a non-skilled service that, because of the patient's condition, can only be safely and effectively provided by a nurse), and accepted standards of medical and nursing practice. All services must be reasonable and necessary to the diagnosis and treatment of the patient's illness or injury within the context of the patient's unique medical condition, and a service that can be safely and effectively self-administered or performed by a nonmedical person without the direct supervision of a nurse, is not considered a skilled nursing service, even if provided by a nurse. A service which, by its nature, requires the skills of a nurse to be provided safely and effectively continues to be a skilled service even if it is taught to the patient, the patient's family, or other caregivers. If a patient needs skilled nursing care and there is no one trained or able and willing to provide it, the services of a nurse would be reasonable and necessary to the treatment of the illness or injury. We also specify that the determination of whether visiting nurse services are reasonable and necessary is made by the physician based on the condition of the patient when the services were ordered and what is reasonably expected to be appropriate treatment for the illness or injury throughout the certification period.

The requirements for furnishing visiting nursing services include that the patient is considered to be ''confined to the home'' as defined in section 1835(a) of the Act and that the RHC or FQHC is located in an area that has a shortage of HHAs. The services and supplies must be provided under a written plan of treatment; are furnished on a part-time or intermittent basis only; and drugs and biological products are not provided.

Chapter 13 of the Medicare Benefit Policy Manual, section 190, specifies the requirements for HHA shortage areas for purposes of visiting nursing services furnished by RHCs and FQHCs. The RHC or FQHC must be currently located in a county, parish or similar geographic area in which the Secretary has determined that there is no participating HHA under Medicare; or adequate home health services are not available to RHC or FQHC patients even though a participating HHA is in the area; or, there are patients whose homes are not within the area serviced by a participating HHA; or considering the area's climate and terrain, whose homes are not within a reasonable traveling distance to a participating HHA. RHCs and FQHCs that are located in an area that has not been determined to have a current HHA shortage and are seeking to provide visiting nurse services must make a written request to the appropriate CMS Regional Office along with written justification that the area it serves meets the required conditions.

b. Revision of Home Health Agency Shortage Area Requirements for Furnishing Visiting Nursing Services

To address the PHE for the COVID–19 pandemic and its impact on underserved rural and urban communities, we are implementing, on an interim basis, changes to the requirements for visiting nursing services furnished in the home by RHCs and FQHCs.

Section 405.2416(a)(1) states that visiting nurse services are covered if the RHC or FQHC is located in an area in which the Secretary has determined that there is a shortage of HHAs, and § 405.2417 provides additional requirements for an area to be determined to have a shortage of HHAs. During the PHE for the COVID–19 pandemic, we believe the need for visiting nursing services furnished by RHCs or FQHCs may increase. Therefore, for the duration of the PHE for the COVID–19 pandemic, we are determining that any area typically served by the RHC, and any area that is included in the FQHCs service area plan, is determined to have a shortage of HHAs, and no request for this determination is required.

We believe this flexibility is important for patient access to nursing services in the home and the potential for HHAs to be overwhelmed during PHE for the COVID–19 pandemic. However, RHCs and FQHCs should check the HIPAA Eligibility Transaction System (HETS) before providing visiting nurse services to ensure that the patient is not already under a home health plan of care. If a patient is under a home health plan of care, the HHA must provide optimal care to achieve the goals and outcomes identified in the patient's plan of care, for each patient's medical, nursing, and rehabilitative needs (§ 484.105). Therefore, RHC/FQHC visiting nurse services would not be covered by Medicare if such services are found to overlap with a 30-day period of home health care. We note that an RHC/FQHC visiting nurse service solely to obtain a nasal or throat culture would not be considered a nursing service because it would not require the skills of a nurse to obtain the culture as the specimen could be obtained by an appropriately-trained medical assistant or laboratory technician. However, during an otherwise covered RHC/FQHC visiting nurse service, the nurse could obtain the nasal or throat culture to send to the laboratory for testing.

Section 405.2416(a)(2) states that visiting nursing services are rendered to a homebound individual, and § 405.2416(d) states that homebound means an individual who is permanently or temporarily confined to his or her place of residence because of a medical or health condition, and that the individual may be considered homebound if he or she leaves the place of residence infrequently. We refer the reader to the definition of ''homebound'' as it pertains the PHE for the COVID–19 pandemic in section II.F. of this IFC, Clarification of Homebound Status under the Medicare Home Health Benefit.

c. Regulatory Changes

To make available additional visiting nursing services during the PHE for the COVID–19 pandemic in areas served by RHCs and FQHCs, we are revising, on an interim basis, § 405.2416 to add paragraph (a)(5), to state that during the PHE for the COVID–19 pandemic, an area typically served by the RHC, and an area that is included in the FQHC's service area plan, is determined to have a shortage of HHAs, and no request for this determination is required.

M. Medicare Clinical Laboratory Fee Schedule: Payment for Specimen Collection for Purposes of COVID–19 Testing

In response to the PHE for the COVID–19 pandemic and in an effort to be as expansive as possible within the current authorities to have testing available to Medicare beneficiaries who need it, we are changing Medicare payment policies during the PHE for the COVID–19 pandemic to provide payment to independent laboratories for specimen collection for COVID–19 testing under certain circumstances.

In general, section 1833(h)(3) of the Act requires the Secretary to provide for and establish a nominal fee for specimen collection for laboratory testing and a fee to cover transportation and personnel expenses for trained personnel to collect specimens from homebound patients and inpatients (not in a hospital), in addition to the amounts provided under the Medicare Clinical Laboratory Fee Schedule (CLFS). Section 1833(h)(3)(A) of the Act provides that the Secretary must establish a nominal fee to cover the appropriate costs in collecting the sample on which a clinical diagnostic laboratory test was performed and for which payment is made under Medicare Part B, except that not more than one such fee may be provided with respect to samples collected in the same encounter. The HCPCS codes for the nominal specimen fees currently listed on the CLFS (HCPCS codes 36415, P9612, and P9615) have a payment rate of $3. Section 216(a) of the Protecting Access to Medicare Act of 2014 (Pub. L. 113–93, enacted April 1, 2014) added section 1834A(b)(5) to the Act which increases by $2 the nominal fee that would otherwise apply under section 1833(h)(3)(A) of the Act for a sample collected from an individual in a skilled nursing facility (SNF) or by a laboratory on behalf of an HHA. Therefore, effective April 1, 2014, the nominal fee that would otherwise apply for a sample collected from an individual in a SNF or by a laboratory on behalf of a HHA is $5 (see § 414.507(f)), and the relevant HCPCS code is G0471.

In addition, section 1833(h)(3)(B) of the Act requires the Secretary to provide for and establish a fee to cover the transportation and personnel expenses for trained personnel to travel to the location of an individual to collect the sample, except that such a fee may be provided only with respect to an individual who is homebound or an inpatient in an inpatient facility (other than a hospital). In accordance with this provision, Medicare established a travel allowance for a laboratory technician to draw a specimen from homebound patients and non-hospital inpatients. Under current guidance, the travel allowance is intended to cover the estimated travel costs of collecting a specimen from a Medicare beneficiary and to reflect the technician's salary and travel costs. It is paid only when the nominal specimen collection is also payable and is not available if the technician is merely performing a messenger service to pick a specimen drawn by a physician or nursing home personnel. The methodology for determining the travel allowance varies depending on the round trip mileage to patients' homes. For instance, a per mile travel allowance methodology applies when the round trip to patients' homes is greater than 20 miles and a flat rate travel allowance methodology applies when the round trip to patients' homes is less than 20 miles. Medicare Part B MACs calculate the travel allowance for each claim. We have heard from stakeholders that in some cases the MAC requires them to maintain paper logs of miles traveled to receive the travel allowance.

CMS' current policies for payment of the nominal specimen collection fee and the fee to cover transportation and expenses for trained personnel to collect specimens from homebound patients and non-hospital inpatients are set forth in Pub. 100–04, Medicare Claims Processing Manual, chapter 16, section 60. We also implemented the increased nominal specimen collection fee under section 1834A(b)(5) of the Act in our regulations at § 414.507(f). The manual instructions regarding payment of these fees are available on the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c16.pdf.* Neither the annual cash deductible nor the 20 percent coinsurance for Medicare apply to the specimen collection fees or travel allowance for laboratory tests.

This IFC is establishing the following changes to the specimen collection fee policy for the duration of the PHE for the COVID–19 pandemic. We will provide for Medicare payment of a nominal specimen collection fee and associated travel allowance to independent laboratories for collection of specimens related to COVID–19 clinical diagnostic laboratory testing for homebound and non-hospital inpatients. Stakeholders have informed us that access to COVID–19 testing in facilities especially is limited due to the resource costs associated with acquiring the samples in a manner that prevents exposure for patients and health care workers. With patients confined to their homes for their own safety or the safety of others, there is an additional need to have patients tested in their homes and minimize exposure to others. We believe that providing a specimen collection fee for COVID–19 testing during the PHE will provide independent laboratories with additional resources to provide this testing and at the same time help with efforts to limit patients' exposure to the general population and alleviate patients' unease with leaving the home.

Under this policy, the nominal specimen collection fee for COVID–19 testing for homebound and non-hospital inpatients generally will be $23.46 and for individuals in a SNF or individuals whose samples will be collected by laboratory on behalf of an HHA will be $25.46. Medicare-enrolled independent laboratories can bill Medicare for the specimen collection fee using one of two new HCPCS codes for specimen collection for COVID–19 testing and bill for the travel allowance with the current HCPCS codes set forth in section 60.2 of the Medicare Claims Processing Manual (P9603 and P9604). Our policy will also incorporate the clarification in the definition of homebound as discussed in section II.F. of this IFC, relating to the clarification of homebound status under the Medicare home health benefit.

In establishing a nominal fee for COVID–19 specimen collection, we considered the type of trained laboratory personnel required to collect the specimen and the resources this type of collection could require. As noted previously, the current specimen collection fee HCPCS codes on the CLFS for homebound and non-hospital inpatients are $3 and $5, but we recognize that these fees are not intended to address additional resources needed during the PHE for the COVID–19 pandemic. Absent concrete information regarding the costs associated with independent laboratories collecting such specimens for COVID–19 tests in the context of the PHE, we looked to similar services in other settings of care as a potential benchmark. In looking at other Medicare payment systems, we believe the PFS is the best source for a potential payment amount since physicians and other practitioners often bill for services that involve specimen collection by trained, non-institutional staff.

Under the PFS, a Level 1 office visit (CPT code 99211) typically does not require the presence of a physician or other qualified health care professional and the usual presenting problem(s) are minimal. This code is what is typically reported by physician practices when the patient only sees clinical office staff

for services like acquiring a routine specimen sample. CPT code 99211, describes an:

Office visit for E/M of an established patient that may be performed by clinical staff under supervision (may not require a physician's presence). Usually the presenting problem(s) are minimal and typically 5 minutes are spent supervising or performing the service.

The CY 2020 national PFS payment amount for Level 1 established patient office visits is $23.46 on the PFS. We also considered establishing a higher payment amount that considered the Level 1 E/M visit plus the payment amount for CPT code 89220, Sputum obtaining specimen aerosol induced technique, for a specimen collection fee of $40.06, but we believe there is likely overlapping costs in staff time for these two services and the Level 1 office visit payment rate is adequate.

For initial diagnostic testing for COVID–19, the CDC issued interim guidelines that recommend collecting and testing for the virus using an upper respiratory nasopharyngeal swab (NP). The CDC guidance also states that collection of oropharyngeal swabs (OP) is a lower priority and if collected should be combined in the same tube as the NP. The CDC guidance advises that collection of sputum should only be done for those patients with productive coughs. See *https://www.cdc.gov/coronavirus/2019-ncov/lab/guidelines-clinical-specimens.html.* Similar collection method types, that is, NP or OP swabs are also used in other laboratory developed tests for COVID–19.

Section 1833(h)(3) of the Act does not specifically describe the types of specimen collection methods that are eligible for the nominal fee and transportation and personnel expenses. However, section 1833(h)(3)(B) of the Act does refer to ''trained personnel'' that would collect the sample from homebound individuals and inpatients in non-hospital inpatient facilities. This suggests that to be medically necessary and for payment to be made for sample collection, the method of sample collection must require some training or skill on the part of the laboratory technician and cannot be conducted by the beneficiary, the beneficiary's caregiver, or facility staff if the facility does not have a laboratory, and therefore, is using an outside laboratory to perform its testing of patients. The Medicare Claims Processing Manual provides additional guidance on the medical necessity requirements for specimen collection. Specifically, the manual states that ''Medicare allows payment for a specimen collection fee when it is medically necessary for a laboratory technician to draw a specimen from either a nursing home patient or homebound patient'' and that ''the technician must personally draw the specimen.'' It also states that ''[t]his fee will not be paid to anyone who has not extracted the specimen'' and lists ''venipuncture or urine sample by catheterization'' as examples of a technician personally drawing the specimen. The manual further clarifies what it means for a specimen collection to be medically necessary stating that ''. . .where the specimen is a type that would require only the services of a messenger and would not require the skills of a laboratory technician, for example, urine or sputum, a specimen pickup service would not be considered medically necessary.''

We note that venipuncture and urine sample by catheterization are currently provided in the Medicare Claims Processing Manual as examples of a technician personally drawing a specimen, however, they are not an exhaustive list of all possible scenarios that require trained personnel to collect a specimen. In the case of collecting a specimen for COVID–19 testing, we believe that in the context of and for the duration of the PHE for the COVID–19 pandemic, collecting specimens using NP or OP swabs or collection of sputum will require a trained laboratory professional, as well as additional precautions that must be taken to minimize exposure risks in handling specimens that are suspected or confirmed for COVID–19. Thus, we believe that collecting a specimen for COVID–19 testing will incur higher costs than similar specimen collection services which require a trained laboratory professional but not additional precautions, to minimize exposure risks. The CDC advises that specimen collection must be performed correctly the first time the specimen is collected. A focus of the response to the PHE for the COVID–19 pandemic is to quickly identify individuals who are infected so that appropriate treatment for the patients being tested is provided in a timely manner. At the same time, another goal is to appropriately isolate those patients and quarantine those exposed to the patients to prevent further spread of the virus. We believe laboratory personnel will need to be trained on how to handle the specimen to maximize accurate test results for COVID–19. Laboratory personnel also will need to be trained on how to minimize risks for spreading the virus to themselves and/or others in the chain of handling the specimen before it arrives at the laboratory for analysis. The CDC guidance states that specimens should be collected as soon as possible once a person under investigation (PUI) is identified, regardless of the time of symptom onset, and that proper infection control must be maintained when collecting specimens. We believe that specimens for COVID–19 testing using NP, OP, or sputum must be collected by trained laboratory personnel, and the specimens are a type that would not require only the services of a messenger or specimen pick up service. The manual currently lists collection of sputum as a type that would require only the services of a messenger, and therefore, is not considered medically necessary. However, for the PHE for the COVID–19 pandemic only, we believe a specimen collection fee for sputum collection would be warranted and medically necessary due to the reasons discussed previously. If in the future other types of COVID–19 tests are available, such as serological tests or point of care tests, we note that the specimen collection fee would apply if the specimen collection method must be performed by trained laboratory personnel. However, COVID–19 tests that allow patients to collect the specimen themselves would not be eligible for the specimen collection fee.

To identify specimen collection for COVID–19 testing, we are establishing two new level II HCPCS codes. Independent laboratories must use one of these HCPCS codes when billing Medicare for the nominal specimen collection fee for COVID–19 testing for the duration of the PHE for the COVID–19 pandemic. These new HCPCS codes are:

- G2023, specimen collection for severe acute respiratory syndrome coronavirus 2 (SARS-CoV–2) (Coronavirus disease [COVID–19]), any specimen source.
- G2024, specimen collection for severe acute respiratory syndrome coronavirus 2 (SARS-CoV–2) (Coronavirus disease [COVID–19]), from an individual in a SNF or by a laboratory on behalf of a HHA, any specimen source.

We created the second Level II HCPCS code, G2024, because section 1834A(b)(5) of the Act and our regulations at § 414.507(f) require a higher fee for collecting a specimen from an individual in a SNF or by a laboratory on behalf of an HHA, as described previously in this section of the IFC. We will issue guidance when the PHE for the COVID–19 pandemic is over and when these codes are no longer valid and terminated in the HCPCS file and/or the CLFS as appropriate.

In addition, Medicare payment for transportation and expenses for trained personnel to collect specimens from homebound patients (as discussed in section II.F. of this IFC, relating to the clarification of homebound status under the Medicare home health benefit) and inpatients (not in a hospital) for purposes of COVID–19 testing will be made in accordance with existing instructions found in the Medicare Claims Processing Manual. Independent laboratories must use the existing level II HCPCS codes when billing for the travel allowance, that is, the per mile travel allowance as described by HCPCS code P9603 and the flat rate travel allowance as described by HCPCS code P9604. Additionally, we are clarifying that paper documentation of miles traveled is not required and laboratories can maintain electronic logs with that information. However, laboratories will need to be able to produce these electronic logs in a form and manner that can be shared with MACs. As stated previously, we have heard from stakeholders that maintaining paper logs of miles is burdensome, especially with the development of GPS systems and various applications for cellular phones in recent years that can track miles traveled. Thus, we are clarifying that there is no requirement that laboratories maintain logs on paper to document travel, and that laboratories may use digital documentation of this information if preferred. The MACs may provide more information on acceptable formats.

In defining an individual who is homebound for purposes of the specimen collection fee and the travel allowance under section 1833(h)(3) of the Act, the manual refers to Chapters 7 and 15 of Pub. 100–02, the Medicare Benefit Policy Manual. The definition of ''homebound'' in Chapters 7 and 15 of Pub. 100–02 originate from the statutory definition of ''confined to the home'' (that is, ''homebound'') under sections 1814(a) and 1835(a) of the Act. As discussed in section II.F. of this IFC, relating to the clarification of homebound status under the Medicare home health benefit patients are considered ''confined to the home'' (that is, ''homebound'') if it is medically contraindicated for the patient to leave the home. When it is medically contraindicated for a patient to leave the home, there exists a normal inability for an individual to leave home and leaving home safely would require a considerable and taxing effort.

As an example for the PHE for COVID–19 pandemic, this would apply for those patients: (1) Where a physician has determined that it is medically contraindicated for a beneficiary to leave the home because he or she has a confirmed or suspected diagnosis of COVID–19; or (2) where a physician has determined that it is medically contraindicated for a beneficiary to leave the home because the patient has a condition that may make the patient more susceptible to contracting COVID–19. A patient who is exercising ''self-quarantine'' for his or her own safety, would not be considered ''homebound'' unless it is also medically contraindicated for the patient to leave the home. Determinations of whether the patient is homebound must be based on an assessment of each beneficiary's individual condition. For the PHE for the COVID–19 pandemic, the CDC is currently advising that older adults and individuals with serious underlying health conditions stay home (CDC's guidance is interim and is expected to continue to be updated as warranted).[14] As such, during the PHE for the COVID–19 pandemic, we expect that many Medicare beneficiaries could be considered ''homebound''. In light of this clarification regarding the definition of homebound, we are noting this clarification pertains to the specimen collection fee and travel allowance in the PHE for COVID–19 pandemic testing for homebound patients; that is, a patient is considered homebound for purposes of the fees under sections 1833(h)(3) and 1834A(b)(5) of the Act if it is medically contraindicated for the patient to leave home.

In summary, to address the PHE for the COVID–19 pandemic, we are using this IFC as a vehicle to provide additional payment during the PHE in the form of a specimen collection fee of $23.46 generally, and $25.46 for an individual in a SNF or by a laboratory on behalf of a HHA, for COVID–19 testing and to provide a travel allowance for a laboratory technician to collect a specimen for COVID–19 testing from a non-hospital inpatients or homebound patients under section 1833(h)(3) of the Act.

N. Requirements for Opioid Treatment Programs (OTP)

In the CY 2020 PFS final rule (84 FR 62645 and 62646), we finalized allowing the use of interactive two-way audio/video communication technology to furnish the counseling and therapy portions of the weekly bundle of services furnished by OTPs. In light of the PHE for the COVID–19 pandemic, during which the public has been instructed to practice self-isolation or social distancing, and because interactive audio-video communication technology may not be available to all beneficiaries, we are revising § 410.67(b)(3) and (4) to allow the therapy and counseling portions of the weekly bundles, as well as the add-on code for additional counseling or therapy, to be furnished using audio-only telephone calls rather than via two-way interactive audio-video communication technology during the PHE for the COVID–19 pandemic if beneficiaries do not have access to two-way audio/video communications technology, provided all other applicable requirements are met. We believe this change is necessary to ensure that beneficiaries with opioid use disorders are able to continue to receive these important services during the current PHE.

O. Application of Teaching Physician and Moonlighting Regulations During the PHE for the COVID–19 Pandemic

a. Background

In context of the PHE for the COVID–19 pandemic, we have been asked by stakeholders to relax supervision requirements related to the provision of teaching physician services under the PFS. For teaching physicians, section 1842(b) of the Act specifies that in the case of physicians' services furnished to a patient in a hospital with a teaching program, the Secretary shall not provide payment for such services unless the physician renders sufficient personal and identifiable physicians' services to the patient to exercise full, personal control over the management of the portion of the case for which payment is sought. We have also been asked to allow residents to independently furnish services in their capacity as fully licensed physicians outside of the scope of their approved GME residency in the inpatient setting of the hospital at which they provide services.

b. Revisions to Teaching Physician Regulations During a PHE for the COVID–19 Pandemic

Regulations regarding PFS payment for teaching physician services and moonlighting are codified in 42 CFR part 415. Under § 415.172, if a resident participates in a service furnished in a teaching setting, PFS payment is made only if the teaching physician is present during the key portion of any service or procedure for which payment is sought. The provisions in § 415.174 exempt certain office/outpatient E/M services provided in the outpatient department of a hospital or another ambulatory care

[14] *https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html.*

entity (that is, primary care centers) from the physical presence requirement for the key portion of the service, pending all provisions of the regulation are met. The regulations in § 415.180 state that for the interpretation of diagnostic radiology and other diagnostic tests, PFS payment is made if the interpretation is performed or reviewed by a physician other than a resident. For § 415.184, the requirement for the presence of the teaching physician during psychiatric services in which a resident is involved may be met by observation of the service by use of a one-way mirror, video equipment, or similar device.

In context of the PHE for the COVID–19 pandemic, teaching hospitals have expressed a need to increase their capacity to respond to the PHE for the COVID–19 pandemic because there has been increased demand for physicians to respond to patient needs. For example, we have been asked by stakeholders to allow Medicare to make payment under the PFS for services billed by teaching physicians when residents have furnished the entirety of a service in the inpatient setting in the area of their approved GME program and have a teaching physician review and sign off on the service, rather than requiring the teaching physician be physically present for the key portion of the service.

Given the circumstances of the PHE for the COVID–19 pandemic, we believe that the requirements for the physical presence of the teaching physician during the key portion of the service would necessarily limit access to services paid under the PFS. We recognize that in some cases, the physical proximity of the physician might present additional exposure risks, especially for high risk patients isolated for their own protection or in cases where the teaching physician and/or the resident has been exposed to the virus and must be under quarantine, or who may be at home caring for family members or providing childcare. If the teaching physician and/or the resident is under quarantine or at home, it could unintentionally limit the number of licensed practitioners available to furnish services to Medicare patients and could have the unintended consequence of limiting access to services paid under the PFS.

To increase the capacity of teaching settings to respond to the PHE for the COVID–19 pandemic as more practitioners are increasingly being asked to assist with the COVID–19 response, on an interim basis, for the duration of the PHE for the COVID–19 pandemic, we are amending the teaching physician regulations to allow that as a general rule under § 415.172, the requirement for the presence of a teaching physician can be met, at a minimum, through direct supervision by interactive telecommunications technology, as described in section II.E. of this IFC. In other words, the teaching physician must provide supervision either with physical presence or be present through interactive telecommunications technology during the key portion of the service. Specifically, we believe that when use of such real-time, audio and video telecommunications technology allows for the teaching physician to interact with the resident through virtual means, their ability to furnish assistance and direction could be met without requiring the teaching physician's physical presence for the key portion of the service.

Currently, under the primary care exception in § 415.174, certain lower and mid-level office/outpatient E/M services provided in primary care centers are exempt from the physical presence requirement for the key portion of the service. The teaching physician must direct the care from such proximity as to constitute immediate availability (that is, provide direct supervision). In context of the PHE for the COVID–19 pandemic, the teaching physician may be under quarantine or otherwise at home, or the physical proximity of the teaching physician might present additional exposure risks. Additionally, during the PHE for the COVID–19 pandemic, more patients may present with more complex needs, such as an underlying condition that places them at high risk for COVID–19 and that necessitate a high level office/outpatient E/M service (that is, level 4 or 5 visit). Consequently, on an interim basis, for the duration of the PHE for the COVID–19 pandemic, we are amending § 415.174 to allow that all levels of an office/outpatient E/M service provided in primary care centers may be provided under direct supervision of the teaching physician by interactive telecommunications technology. We believe use of real-time, audio and video telecommunications technology allows for the teaching physician to interact with the resident through virtual means, and thus would meet the requirement for teaching physician presence for office/outpatient E/M services furnished in primary care centers. For § 415.180, for the duration of the PHE for the COVID–19 pandemic, we will allow PFS payment to be made for the interpretation of diagnostic radiology and other diagnostic tests when the interpretation is performed by a resident under direct supervision of the teaching physician by interactive telecommunications technology. The teaching physician must still review the resident's interpretation. For § 415.184, for the duration of the PHE for the COVID–19 pandemic, the requirement for the presence of the teaching physician during the psychiatric service in which a resident is involved may be met by the teaching physician's direct supervision by interactive telecommunications technology. For both §§ 415.180 and 415.184, allowing residents to furnish these services under direct supervision of the teaching physician by interactive telecommunications technology would allow for the presence requirement to be met. These diagnostic radiology, diagnostic tests, and psychiatry services could continue to be provided to patients that need them in the event the teaching physician is in quarantine or otherwise at home, or where the physical proximity of the teaching physical might present additional exposure risk.

The regulations describing PFS payment for teaching physician services do have additional exceptions for specific policies. For example, as described in § 415.172, in the case of surgical, high-risk, or other complex procedures, the teaching physician must be present during all critical portions of the procedure and immediately available to furnish services during the entire service or procedure. In the case of procedures performed through an endoscope, the teaching physician must be present during the entire viewing. As described in § 415.178 for anesthesia services, the teaching anesthesiologist must be present during all critical or key portions of the anesthesia service or procedure involved and the teaching anesthesiologist must be immediately available to furnish anesthesia services during the entire procedure. Given the complex nature of these procedures and the potential danger to the patient, even in the context of the PHE for the COVID–19 pandemic and the inherent exposure risks for patients and physicians, we believe that the requirements for physical presence for either the entire procedure or the key portions of the service, whichever are applicable, are necessary for patient safety. Thus, the PHE for the COVID–19 pandemic exceptions previously described will not apply in the case of surgical, high risk, interventional, or other complex procedures, services performed through an endoscope, and anesthesia services. We seek comment

on whether other procedures should also be exempt from this policy given the complex nature or potential danger to the patient.

Collectively, the flexibilities described for §§ 415.172, 415.174, 415.180, and 415.184 are intended to ensure there are as many qualified practitioners as possible. They are also intended to minimize the number of people coming into contact with one another by removing the need for in-person direct supervision. We view direct supervision by interactive telecommunications technology as the minimum requirement for provision of the service for purposes of Medicare payment. However, teaching physicians may continue to exercise their clinical judgment to decide whether it is appropriate to utilize these flexibilities in furnishing their services involving residents. We also seek comment on our belief that direct supervision by interactive telecommunications technology is appropriate in the context of this PHE, as well as whether any guardrails should be included, and how it balances risks that might be introduced for beneficiaries with reducing exposure risk and the increased spread of the disease, in the context of this PHE.

c. Application of the Expansion of Telehealth Services to Teaching Physician Services

On March 17, 2020, we announced the expansion of telehealth services on a temporary and emergency basis pursuant to waiver authority added under section 1135(b)(8) by the Coronavirus Preparedness and Response Supplemental Appropriations Act.[15] Starting on March 1, 2020, Medicare can pay for telehealth services, including office, hospital, and other visits furnished by physicians and other practitioners to patients located anywhere across the country including in a patient's place of residence. We have been asked by stakeholders to clarify whether this expansion applies to teaching physician services, including those furnished under the primary care exception. We believe that allowing Medicare payment for services billed by the teaching physician when the resident is furnishing services, including office/outpatient E/M services provided in primary care centers, via telehealth under direct supervision by interactive telecommunications technology would allow residents to furnish services remotely to patients who may need to be isolated for purposes of exposure risk based on presumed or confirmed COVID–19 infection, and as a result, would increase access to services for patients. To increase the capacity of teaching settings to respond to the PHE for the COVID–19 pandemic as more practitioners are increasingly being asked to assist with the COVID–19 response, we believe that, for telehealth services involving residents, the requirement that a teaching physician be present for key portions of the service can be met through virtual means. We also believe same is true for telehealth services furnished by the resident in primary care centers. The use of real-time, audio and video telecommunications technology allows for the teaching physician to interact with the resident through virtual means while the resident is furnishing services via telecommunications technology, and thus, in the circumstances of the PHE, would meet the requirement for teaching physician presence for office/outpatient E/M services furnished in primary care centers. Consequently, on an interim basis for the duration of the PHE for the COVID–19 pandemic, we are revising our regulations to specify that Medicare may make payment under the PFS for teaching physician services when a resident furnishes telehealth services to beneficiaries under direct supervision of the teaching physician which is provided by interactive telecommunications technology. Additionally, on an interim basis, for the duration of the PHE for the COVID–19 pandemic, Medicare may make payment under the PFS for services billed under the primary care exception by the teaching physician when a resident furnishes telehealth services to beneficiaries under the direct supervision of the teaching physician by interactive telecommunications technology. We also seek comment on our belief that direct supervision by interactive telecommunications technology is appropriate in the context of this PHE, as well as whether and how it balances risks that might be introduced for beneficiaries with reducing exposure risk and the increased spread of the disease, in the context of this PHE.

d. Payment Under the PFS for Teaching Physician Services When Resident Under Quarantine

There also may be circumstances in which the resident may need to furnish services while under quarantine (for example, while at home). We have been asked by stakeholders if residents who have been exposed to COVID–19 and are under quarantine, and otherwise well and able to work, are able to furnish services that do not require face-to-face patient care, such as reading the results of tests and other imaging studies. Because current regulations require the physical presence of the teaching physician during the key portion of the service, residents would not be able to furnish services from quarantine, which could limit the number of licensed practitioners available to furnish services to Medicare patients and could have the unintended consequence of limiting access to services paid under the PFS. Because we are amending the teaching physician regulations to allow that as a general rule under § 415.172, the requirement for the presence of a teaching physician can be met through direct supervision by interactive telecommunications technology, on an interim basis, for the duration of the PHE for the COVID–19 pandemic, Medicare may also make payment under the PFS for teaching physician services when the resident is furnishing these services while in quarantine under direct supervision of the teaching physician by interactive telecommunications technology. We believe this policy will limit exposure to COVID–19 and to allow for the continued access to physicians' services of residents while in quarantine.

e. Revisions to Moonlighting Regulations During a PHE for the COVID–19 Pandemic

A licensed resident physician is considered to be ''moonlighting'' when they furnish physicians' services to outpatients outside the scope of an approved graduate medical education (GME) program. Under current regulations, the services of residents in hospitals in which the residents have their approved GME program are not considered separately billable as physicians' services and instead are payable under §§ 413.75 through 413.83 regarding direct GME payments, whether or not the services are related to the approved GME training program. When a resident furnishes services that are not related to their approved GME programs in an outpatient department or emergency department of a hospital in which they have their training program, those services can be billed separately as physicians' services and payable under the PFS if they meet the criteria described in our regulation at § 415.208(b)(2).

In light of the PHE for the COVID–19 pandemic, teaching hospitals need to secure as much physician coverage as possible because there has been increased demand for physicians to

[15] *https://www.cms.gov/newsroom/press-releases/president-trump-expands-telehealth-benefits-medicare-beneficiaries-during-covid-19-outbreak.*

respond to patient needs, such as furnishing services to patients in inpatient settings who have either a presumed or confirmed COVID–19 infection. Stakeholders have requested that residents be able to furnish physicians' services to patients in the inpatient setting outside of the scope of their approved GME programs in the hospital where they have their training.

We believe that our regulation at § 415.208(b), which limits the scope of services that can be separately billable by moonlighting residents when furnished outside their approved GME programs to patients in an outpatient department or emergency department of a hospital in which they have their training program, does not adequately meet the needs of teaching hospitals to ensure there are as many qualified practitioners available as possible given the circumstances of the PHE for the COVID–19 pandemic. Under current policy, for example, a resident in a hospital's approved GME program for anesthesia who typically furnishes only anesthesia-related services in an operating room would not be able to provide separately billable physicians' services when treating inpatients in the intensive care unit for COVID–19 infection, even if these services were not part of the resident's approved GME program. As a result, this regulation could unintentionally limit the number of licensed practitioners available to furnish services to Medicare patients and could have the unintended consequence of limiting access to critically needed care. Consequently, on an interim basis, for the duration of the PHE for the COVID–19 pandemic, we are amending our regulation in § 415.208 to state that the services of residents that are not related to their approved GME programs and are performed in the inpatient setting of a hospital in which they have their training program are separately billable physicians' services for which payment can be made under the PFS provided that the services are identifiable physicians' services and meet the conditions of payment for physicians' services to beneficiaries in providers in § 415.102(a), the resident is fully licensed to practice medicine, osteopathy, dentistry, or podiatry by the State in which the services are performed, and the services are not performed as part of the approved GME program.

P. Special Requirements for Psychiatric Hospitals (§ 482.61(d))

In the June 16, 2016 **Federal Register**, we published the ''Medicare and Medicaid Programs; Hospital and Critical Access Hospital (CAH) Changes To Promote Innovation, Flexibility, and Improvement in Patient Care'' proposed rule (81 FR 39447), which outlined a number of proposed hospital and CAH Condition of Participation (CoP) requirements, including those focused on infection control, antibiotic use, and scope of practice for NPPs (that is, advanced practice providers (APPs) such as PAs, NPs, psychologists, and CNSs, as well as other qualified, licensed practitioners to whom this revision might also be applicable).

Subsequently, in the September 30, 2019 **Federal Register**, we published the ''Medicare and Medicaid Programs; Hospital and Critical Access Hospital (CAH) Changes To Promote Innovation, Flexibility, and Improvement in Patient Care'' final rule (84 FR 51775) that finalized several of these proposed changes to modernize the hospital and CAH requirements, improve quality of care, and support HHS and CMS priorities. In that final rule, we deleted the modifying term ''independent'' from the Patient's Rights CoP at 42 CFR 482.13(e)(5) and (e)(8)(ii) regarding which practitioners may order the use of restraints and seclusion. These revisions to the regulatory text were intended to finally make the language of the hospital CoPs consistent with the language of the Children's Health Act of 2000 (CHA) (Pub. L. 106–310, enacted October 17, 2000) regarding restraint and seclusion orders and licensed practitioners, and upon which the CoP language was originally intended to be based. Additionally, and to remain consistent throughout this CoP, we revised § 482.13(e)(10) and (11), (e)(12)(i)(A), (e)(14), and (g)(4)(ii) that contained the term ''licensed independent practitioner'' by changing the term from ''licensed independent practitioner'' to simply ''licensed practitioner.''

In the final rule, we stated that the revision reflected our goal to have health professionals operate within the scope of practice allowed by state law, and that it also recognized the need to fully utilize the healthcare workforce. We also stated that we believe that this change will reduce unnecessary burden for hospitals and remove obstacles APPs face when ordering seclusion and restraints. However, we stated that we disagreed with the commenters who stated that the removal of the term ''independent'' will cause confusion over the applicability of this requirement. Our removal of the term ''independent'' is consistent with the language used in the CHA, which utilizes the term ''other licensed practitioner,'' without the independent modifying term. In addition, the order of restraint or seclusion must be ordered by a licensed practitioner who is authorized by hospital policy in accordance with State law to do so.

In the September 30, 2019 final rule, we made additional revisions to address other areas of the hospital CoPs that we viewed as being either conflicting with, or more stringent than, existing state scope-of-practice laws and licensing requirements, and which, if appropriately revised, would give APPs greater flexibility to practice more broadly in the current healthcare system while still being in accordance with respective state scope-of-practice laws.

Therefore, in our review of the Hospital CoPs for the proposed rule, we discovered that there were several provisions that incorrectly reference § 482.12(c)(1), which lists the types of physicians and applies only to patients who are Medicare beneficiaries. Section 482.12(c) states that the governing body of the hospital must ensure that every Medicare patient is under the care of one of the following practitioners:

- A doctor of medicine or osteopathy;
- A doctor of dental surgery or dental medicine who is legally authorized to practice dentistry by the State and who is acting within the scope of his or her license;
- A doctor of podiatric medicine, but only with respect to functions which he or she is legally authorized by the State to perform;
- A doctor of optometry who is legally authorized to practice optometry by the State in which he or she practices;
- A chiropractor who is licensed by the State or legally authorized to perform the services of a chiropractor, but only with respect to treatment by means of manual manipulation of the spine to correct a subluxation demonstrated by X-ray to exist; and
- A clinical psychologist as defined in § 410.71, but only for a clinical psychologist services as defined in § 410.71 and only to the extent permitted by State law.

The reference of this ''Medicare beneficiary-only'' requirement in certain other provisions of the hospital CoPs (which we have listed below) inappropriately links it to *all* patients and not Medicare beneficiaries exclusively. In fact, per section 1861(e)(4) of the Act, every patient with respect to whom payment may be made under this title must be under the care of a physician except that a patient receiving qualified psychologist services (as defined in subsection (ii)) may be under the care of a clinical psychologist with respect to such services to the extent permitted under State law. In

accordance with that provision, we have chosen to apply § 482.12(c) to Medicare patients. With the exception of a few provisions in the CoPs such as those directly related to § 482.12(c) described here, the remainder of the CoPs apply to all patients, regardless of payment source, and not just Medicare beneficiaries. For example, the Nursing Services CoP, at § 482.23(c)(1), requires that all drugs and biologicals must be prepared and administered in accordance with Federal and State laws, the orders of the practitioner or practitioners responsible for the patient's care as specified under § 482.12(c), and accepted standards of practice. Since the CoPs clearly allow hospitals to determine which categories of practitioners would be responsible for the care of other patients, outside the narrow Medicare beneficiary restrictions of § 482.12(c), this reference is inappropriate and unnecessarily restrictive of hospitals and their medical staffs to make these determinations based on State law and practitioner scope of practice.

To clarify that these provisions apply to all patients and not only Medicare beneficiaries, we deleted any inappropriate references to § 482.12(c) in the final rule. Therefore, we deleted references to § 482.12(c) found in the following provisions: § 482.13(e)(5), (e)(8)(ii), (e)(14), and (g)(4)(ii) in the Patients' Rights CoP; and § 482.23(c)(1) and (3) in the Nursing Services CoP. We note here that we did not receive any comments on these changes as they proposed in the June 2016 proposed rule, and therefore, we finalized them without change.

In performing our most recent review of the hospital CoPs, including the Requirements for Specialty Hospitals at subpart E of 42 CFR part 482, we discovered that we inadvertently failed to propose to delete another inappropriate reference to § 482.12(c), which is contained in the current provision at § 482.61(d) in the Special Medical Record Requirements for Psychiatric Hospitals CoP (pertaining to which hospital personnel may complete progress notes for patients). The current provision also contains the term ''licensed independent practitioner.'' Therefore, in the interests of consistency with the other recent revisions we have noted here, we are now deleting the reference to § 482.12(c) along with the modifier ''independent'' in this IFC.

We believe that as currently written and implemented, this requirement requires some clarification for the reasons that we have discussed. As we have already stated and made clear through our recent revisions to the hospital CoPs, we believe that APPs, including PAs, NPs, psychologists, and CNSs (as well as other qualified, licensed practitioners to whom this revision might also be applicable), when acting in accordance with State law, their scope of practice, and hospital policy, should have the authority to practice more broadly and to the highest level of their education, training, and qualifications as allowed under their respective state requirements and laws in this area.

We believe that NPPs practicing in the psychiatric hospital setting should be able to record progress notes of psychiatric patients for whom they are responsible. Therefore, we will allow the use of NPPs, or APPs, to document progress notes of patients receiving services in psychiatric hospitals, in addition to MDs/DOs as is currently allowed.

Given the changes made to the requirements under § 482.13 regarding the removal of the word ''independent'' from the phrase ''licensed independent practitioner'' when referencing NPPs that we have previously discussed, we are making the same change for this provision. We believe that the regulatory language should be as consistent as possible throughout the hospital CoPs and, in addition, as was the case with the requirement under § 482.13, using the term ''licensed independent practitioner'' may inadvertently exacerbate workforce shortage concerns, might unnecessarily impose regulatory burden on hospitals by restricting a hospital's ability to allow APPs and other NPPs to operate within the scope of practice allowed by state law, and does not recognize the benefits to patient care that might be derived from fully utilizing APPs and their clinical skills to the highest levels of their training, education, and experience as allowed by hospital policy in accordance with state law. We believe that this change permits a greater scope of practice for these professionals in the psychiatric hospital context.

Q. Innovation Center Models

1. Medicare Diabetes Prevention Program (MDPP) Expanded Model Emergency Policy

Through this IFC, we are amending the Medicare Diabetes Prevention Program (MDPP) expanded model to modify certain MDPP policies during the PHE. Specifically, this IFC will permit certain beneficiaries to obtain the set of MDPP services more than once per lifetime, increase the number of virtual make-up sessions, and allow certain MDPP suppliers to deliver virtual MDPP sessions on a temporary basis. These changes are in response to COVID–19, which resulted in an interruption to expanded model services delivered by MDPP suppliers and/or prevented MDPP beneficiaries from attending sessions. Throughout the rulemaking for the MDPP expanded model, we sought to ensure that the MDPP set of services would be delivered in-person, in a classroom based setting, within an established timeline. At the time, the priority was placed on establishing a structured service that, when delivered within the confines of the rule, would create the least risk of fraud and abuse, increase the likelihood of success, and maintain the integrity of the data collected for evaluation purposes. However, the COVID–19 pandemic has led to suspension of in-person class sessions and guidance from CDC that Medicare-age beneficiaries stay home. In response, we will implement provisions that allow for temporary flexibilities that prioritize availability and continuity of services for MDPP suppliers and MDPP beneficiaries impacted by extreme and uncontrollable circumstances during the COVID–19 PHE. The changes in this IFC are applicable to MDPP suppliers, as defined in § 410.79(b), that are enrolled in MDPP as March 1, 2020, and MDPP beneficiaries as defined in § 410.79(b) who were receiving MDPP set of services as of March 1, 2020. Under these temporary flexibilities, the requirement for in-person attendance at the first core-session will remain in effect. As a result, if beneficiaries are prohibited from attending the first core session in person, suppliers will be unable to start any new cohorts with MDPP beneficiaries. All flexibilities described in this IFC will cease to be available at the conclusion of the PHE. The CDC issued guidance to all National Diabetes Prevention Program suppliers on or about March 12, 2020, providing alternative delivery options during the COVID–19 national emergency, including encouraging organizations to use virtual make-up sessions as necessary, regardless of usual delivery mode; if virtual make-up sessions are not possible, organizations may pause offering classes. When classes resume, the CDC is allowing suppliers to pick up where they left off, or to restart the expanded model program from week one. It is our intent to conform with the CDC guidance where feasible, with the overall intent to minimize disruption of services for MDPP suppliers and MDPP beneficiaries; by allowing MDPP beneficiaries to maintain their

eligibility. We are amending the MDPP regulations to provide for certain changes, including allowing MDPP suppliers to either deliver MDPP services virtually or suspend in-person services and resume services at a later date. The limit to the number of virtual make-up sessions is waived for MDPP suppliers with existing capabilities to provide services virtually, so long as the virtual services are furnished in a manner that is consistent with the CDC Diabetes Prevention Recognition Program (DPRP) standards for virtual sessions, follow the CDC-approved DPP curriculum requirements, and are provided upon the individual MDPP beneficiary's request. In addition, the MDPP supplier may only furnish to the MDPP beneficiary a maximum of one session on the same day as a regularly scheduled session and a maximum of one virtual make-up session per week. Virtual make-up sessions may only be furnished to achieve attendance goals and may not be furnished to achieve weight-loss goals. An MDPP supplier may offer to an MDPP beneficiary no more than: 15 virtual make-up sessions offered weekly during the core session period; 6 virtual make-up sessions offered monthly during the core maintenance session interval periods; and 12 virtual make-up sessions offered monthly during the ongoing maintenance session interval periods.

In addition, these changes permit certain MDPP beneficiaries to obtain the set of MDPP services more than once per lifetime, for the limited purposes of allowing a pause in service and to provide the flexibilities that will allow MDPP beneficiaries to maintain eligibility for MDPP services despite a break in service, attendance, or weight loss achievement.

We are amending our provisions at § 410.79 by adding paragraph (e).

2. Changes to the Comprehensive Care for Joint Replacement (CJR) Model To Extend the Length of Performance Year 5 by Three Additional Months and To Change the Extreme and Uncontrollable Circumstances Policy To Account for the COVID–19 Pandemic

Through this IFC, we are implementing two changes to the Comprehensive Care for Joint Replacement (CJR) model to support the continuity of model operations and to ensure that CJR participants do not unfairly suffer financial consequences from the impact of COVID–19 due to their participation in CJR. Specifically, we are implementing a 3-month extension to CJR performance year (PY) 5 such that the model will now end on March 31, 2021, rather than ending on December 31, 2020. On February 24, 2020, we published a proposed rule titled ''Medicare Program: Comprehensive Care for Joint Replacement Model Three-Year Extension and Changes to Episode Definition and Pricing'' (85 FR 10516; CMS–5529–P). We wish to ensure continuity of CJR model operations in participant hospitals during this PHE for the COVID–19 pandemic so that we do not create any additional disruptions to the standard care procedures hospitals have in place during this challenging time. Therefore, we are implementing a 3-month extension of CJR PY 5 and amending the provisions at 42 CFR 510.2 and 510.200(a) to reflect that extension.

Further, recognizing that the current CJR model policy for extreme and uncontrollable circumstances policy is not applicable to the PHE for the COVID–19 pandemic, we also are implementing a change to that policy in this IFC such that it will be applicable to episodes impacted by the COVID–19 pandemic. Currently, the CJR extreme and uncontrollable circumstances policy, which is codified at § 510.305(k), applies only during major disaster declarations where a participant hospital and its beneficiaries are affected by natural disasters, such as, hurricanes, earthquakes, wildfires.[16] Although the COVID–19 outbreak in the United States was declared as a national emergency on March 13, 2020,[17] the current CJR extreme and uncontrollable circumstances policy does not apply to this national emergency. Although we do not expect many new CJR episodes to initiate as we have recently issued guidance [18] stressing the need to avoid elective surgeries in light of the COVID–19 virus, we recognize that a number of beneficiaries are in active CJR episodes that initiated prior to March 2020. Further, we acknowledge that CJR hip fracture episodes, which generally result from emergent accidents and are not necessarily avoidable, will continue to occur. Given the challenges to the health care delivery system in responding to COVID–19 cases and the expenses associated with treating this highly contagious virus, we want to avoid inadvertently creating incentives to place cost considerations above patient safety within the CJR model during this COVID–19 pandemic. Therefore, to enable the CJR model to adjust for the effect of COVID–19, we are broadening the extreme and uncontrollable circumstances policy by applying certain financial safeguards to participant hospitals that have a CCN primary address that is located in an emergency area for episodes that overlap with the emergency period, as those terms are defined in section 1135(g) of the Act, for which the Secretary issued a waiver or modification of requirements under section 1135 of the Act on March 13, 2020, which applies nationwide.[19] Accordingly, all participant hospitals are located in the emergency area and qualify for applicable financial safeguards during the emergency period.

Amending the extreme and uncontrollable circumstances policy to account for all participant hospitals affected by the COVID–19 pandemic allows participant hospitals to concentrate on patient care and ensures that participant hospitals are not held financially liable for episode costs that escalate due to effects from the COVID–19 pandemic. While this amendment greatly broadens the extreme and uncontrollable circumstances policy, the significant impact the health care delivery system faces in responding to COVID–19 cases and the expenses associated with treating this highly-contagious virus justifies modifying the extreme and uncontrollable circumstances policy and increasing the financial safeguards. Specifically, we are stating that for a fracture or non-fracture episode with a date of admission to the anchor hospitalization that is on or within 30 days before the date that the emergency period (as defined in section 1135(g) of the Act) begins or that occurs through the termination of the emergency period (as described in section 1135(e) of the Act), actual episode payments are capped at the target price determined for that episode under § 510.300. Though different financial safeguards apply for fracture and non-fracture episodes when a major disaster declaration is declared, we believe applying equal financial safeguards for both episodes during the COVID–19 pandemic is more appropriate due to its nationwide impact on hospitals and post-acute care facilities ability to provide care for beneficiaries during this PHE.

We are codifying these provisions at § 510.305 (k)(3) and (4).

[16] 82 FR 57066.

[17] See: *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[18] See: *https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf.*

[19] See *https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx.*

3. Alternative Payment Model Treatment Under the Quality Payment Program

As has been described previously in this IFC, we are seeking to give entities and individuals that provide services to Medicare beneficiaries needed flexibilities to respond effectively to the serious public health threats posed by the spread of the COVID–19, and to address the needs of health care providers specific to this declared national emergency. We further recognize that flexibilities may be necessary and appropriate in the context of Alternative Payment Models (APMs), including applicable model tests conducted under section 1115A of the Act by the CMS Center for Medicare and Medicaid Innovation (Innovation Center), as well as the Medicare Shared Savings Program. We note that aspects of APM policies under the Quality Payment Program are designed to follow on from the specific designs, policies, and operations of individual APMs. We recognize that our current regulations may be insufficient for purposes of adequately responding to the still-emerging COVID–19 national emergency and that additional action may be necessary and appropriate to prevent APM participants from facing undue burden in or negative consequences through the Quality Payment Program.

We acknowledge that possible changes might be needed to address issues that may arise for APM participants in light of the current emergency. We will consider undertaking additional rulemaking, including possibly another interim final rule, to amend or suspend APM QPP policies as necessary to ensure accurate and appropriate application of Quality Payment Program policies in light of the PHE due to COVID–19.

R. Remote Physiologic Monitoring

In recent years, we have finalized payment for seven CPT codes in the Remote Physiologic Monitoring (RPM) code family. We finalized payment in the CY 2018 PFS final rule for CPT code 99091 (*Collection and interpretation of physiologic data digitally stored and/or transmitted by the patient and/or caregiver to the physician or other qualified health care professional, qualified by education, training, licensure/regulation requiring a minimum of 30 minutes of time*). The following year, we finalized payment for CPT codes 99453 (*Remote monitoring of physiologic parameter(s)(e.g., weight, blood pressure, pulse oximetry, respiratory flow rate), initial; set-up and patient education on use of equipment*), 99454 (*Remote monitoring of physiologic parameter(s)(e.g., weight, blood pressure, pulse oximetry, respiratory flow rate), initial; device(s) supply with daily recording(s) or programmed alert(s) transmission, each 30 days*), and 99457 (*Remote physiologic monitoring treatment management services, clinical staff/physician/other qualified health care professional time in a calendar month requiring interactive communication with the patient/caregiver during the month; first 20 minutes*)). Most recently, for the CY 2020 PFS final rule (84 FR 62645 and 62646), we finalized a treatment management add-on code CPT code 99458 (*Remote physiologic monitoring treatment management services, clinical staff/physician/other qualified health care professional time in a calendar month requiring interactive communication with the patient/caregiver during the month; each additional 20* minutes) and two self-measured blood pressure monitoring codes, CPT code 99473 (*Self-measured blood pressure using a device validated for clinical accuracy; patient education/training and device calibration*) and CPT code 99474 (*Separate self-measurements of two readings one minute apart, twice daily over a 30-day period (minimum of 12 readings), collection of data reported by the patient and/or caregiver to the physician or other qualified health care professional, with report of average systolic and diastolic pressures and subsequent communication of a treatment plan to the patient*).

We are concerned that under the PHE for the COVID–19 pandemic, physicians and other health care professionals are faced with challenges regarding potential exposure risks for themselves and their patients. In response, the CDC has urged health care professionals to make every effort to interview patients by telephone, text monitoring, or video conferencing instead of in-person. We believe that RPM services support the CDC's goal of reducing human exposure to the novel coronavirus while also increasing access to care and improving patient outcomes.

RPM services are considered to be CTBS and, as such, would be billable only for established patients. Our goal during the PHE for the COVID–19 pandemic is to reduce exposure risks to the novel coronavirus for practitioners and patients and to increase access to services by eliminating as many obstacles as possible to delivering necessary services. Allowing RPM services to be furnished only to established patients could be an obstacle to delivery of reasonable and necessary care particularly during current conditions. Thus, in response to the PHE for the COVID–19 pandemic, we are finalizing on an interim basis, that RPM services can be furnished to new patients, as well as to established patients.

In addition to current policy that there be an established patient-practitioner relationship, we require for CTBS at least verbal consent from a Medicare beneficiary to receive the services. We finalized this requirement to avoid scenarios where beneficiaries are unexpectedly responsible for copays for services that do not involve the typical in-person, face-to-face service that a patient receives during an office visit. We continue to believe that patient consent is important. However, we also believe that acquiring patient consent should not interfere with the provision of RPM services during the PHE for the COVID–19 pandemic. Therefore, we are finalizing on an interim basis that consent to receive RPM services can be obtained once annually, including at the time services are furnished, during the duration of the PHE for the COVID–19 pandemic. However, to enhance beneficiary protection, for both new and established patients, we suggest that the physician or other health care practitioner review consent information with a beneficiary, obtain the beneficiary's verbal consent, and document in the medical record that consent was obtained.

Finally, we are clarifying that RPM codes can be used for physiologic monitoring of patients with acute and/or chronic conditions. The typical patient needing RPM services may have a chronic condition (for example, high blood pressure, diabetes, COPD). However, RPM can be used for other conditions. For example, RPM services allow a patient with an acute respiratory virus to monitor pulse and oxygen saturation levels using pulse oximetry. Nurses, working with physicians, can check-in with the patient and then using patient data, determine whether home treatment is safe, all the while reducing exposure risk and eliminating potentially unnecessary emergency department and hospital visits.

S. Telephone Evaluation and Management (E/M) Services

For CY 2008, the CPT Editorial Panel created CPT codes to describe E/M services furnished by a physician or qualified healthcare professional via telephone or online, including CPT codes 98966 (*Telephone assessment and management service provided by a qualified nonphysician health care professional to an established patient,*

parent, or guardian not originating from a related assessment and management service provided within the previous 7 days nor leading to an assessment and management service or procedure within the next 24 hours or soonest available appointment; 5–10 minutes of medical discussion), 98967 (*Telephone assessment and management service provided by a qualified nonphysician health care professional to an established patient, parent, or guardian not originating from a related assessment and management service provided within the previous 7 days nor leading to an assessment and management service or procedure within the next 24 hours or soonest available appointment; 11–20 minutes of medical discussion*), 98968 (*Telephone assessment and management service provided by a qualified nonphysician health care professional to an established patient, parent, or guardian not originating from a related assessment and management service provided within the previous 7 days nor leading to an assessment and management service or procedure within the next 24 hours or soonest available appointment; 21–30 minutes of medical discussion*), 99441 (*Telephone evaluation and management service by a physician or other qualified health care professional who may report evaluation and management services provided to an established patient, parent, or guardian not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment; 5–10 minutes of medical discussion*), 99442 (*Telephone evaluation and management service by a physician or other qualified health care professional who may report evaluation and management services provided to an established patient, parent, or guardian not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment; 11–20 minutes of medical discussion*), and 99443 (*Telephone evaluation and management service by a physician or other qualified health care professional who may report evaluation and management services provided to an established patient, parent, or guardian not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment; 21–30 minutes of medical discussion*). We assigned a status indicator of ''N'' (Noncovered) to these services because: (1) These services are non-face-to-face; and (2) the code descriptors include language that recognizes the provision of services to parties other than the beneficiary for whom Medicare does not provide coverage (for example, a guardian).

We do not believe that we should continue to consider these to be categorically non-covered services. In PFS rulemaking subsequent to CY 2008, we established separate payment for numerous non-face-to-face services, including care management services and prolonged non-face-to-face E/M services. We have also noted, for example in CY 2017, that we recognize that in current medical practice, practitioner interaction with caregivers is an integral part of treatment for some patients. Accordingly, the descriptions for several payable codes under the PFS include direct interactions between practitioners and caregivers (81 FR 80331).

When we established separate payment for services like virtual check-ins and e-visits, we recognized that non-face-to-face services had become an important part of overall physician care of Medicare beneficiaries, especially relative to care for chronic conditions. The current Medicare policy regarding the CPT codes that describe telephone E/M services predated our ongoing recognition of the need to pay separately for these kinds of services. Despite the fact that these are classified as E/M services in the coding, we do not believe that these codes describe full E/M services, but rather are closely analogous to the virtual check-in services. Although we assigned a ''Noncovered'' status indicator for the telephone E/M codes, we still established the American Medical Association's RUC-recommended RVUs for them. To establish the payment rate for the virtual check-in service, we used the RUC-recommended valuation for the lowest level telephone E/M code. However, the telephone E/M codes provide additional stratification by time for circumstances when a practitioner spends more than a brief amount of time in direct communication with the patient. We believe that under ordinary circumstances outside of the PHE, if the needs of the patient are significant enough to require the amount of time and attention from the practitioner specified in the codes for higher level telephone evaluations or assessments, either an in-person visit or a telehealth visit would be required. Alternatively, if the needs of the patient are less acute and lengthy, a virtual check-in would suffice. However, in the context of the goal of reducing exposure risks associated with the PHE for the COVID–19 pandemic, especially in the case that two-way, audio and video technology required to furnish a Medicare telehealth service might not be available, we believe there are many circumstances where prolonged, audio-only communication between the practitioner and the patient could be clinically appropriate yet not fully replace a face-to-face visit. We believe that the existing telephone E/M codes, in both description and valuation, are the best way to recognize the relative resource costs of these kinds of services. Therefore, we are finalizing, on an interim basis for the duration of the PHE for the COVID–19 pandemic, separate payment for CPT codes 98966–98968 and CPT codes 99441–99443. For these codes, we are finalizing on an interim basis for the duration of the PHE for the COVID–19 pandemic, work RVUs as recommended by the AMA Health Care Professionals Advisory Committee (HCPAC) for CY PFS 2008 rulemaking as discussed in the CY 2008 PFS final rule (72 CFR 66371) of 0.25 for CPT code 98966, 0.50 work RVUs for CPT code 98967, and 0.75 for CPT code 98968, and work RVUs as recommended by the AMA Relative Value Scale Update Committee (RUC) of 0.25 for CPT code 99441, 0.50 for CPT code 99442, and 0.75 for CPT code 99443. We are finalizing the HCPAC and RUC-recommended direct PE inputs which consist of 3 minutes of post-service RN/LPN/MTA clinical labor time for each code.

Similar to the CTBS described in section II.D. of this IFC, we believe it is important during the PHE to extend these services to both new and established patients. While some of the code descriptors refer to ''established patient,'' during the PHE we are exercising enforcement discretion on an interim basis to relax enforcement of this aspect of the code descriptors. Specifically, we will not conduct review to consider whether those services were furnished to established patients. CPT codes 98966–98968 described assessment and management services performed by practitioners who cannot separately bill for E/Ms. We are noting that these services may be furnished by, among others, LCSWs, clinical psychologists, and physical therapists, occupational therapists, and speech language pathologists when the visit pertains to a service that falls within the benefit category of those practitioners.

To facilitate billing of these services by therapists, we are designating CPT codes 98966–98968 as CTBS ''sometimes therapy'' services that

would require the private practice occupational therapist, physical therapist, and speech-language pathologist to include the corresponding GO, GP, or GN therapy modifier on claims for these services.

T. Physician Supervision Flexibility for Outpatient Hospitals—Outpatient Hospital Therapeutic Services Assigned to the Non-Surgical Extended Duration Therapeutic Services (NSEDTS) Level of Supervision

Non-surgical extended duration therapeutic services (NSEDTS) describe services that have a significant monitoring component that can extend for a sizable period of time, that are not surgical, and that typically have a low risk of complications after the assessment at the beginning of the service. The minimum default supervision level of NSEDTS was established in the CY 2011 OPPS/ASC final rule with comment period (75 FR 72003 through 72013) as being direct supervision during the initiation of the service, which may be followed by general supervision at the discretion of the supervising physician or the appropriate NPP (§ 410.27(a)(1)(iv)(E)). In this case, initiation means the beginning portion of the NSEDTS which ends when the patient is stable and the supervising physician or the appropriate NPP determines that the remainder of the service can be delivered safely under general supervision. We established general supervision as the appropriate level of supervision after the initiation of the service because it is challenging for hospitals to ensure direct supervision for services with an extended duration and a significant monitoring component, particularly for CAHs and small rural hospitals.

In the CY 2020 OPPS/ASC final rule with comment period (84 FR 61359 through 61363), we changed the generally applicable minimum required level of supervision for most hospital outpatient therapeutic services from direct supervision to general supervision for hospitals and CAHs. Given the circumstances of the PHE for the COVID–19 pandemic, we believe it is critical that hospitals have the most flexibility as possible to provide the services Medicare beneficiaries need during this challenging time. Changing the minimum default level of supervision to general supervision for NSEDTS during the initiation of the service will give providers additional flexibility they will need to handle the burdens created by the PHE for the COVID–19 pandemic.

Therefore, we are assigning, on an interim basis, all outpatient hospital therapeutic services that fall under § 410.27(a)(1)(iv)(E), a minimum level of general supervision to be consistent with the minimum default level of general supervision that applies for most outpatient hospital therapeutic services, and we are revising § 410.27(a)(1)(iv)(E) to reflect this change in the minimum level of supervision. General supervision, as defined in our regulation at § 410.32(b)(3)(i) means that the procedure is furnished under the physician's overall direction and control, but that the physician's presence is not required during the performance of the procedure.

U. Application of Certain National Coverage Determination and Local Coverage Determination Requirements During the PHE for the COVID–19 Pandemic

National Coverage Determinations (NCDs) are determinations by the Secretary with respect to whether or not a particular item or service is covered nationally under Title XVIII. Local Coverage Determinations (LCDs) are determinations by a Medicare Administrative Contractor (MAC) with respect to whether or not a particular item or service is covered under section 1862(a)(1)(A) of the Act in the particular MAC's geographical areas. Articles are often published alongside LCDs and contain coding or other guidelines that complement an LCD. NCDs and LCDs contain clinical conditions a patient must meet to qualify for coverage of the item or service. Some NCDs and LCDs may also contain requirements for face-to-face, timely evaluations or re-evaluations for a patient to initially qualify for coverage or to qualify for continuing coverage of the item or service. These requirements are more often present in NCDs and LCDs for durable medical equipment than for other items and services.

1. Face-to-Face and In-Person Requirements

For the duration of this PHE for the COVID–19 pandemic, it is in the best interest of patients, health care professionals and suppliers to limit face-to-face encounters and avoid exposure of vulnerable Medicare beneficiaries to COVID–19. Therefore, on an interim basis, we are finalizing that to the extent an NCD or LCD (including articles) would otherwise require a face-to-face or in-person encounter for evaluations, assessments, certifications or other implied face-to-face services, those requirements would not apply during the PHE for the COVID–19 pandemic.

We note that some face-to-face encounter requirements for DMEPOS Power Mobility Devices (PMDs) are mandated by statute for program integrity purposes. This IFC does not apply to those statutory requirements. For example, PMD face-to-face encounter requirements are found in section 1834(a)(1)(E)(iv) of the Act, as codified in § 410.38, and our regulation already permits the use of telehealth in accordance with Medicare guidelines. We have extended flexibilities to permit a broader use of telehealth services during the PHE for the COVID–19 pandemic. It should be noted that this does not confer changes to the clinical indications of coverage for any LCD or NCD unless specifically indicated below.

2. Clinical Indications for Certain Respiratory, Home Anticoagulation Management and Infusion Pump Policies

During the PHE for the COVID–19 pandemic, it is possible that patients receiving services for respiratory related indications will be required to receive care in unexpected settings, including the home. This may be necessary as COVID–19 and other patients are shifted across healthcare settings to accommodate an increase in patient volume.

Therefore, we are finalizing on an interim basis that we will not enforce the clinical indications for coverage across respiratory, home anticoagulation management and infusion pump NCDs and LCDs (including articles) allowing for maximum flexibility for practitioners to care for their patients. This enforcement discretion will only apply during the PHE for the COVID–19 pandemic. These policies include, but are not limited to:

- NCD 240.2 Home Oxygen.
- NCD 240.4 Continuous Positive Airway Pressure for Obstructive Sleep Apnea.
- LCD L33800 Respiratory Assist Devices (ventilators for home use).
- NCD 240.5 Intrapulmonary Percussive Ventilator.
- LCD L33797 Oxygen and Oxygen Equipment (for home use).
- NCD 190.11 Home Prothrombin Time/International Normalized Ratio (PT/INR) Monitoring for Anticoagulation Management.
- NCD 280.14 Infusion Pumps.
- LCD L33794 External Infusion Pumps.

At the conclusion of the PHE for the COVID–19 pandemic, we will return to enforcement of these clinical indications for coverage.

3. Requirements for Consultations or Services Furnished by or With the Supervision of a Particular Medical Practitioner or Specialist

Staffing is being adjusted in both facility and non-facility settings to accommodate for the needs of patients during the PHE for the COVID–19 pandemic. These staffing decisions may impact the availability of physicians and physician specialists to furnish evaluations, consultations and procedures or to supervise others. To the extent NCDs and LCDs require a specific practitioner type or physician specialty to furnish a service, procedure or any portion thereof, we are finalizing on an interim basis the chief medical officer or equivalent of the facility can authorize another physician specialty or other practitioner type to meet those requirements during the PHE for the COVID–19 pandemic. Additionally, to the extent NCDs and LCDs require a physician or physician specialty to supervise other practitioners, professionals or qualified personnel, the chief medical officer of the facility can authorize that such supervision requirements do not apply during the PHE for the COVID–19 pandemic.

V. Change to Medicare Shared Savings Program Extreme and Uncontrollable Circumstances Policy

In December 2017, we issued an interim final rule with comment period, titled ''Medicare Shared Savings Program: Extreme and Uncontrollable Circumstances Policies for Performance Year 2017'' (hereinafter referred to as the ''December 2017 interim final rule with comment period''), which appeared in the **Federal Register** on December 26, 2017 (82 FR 60912 through 60919). The December 2017 interim final rule with comment period established a policy for determining quality performance scores for accountable care organizations (ACOs) participating in the Medicare Shared Savings Program (Shared Savings Program), when the ACO, its participating ACO providers and suppliers, and assigned beneficiaries were located in geographic areas that were impacted by extreme and uncontrollable circumstances, such as hurricanes, wildfires, or other triggering events, during performance year (PY) 2017, including the applicable quality data reporting period for the performance year if the quality reporting period was not extended. In the CY 2019 PFS final rule we extended the extreme and uncontrollable circumstances policy finalized for PY 2017 to PY 2018 and subsequent performance years. Under the policy adopted in that final rule, for a given performance year, including the applicable quality data reporting period for the performance year if the quality reporting period is not extended, we will use an alternative approach to calculating the quality score for ACOs affected by extreme and uncontrollable circumstances (42 CFR 425.502(f)).

Under this current policy at § 425.502(f), the Shared Savings Program extreme and uncontrollable circumstances policy does not apply for a performance year if an extreme and uncontrollable circumstance occurs during the quality reporting period for that performance year and the quality reporting period is extended. For all performance years starting in 2019, the original quality reporting period was January 2, 2020, through March 31, 2020. In response to the PHE for the COVID–19 pandemic, we have determined that the 2019 MIPS data submission deadline will be extended by 30 days until April 30, 2020, to give eligible clinicians more time to report quality and other data for purposes of MIPS. This extended timeline also applies to Shared Savings Program ACOs because they are required to report quality data via the CMS Web Interface and we align the Shared Savings Program data submission timeline with the timeline for MIPS data submission. While the extended timeframe for data submission is intended to give eligible clinicians sufficient time to complete all the elements of MIPS reporting during the PHE for the COVID–19 pandemic, we realize that this extension alone may not be sufficient to ease the burden of reporting given the increased burden of providing care to all patients during this time. For this reason, under the Quality Payment Program, we have determined that the MIPS automatic extreme and uncontrollable circumstances policy will apply to MIPS eligible clinicians, who do not submit their MIPS data by the extended timeline. Under this automatic extreme and uncontrollable circumstances policy, MIPS eligible clinicians, who are not participants in APMs, who do not submit any MIPS data will have all performance categories reweighted to zero percent, resulting in a score equal to the performance threshold, and a neutral MIPS payment adjustment. However, under the policy, if a MIPS eligible clinician submits data on two or more MIPS performance categories, they will be scored and receive a 2021 MIPS payment adjustment based on their final score.

The automatic extreme and uncontrollable circumstances policy described above does not apply to MIPS eligible clinicians who are subject to the APM scoring standard (82 FR 53899), such as MIPS eligible clinicians participating in Shared Savings Program ACOs. Instead, these MIPS eligible clinicians will continue to be scored under the existing APM scoring standard. Generally, if no MIPS eligible clinicians in an APM Entity submit data by the extended deadline for the Quality and Promoting Interoperability performance categories due to extreme and uncontrollable circumstances, the APM scoring standard would apply as follows. The Cost performance category will be weighted at zero percent, as usual. The Improvement Activities performance category will be scored as usual. The Quality performance category will be reweighted to zero percent where the APM has waived quality reporting for purposes of the APM as in these circumstances CMS determines that there are not sufficient measures or activities applicable and available to MIPS eligible clinicians, consistent with § 414.1370(h). Finally, if all MIPS eligible clinicians in an APM Entity have been excepted from reporting the Promoting Interoperability performance category, then the Promoting Interoperability performance category weight will be reweighted to zero for the APM Entity for that MIPS performance period (§ 414.1370(g)(4)(iii)(A)). As a result, in these circumstances, the Quality, Cost, and Promoting Interoperability categories would all be weighted at zero percent. And as only one performance category will be scored, the Improvement Activities performance category, such MIPS eligible clinicians would receive a neutral MIPS payment adjustment.

For MIPS eligible clinicians participating in Shared Savings Program ACOs that do not report quality and obtain a neutral payment adjustment under MIPS, according to the existing APM scoring standard described above, the Shared Savings Program must determine that the ACOs are impacted by an extreme and uncontrollable circumstance and waive the quality reporting requirement under the Shared Savings Program. As currently written, the Shared Savings Program extreme and uncontrollable circumstances policy does not allow for the determination that an ACO has been impacted by an extreme and uncontrollable circumstance that occurs during the quality reporting period if quality reporting period is extended, as

it has been for performance years starting in 2019.

In addition, under the Shared Savings Program, if an ACO fails to report quality data by the submission deadline, the ACO will not have met the quality performance standard and will receive a quality score of zero, unless the extreme and uncontrollable circumstances policy under § 425.502(f) applies. In the event an ACO receives a quality performance score of zero, the ACO would be ineligible to share in savings, if earned and would owe maximum losses if participating under Track 2 or the ENHANCED track. The current Medicare Shared Savings Program extreme and uncontrollable circumstances policy for purposes of determining an ACO's quality score for use in determining shared savings or losses applies if twenty percent or more of an ACO's assigned beneficiaries or its legal business entity are located in an area identified under the Quality Payment Program as being affected by an extreme and uncontrollable circumstance for the performance year, including the quality reporting period if the quality reporting period is not extended.

The effect of the MIPS quality reporting period extension is that the current Shared Savings Program extreme and uncontrollable circumstance policy does not apply, because the current extreme and uncontrollable circumstances policy is only available for extreme and uncontrollable circumstances that occur during the quality reporting period, such as the current PHE for the COVID–19 pandemic, if the quality reporting period is not extended. The inability to apply the extreme and uncontrollable circumstances policy to waive the quality reporting requirements under the Shared Savings Program during the PHE may adversely impact ACOs and their participating ACO providers and suppliers, because the extended timeline to submit data alone may not be sufficient to support ACOs and their participating ACO providers and suppliers, who are focused on care delivery during the national emergency.

The intent of the Shared Savings Program extreme and uncontrollable circumstance policy is to mitigate any impact on quality performance and the resultant effect on financial reconciliation due to emergency circumstances outside of the ACO's control. Accordingly, we believe it is necessary to revise the policies governing the availability of the Shared Savings Program extreme and uncontrollable circumstances policies to extend the protection to ACOs that may not be able to completely and accurately report their quality data for 2019, despite the extension of the quality reporting period. To provide relief to all ACOs participating in the Shared Savings Program during 2019, we need to modify the extreme and uncontrollable circumstances policy as it applies to disasters that occur during the reporting period to eliminate the restriction that the extreme and uncontrollable circumstances policy applies only if the reporting period is not extended.

As explained above, the PHE for the COVID–19 pandemic was declared during the quality reporting period for performance years starting in 2019. The PHE for the COVID–19 pandemic applies to all counties in the United States, and we believe it is appropriate to offer relief under the Shared Savings Program extreme and uncontrollable circumstances policy to all Shared Savings Program ACOs that are unable to completely and accurately report quality for 2019 by the extended deadline due to the PHE for the COVID–19 pandemic. Due to the PHE for the COVID–19 pandemic and our desire to provide relief for Shared Savings ACOs who need to focus resources on patient care at this time, we believe that this policy must be effective starting with the quality reporting period for performance years starting in 2019. Further, as illustrated by the current PHE for the COVID–19 pandemic, there may be unanticipated situations in the future, during which extension of a quality reporting window alone would not provide sufficient relief from reporting burden at a time when ACOs and their ACO providers and suppliers need to focus on patient care. Accordingly, in this IFC, we are revising the regulation at § 425.502(f) to remove the restriction which prevents the application of the Shared Savings Program extreme and uncontrollable circumstances policy for disasters that occur during the quality reporting period if the reporting period is extended, to offer relief under the Shared Savings Program to all ACOs that may be unable to completely and accurately report quality data for 2019 due to the PHE for the COVID–19 pandemic. Specifically, we are amending the regulation at § 425.502(f) to remove the phrase ''if the quality reporting period is not extended,'' effective with quality reporting for PY 2019.

We are considering whether the current policy, which assigns an ACO the higher of the mean quality score across all ACOs and the ACO's own quality score, in the event the ACO is determined to be impacted by an extreme and uncontrollable circumstances, will continue to be appropriate for PY 2020 and beyond. Any change to that current policy would be made through future notice and comment rulemaking.

Regarding Shared Savings Program financial reconciliations for performance years starting in 2019, we note that because the PHE for the COVID–19 pandemic was declared during the reporting period for those performance years, the provisions that allow for an adjustment to the amount of shared losses for ACOs found to be affected by an extreme and uncontrollable circumstance during a performance year would not apply for performance years starting in 2019. However, for PY 2020 financial reconciliation, we will reduce the amount of an ACO's shared losses by an amount determined by multiplying the shared losses by the percentage of the total months in the performance year affected by an extreme and uncontrollable circumstance, and the percentage of the ACO's assigned beneficiaries who reside in an area affected by an extreme and uncontrollable circumstance. At this time, the PHE for the COVID–19 pandemic applies to all counties in the country; therefore, 100 percent of assigned beneficiaries for all Shared Savings Program ACOs reside in an affected area and the total months affected by an extreme and uncontrollable circumstance will begin with March and continue through the end of the current PHE, as defined in § 400.200.

Additionally, the Medicare Shared Savings Program financial methodology includes updating each ACO's benchmark at the end of each performance year based on the performance year expenditure trend. The factors used to update ACOs' benchmarks will reflect the national and regional trends related to spending and utilization changes during 2020, including any changes arising from the PHE for the COVID–19 pandemic.

W. Level Selection for Office/Outpatient E/M Visits When Furnished Via Medicare Telehealth

In the CY 2020 PFS final rule (84 FR 62847 and 62848), we finalized a number of changes to the framework of the office/outpatient E/M requirements for CY 2021. Beginning January 1, 2021 for office/outpatient E/M visits, the code level will be selected based on either the level of MDM or the total time personally spent by the reporting practitioner on the day of the visit

(including face-to-face and non-face-to-face time). We noted that there was broad support for these changes from the AMA and other specialty societies. Currently, telehealth office/outpatient E/Ms can be furnished to beneficiaries in their homes only when they are for individuals with a substance use disorder (SUD) diagnosis for purposes of treatment of such disorder or co-occurring mental health disorder. For these services, the primary factor in selecting the appropriate level of E/M service to bill would be time spent counseling the patient. Under the waiver issued by the Secretary pursuant to section 1135(b)(8) of the Act, telehealth office/outpatient E/Ms can be furnished to any patient in their home regardless of their diagnosis or medical condition. However, the current E/M coding guidelines would preclude the billing practitioner from selecting the office/outpatient E/M code level based on time in circumstances where the practitioner is not engaged in counseling and/or care coordination.

On an interim basis, we are revising our policy to specify that the office/outpatient E/M level selection for these services when furnished via telehealth can be based on MDM or time, with time defined as all of the time associated with the E/M on the day of the encounter; and to remove any requirements regarding documentation of history and/or physical exam in the medical record. This policy is similar to the policy that will apply to all office/outpatient E/Ms beginning in 2021 under policies finalized in the CY 2020 PFS final rule. It remains our expectation that practitioners will document E/M visits as necessary to ensure quality and continuity of care. To reduce the potential for confusion, we are maintaining the current definition of MDM. We note that currently there are typical times associated with the office/outpatient E/Ms, and we are finalizing those times as what should be met for purposes of level selection. The typical times associated with the office/outpatient E/Ms are available as a public use file at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/PhysicianFeeSched/PFS-Federal-Regulation-Notices-Items/CMS-1715-F.* This policy only applies to office/outpatient visits furnished via Medicare telehealth, and only during the PHE for the COVID–19 pandemic.

X. Counting of Resident Time During the PHE for the COVID–19 Pandemic

In section II.O. of this IFC, ''Application of the Teaching Physician Regulations During the PHE for the COVID–19 pandemic,'' we state that the teaching supervision requirement can be met in certain circumstances through direct supervision using interactive telecommunications technology, including when a medical resident is quarantined at home. Regarding claiming of the residents for indirect medical education (IME) and Direct graduate medical education (DGME) purposes, under current regulations, if a resident is training in a hospital, that hospital claims the resident for IME and DGME (per § 413.78(a)), and if a resident is training in a nonprovider site such as a doctor's office or clinic, the hospital or hospitals that pays the resident's salaries and fringe benefits claims the resident for IME and DGME (per § 413.78(g)). Currently, there is no provision in the regulations for a hospital to claim a resident for IME or DGME if the resident is performing patient care activities within the scope of his or her approved program in his or her own home, or in a patient's home. For the duration of this emergency situation, we are permitting the hospital that is paying the resident's salary and fringe benefits for the time that the resident is at home or in the home of a patient that is already a patient of the physician or hospital, but performing patient care duties within the scope of the approved residency program (and meets appropriate physician supervision requirements as stated in section II.O. of this IFC) to claim that resident for IME and DGME purposes.

Y. Addressing the Impact of COVID–19 on Part C and Part D Quality Rating Systems

1. Background

a. Legislative Authority for Star Ratings

Based on its authority to disseminate comparative information, including about quality, to beneficiaries under sections 1851(d) and 1860D–1(c) of the Act and authority to collect various types of quality data under section 1852(e) of the Act, CMS develops and publicly posts a 5-star ratings system for MA and Part D plans. That system is also the basis for determining quality bonus payment (QBP) status for MA plans under section 1853(o) of the Act. Section 1876 cost plans are also included in the MA and Part D Star Rating system as codified at 42 CFR 417.472(k) and are also required by § 417.472(j) to make CAHPS survey data available to CMS. In a final rule, ''Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plans, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program,'' published on April 16, 2018 (83 FR 16519 through 16589), we adopted regulations to govern this quality rating system for cost MA and Part D plans, which are generally rated at the contract level. In a final rule, ''Medicare and Medicaid Program; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Programs of All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021,'' published April 16, 2019 (84 FR 15830 and 15831), we amended the regulations governing the quality rating program for MA and Part D plans. Those final rules contain a more detailed discussion of CMS' authority in this area and we encourage readers to refer to those final rules.

In the CY 2020 Final Call Letter and the CY 2020 final rule, published in the **Federal Register** on April 16, 2019 (84 FR 15830 and 15831), we finalized a set of rules for adjusting the calculation of Star Ratings for the cost and Parts C and D organizations that are impacted by extreme and uncontrollable circumstances. We provided in the 2021 Advance Notice that the same policy as used for adjustments to 2020 Star Ratings based on extreme and uncontrollable circumstances would be continued for CY 2021 Star Ratings. We did not envision the unprecedented circumstances surrounding the PHE for the COVID–19 pandemic when we developed the adjustments for extreme and uncontrollable circumstances for the Part C and D Star Ratings program; as they exist currently, they are not sufficient in the case of the PHE for the COVID–19 pandemic.

b. Overview of Star Ratings

The Star Ratings are generally based on measures of performance during a period that is 2 calendar years before the year for which the Star Ratings are issued; 2021 Star Ratings will generally be based on performance during 2019 and the 2022 Star Ratings will similarly be based on performance in 2020. We use multiple data sources to measure quality and performance of contracts. Various regulations require plans to report on quality improvement and quality assurance and to provide data which we can use to help beneficiaries compare plans (for example, §§ 417.472(j) and (k), 422.152(b), 423.153(c), and 423.156). In addition, we may require plans to report statistics and other information in specific categories (§§ 422.516 and 423.514). Data from these sources and other sources are used to calculate measures

of plan sponsor performance each year, as provided in §§ 422.162 and 423.182. The Star Ratings serve an important purpose in providing comparative information to enrollees and are also used to identify whether an MA plan is eligible for a QBP under section 1853(o) of the Act. The Patient Protection and Affordable Care Act (Pub. L. 111–148), as amended by the Healthcare and Education Reconciliation Act (Pub. L. 111–152), provides for quality ratings, based on a 5-star rating system and the information collected under section 1852(e) of the Act, to be used in calculating payment to MA organizations beginning in 2012. Specifically, sections 1853(o) and 1854(b)(1)(c) of the Act were added and amended to provide, respectively, for an increase in the benchmark against which MA organizations bid and in the portion of the savings between the bid and the benchmark available to the MA organization to use as a rebate. We assign both low and high performing icons that are displayed on *www.Medicare.gov* to help Medicare beneficiaries make plan decisions based on either consistently low performance for 3 or more years or receiving 5 stars for the highest rating, respectively. Additionally, plans that demonstrate exceptional performance due to achieving a 5 Star Rating for their highest rating can market year round and beneficiaries receive a special election period that allows the eligible beneficiary to enroll in a 5-star plan during the contract year. We also have the authority to terminate plans that have below a 3-star rating for 3 or more years. The Star Ratings therefore serve a number of important purposes for cost, MA and Part D plans; we believe that plans engage in behavior during the performance measurement period to improve their Star Ratings and to achieve higher Star Ratings.

Healthcare Effectiveness Data and Information Set (HEDIS) and Consumer Assessment of Healthcare Providers and Systems (CAHPS) data are the basis for the calculation of the majority of measures for both the Part C and Part D Star Ratings. HEDIS measures include clinical measures assessing the effectiveness of care, access/availability measures, and service use measures and are calculated by CMS through a contract with the National Committee for Quality Assurance (NCQA). Many of the HEDIS measures require plans to perform reviews of patients' medical records or to obtain information directly from physician offices, which is a time-intensive activity.

CAHPS refers to a comprehensive family of surveys that ask consumers and patients to evaluate experiences of care. Cost plans, Part C plans, and Part D plans are all required by regulation (§§ 417.472, 422.152, and 423.156, respectively) to contract with approved Medicare CAHPS survey vendors to conduct the Medicare CAHPS satisfaction survey of Medicare plan enrollees in accordance with CMS specifications and submit the survey data to CMS. The Star Ratings system uses measures from HEDIS and CAHPS extensively, and there are negative consequences for a plan's Star Ratings (overall and on specific measures) if the necessary data for the HEDIS and CAHPS measures are not reported or validated. Although the 2021 Star Ratings reflect performance in 2019 for most of the measures, data collection for HEDIS and CAHPS is conducted in the first half of CY 2020 to feed into the 2021 Star Ratings that are finalized by October 2020. Similarly, the Health Outcomes Survey will occur in 2020 to collect data used for the 2022 Star Ratings and the same concerns about survey activities apply to that survey.

2. Impact of COVID–19 on Star Ratings Data Collection

The World Health Organization (WHO) has characterized COVID–19 as a pandemic, and there are alarming levels of spread and severity of COVID–19 across the United States. The CDC and medical professionals recommend that the best way to prevent the spread of the virus is to avoid contact with infected individuals. Social distancing is a method that public health officials use to curb the transmission and spread of infectious illnesses like COVID–19. Prior research has shown that these measures help mitigate the spread of contagious viruses in the absence of vaccines (*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3372334/*), as is the case with COVID–19.

To help curb the spread of COVID–19, governors around the country are putting in place actions to protect public health and safety and help mitigate the spread of the virus, including school closures, limiting the size of gatherings and events, and restaurant closures. Employers are moving to mandatory telework when feasible. The intent of these actions is to save lives, keep people safe, and slow the rate of infection. As of March 28, 2020, all 50 states were under a State of Emergency. Additionally, areas of the country are being put under shelter-in-place orders to further curtail the spread of the virus. CDC has provided guidance to health care facilities (for example, *https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html*) that range from rescheduling non-urgent outpatient visits and elective surgeries, promoting telehealth visits, and managing mildly ill COVID–19 patients at home. Also, on March 16, 2020, CDC issued interim guidance (*https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html*) advising the public against holding gatherings of more than 10 individuals. On March 18, 2020, we released recommendations related to delaying adult elective surgeries, non-essential medical, surgical, and dental procedures during the COVID–19 outbreak to be able to focus health care professionals on those most in need of healthcare (*https://www.cms.gov/newsroom/press-releases/cms-releases-recommendations-adult-elective-surgeries-non-essential-medical-surgical-and-dental*).

On March 13, 2020, President Trump declared a national emergency as a result of the COVID–19 pandemic. The declaration of the PHE for the COVID–19 pandemic allows certain Medicare requirements and conditions of participation to be waived under section 1135 of the Act providing more flexibility to providers in furnishing medically necessary health care to beneficiaries.

Currently, data collection for HEDIS measures is ongoing for services and performance during the 2019 measurement period. MA contracts are required to submit their HEDIS summary-level data to the NCQA by June 15, 2020, as well as to submit their HEDIS patient-level data to CMS the same day. Currently, data collection activities are underway to meet the June deadlines. Some of the HEDIS measures require medical record review or obtaining information directly from physician offices. We recognize that obtaining medical records from physician offices and the necessary documentation from physician offices needed for the plan to meet HEDIS requirements, and requiring plans to participate in HEDIS audits will put a strain on the limited resources available to these health care providers. Some of these activities are generally done in person so compliance with social distancing efforts, travel bans and quarantines raise additional challenges, as well as risks to staff. CMS' top priority is to ensure public health and safety, including that of beneficiaries, health and drug plan staff, and providers, and to allow health and drug plans, providers, and physician offices to focus on what is most important at this time: The provision of care.

Under §§ 417.472(i) and (j), 422.152(b)(5), and 423.156, all

coordinated care MA plans, section 1876 contracts, and Part D sponsors, respectively, are required to contract with a CMS-approved CAHPS survey vendor to conduct the Medicare CAHPS satisfaction survey in accordance CMS specifications and to submit the data to CMS. The administration of the surveys and data collection are currently ongoing until the end of May 2020 for the CAHPS survey data that would be used for the 2021 Star Ratings. We are concerned that the COVID–19 pandemic will pose significant challenges and safety concerns in successfully completing the current CAHPS data collection. Most of the survey administration protocols cannot be completed remotely, requiring staff to work in mail facilities and call centers where telephone interviewers assemble in close quarters to perform the telephone administration of the survey. We are concerned that cost plans, MA organizations, and Part D plan sponsors will not be able to complete this year's data collection without jeopardizing the health and safety of survey vendor staff. We have similar concerns about the Health Outcomes Survey (HOS) data collection scheduled for later in 2020.

This IFC amends, as necessary, the calculations for the 2021 and 2022 Part C and D Star Ratings to incorporate changes to address the expected impact of the PHE for the COVID–19 pandemic on data collection and performance. Plans urgently need to know these changes so as not to further exacerbate the PHE for the COVID–19 pandemic by continuing efforts to complete the HEDIS and CAHPS data collection activities. The HEDIS data collection diverts physicians' offices and health plans from handling the day-to-day emergencies as a result of the PHE for the COVID–19 pandemic. Additionally, we are concerned it is not possible to safely continue the HEDIS and CAHPS data collection activities while complying with the CDC recommendation for social distancing.

Under normal circumstances, if Part C and section 1876 plans do not fully complete their HEDIS data collection activities and successfully meet NCQA's HEDIS audit requirements, we assign each of the HEDIS Star Ratings measures 1 star. Similarly, if the CAHPS data cannot be completed and submitted on time by Part C, section 1876 cost, and Part D plans, we historically have assigned each of the CAHPS Star Ratings measures 1 star. Furthermore, unreliable CAHPS measure scores are excluded from the Part C and D Star Ratings calculations. Without knowing the changes made by this IFC to the methodology for calculating the 2021 and 2022 Star Rating, plans could have conflicting incentives, needing physician offices and plan staff to focus on caring for those impacted by COVID–19 and keeping Medicare beneficiaries and those involved in data collection activities safe, while at the same time wanting to ensure that future Star Ratings and QBP ratings are not impacted by the PHE for the COVID–19 pandemic which could negatively impact future benefits offered by MA organizations. The changes to the calculations for 2021 and 2022 Star Ratings are designed to avoid inadvertently creating incentives for plans to place cost and Star Rating considerations above efforts to address the COVID–19 pandemic.

3. Provisions of IFC

This IFC is modifying the calculation of the 2021 and 2022 Part C and D Star Ratings to address the expected disruption to data collection posed by the PHE for the COVID–19 pandemic. Specifically, this IFC: (1) Replaces the 2021 Star Ratings measures calculated based on HEDIS and Medicare CAHPS data collections with earlier values from the 2020 Star Ratings (which are not affected by the public health threats posed by COVID–19); (2) establishes how we will calculate or assign Star Ratings for 2021 in the event that CMS' functions become focused on only continued performance of essential Agency functions and the Agency and/or its contractors do not have the ability to calculate the 2021 Star Ratings; (3) modifies the current rules for the 2021 Star Ratings to replace any measure that has a data quality issue for all plans due to the COVID–19 outbreak with the measure-level Star Ratings and scores from the 2020 Star Ratings; (4) in the event that we are unable to complete HOS data collection in 2020 (for the 2022 Star Ratings), replaces the measures calculated based on HOS data collections with earlier values that are not affected by the public health threats posed by COVID–19 for the 2022 Star Ratings; (5) removes guardrails for the 2022 Star Ratings; and (6) expands the existing hold harmless provision for the Part C and D Improvement measures to include all contracts for the 2022 Star Ratings.

a. HEDIS, CAHPS, and HOS Data Collection and Submission for 2021 Star Ratings and 2022 Star Ratings

We issued a Health Plan Management System (HPMS) memo, entitled ''Reporting Requirements for 2020 HEDIS®, HOS, and CAHPS® Measures,'' on September 9, 2019 to establish the due date for the 2019 measurement year for HEDIS. In light of the public safety issues in continuing to require the submission of HEDIS data for the 2019 measurement year, we are eliminating the HEDIS 2020 submission requirement that covers the 2019 measurement year and we are requesting that Medicare health plans, including MA and section 1876 organizations, curtail HEDIS data collection work immediately. This will allow health plans, providers, and physician offices to focus on caring for Medicare beneficiaries during this PHE for the COVID–19 pandemic and will minimize risk of the spread of infection by eliminating travel and in-person work for the collection of HEDIS data. Our goal is to ensure that offices of health care providers remain focused on patients needing care. Medicare health plans can use any HEDIS data that they have collected for their internal quality improvement efforts.

We are also amending the regulations requiring the submission of the CAHPS survey data to CMS for Medicare health and drug plans to relieve them of the requirement as it applies to the 2020 survey data collection to ensure the safety of survey vendor staff and align with the CDC's social distancing guidance. Both Part C and D plans can use any CAHPS survey data already collected for their internal quality improvement efforts. Accordingly, we are modifying regulations in parts 417, 422, and 423 to eliminate requirements for the collection of HEDIS and CAHPS data that would otherwise occur in 2020. Specifically, we are revising the Part C regulation at § 422.152 by adding a new paragraph (b)(6), which provides that MA organizations are not required to submit HEDIS and CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings. In addition, we are revising the cost plan regulation at § 417.472(i) and (j) in two ways: In paragraph (i), to add a requirement for cost plans to comply with § 422.152(b)(6) and in paragraph (j), to make the obligation for cost plans to conduct CAHPS surveys subject to paragraph (i). Finally, we are revising the Part D regulations at §§ 423.156 and 423.182. We are revising § 423.156 to not require Part D sponsors to submit CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings. We are also adding § 423.182(c)(3) so that for 2021 Star Ratings only, Part D sponsors are not required to submit CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings. While our revisions do not outright prohibit cost plans, MA plans, and Part D plans from continuing efforts to

collect HEDIS data or conduct CAHPS surveys during 2020, such as to use that data about plan performance in 2019 for the plan's own internal quality initiatives, we do not expect plans to do so. An additional component of the HEDIS data collection is the HOS that NCQA administers in partnership with CMS. This year's HOS survey administration was scheduled to be from April through July 2020. Given the significant safety concerns, similar to the ones related to the administration of the CAHPS survey, we are moving the HOS survey administration to late summer and will provide MA plans more information in the upcoming months. We will continue to monitor the situation to see if any further adjustments are needed. To prepare for the possibility that the PHE for the COVID–19 pandemic continues and the HOS survey data cannot be collected starting in late summer for the 2022 Star Ratings, we are amending the regulations for the Part C 2022 Star Ratings (by adding new § 422.166(j)(2)) to allow us to use the Star Ratings and measure scores for the 2021 Star Ratings for any measures that come from the HOS survey; this will address any gaps in the necessary HOS data if the HOS survey cannot be administered in 2020. The measures from the HOS survey include the following: Improving or Maintaining Physical Health; Improving or Maintaining Mental Health; Reducing the Risk of Falling; Improving Bladder Control; and Monitoring Physical Activity.

b. Adjustments to the 2021 Star Ratings Methodology Due To Lack of HEDIS and CAHPS Data

In response to the PHE for the COVID–19 pandemic and its impact on health care delivery and data collection, we are making a series of adjustments to the Star Ratings methodology to protect the health and safety of individuals who would collect the HEDIS and CAHPS data; to allow health and drug plans and their providers to focus on caring for Medicare beneficiaries during the PHE for the COVID–19 pandemic; and to address the unusual, unexpected, and uncontrollable changes that this pandemic is likely to have on the Part C and D Star Ratings. Because of the short time frame during which information is collected, analyzed, and used in the calculation of the Star Ratings published in October each year, immediate action is necessary to amend the methodology as a result of the extraordinary circumstances created by the PHE for the COVID–19 pandemic. Data collection is currently underway for both the HEDIS and CAHPS data, and the data are due to CMS in June 2020. A series of adjustments to the 2021 Star Ratings are being made to account for eliminating the need to collect and submit HEDIS and CAHPS data for the 2021 Star Ratings.

The April 2018 final rule (83 FR 16538 through 16546) included the measures finalized for the 2021 Star Ratings. Included in those measures are many that use HEDIS or CAHPS as the data source. In the 2020 Star Ratings, 14 measures had HEDIS as their data source, and nine measures had CAHPS as their data source. The measurement period for most of the Star Ratings measures is 2019; for many of those measures, we (or the plans) already have the data necessary to calculate a measure score and assign a 2021 measure-level rating but validation and analysis of those data remain to be done. For the HEDIS data source, the measurement period finalized in the April 2018 final rule is the calendar year 2 years prior to the Star Ratings year so for the 2021 Star Ratings, the HEDIS measurement period is the 2019 measurement year. However, those data are collected in 2020.

Similarly, for the CAHPS data source, the measurement period finalized for the 2021 Star Ratings is the most recent data submitted for the survey of enrollees. In general, the most recent data would be the survey conducted from March through the end of May each year, which for the 2021 Star Ratings would have corresponded to March through May 2020 data collection. However, these data will not be available for HEDIS and CAHPS measures. CMS considered if we could remove all of the HEDIS and CAHPS measures from the 2021 Star Ratings. If we removed these measures from the Star Ratings, we would not have enough measures to rate plans and to have a complete picture of performance given approximately half of the Star Ratings measures come from HEDIS and CAHPS. Removing all of these measures would severely compromise the integrity of the Part C and D Star Ratings and would have significant impact on payment for MA organizations. Given measure scores and stars do not fluctuate significantly year to year, we believe using the 2020 measure-level stars and scores for the missing HEDIS and CAHPS data provides the best approximation of performance in 2019. This substitution addresses the lack of HEDIS and CAHPS data that would otherwise be used for 2021 Star Ratings while permitting us to calculate and use reliable Star Ratings for 2021 enrollment and 2022 QBP status determinations. Given the issues related to PHE for the COVID–19 pandemic associated with completing the HEDIS data collection for the 2019 measurement year, we will use the HEDIS measure scores and Star Ratings based on the 2018 measurement year (that is, the data used for the 2020 Star Ratings) for the 2021 Star Ratings. For the 2021 Star Ratings, given the safety concerns related to completing the CAHPS surveys and data collection and the inability of survey vendors to fully complete data collection for 2020, we will use the CAHPS data submitted to CMS in June 2019. To accomplish this, we are revising §§ 422.166 and 423.186 to add new regulation text that the measures calculated based on HEDIS data are calculated based on data for the 2018 performance period and the measures calculated based on CAHPS data are calculated based on survey data collected from March through May 2019. Specifically, we are adding a new paragraph (j) to each of these regulations and are codifying these specific rules about HEDIS and CAHPS data at §§ 422.166(j)(1)(i) and (ii) and 423.186(j)(1)(i).

The measurement period for all other measures will not change from what was finalized in the April 2018 final rule. For both HEDIS and CAHPS measures, we will use 2020 measure-level Star Ratings (and associated measure-level scores) in all the Star Ratings calculations codified at §§ 422.160, 422.162, 422.164, 422.166, 423.180, 423.182, 423.184, and 423.186 in calculating the 2021 Star Ratings. For the 2021 Star Ratings, there will be no changes from the prior year in the measure-level cut points for any of the HEDIS and CAHPS measures. We had previously announced in the April 2019 final rule that the Plan All-Cause Readmissions measure would be moved to display for the 2021 Star Ratings due to the substantive specification change. We will continue to exclude this measure for the 2021 Star Ratings as provided in that final rule, so the data associated with it for the 2018 performance period (collected in spring 2019) will be posted on the display page for 2021 ratings.

Since we will be using the 2020 Star Ratings data for the HEDIS and CAHPS measures, we will carry forward the measure-level improvement change score as described at §§ 422.164(f)(4)(i) and 423.184(f)(4)(i) from the 2020 Star Ratings for all HEDIS or CAHPS measures for the 2021 Star Ratings Part C and D improvement measure calculations. We are codifying this at §§ 422.166(j)(1)(iii) and 423.186(j)(1)(ii).

Under §§ 422.164(g)(1) and (2) and 423.184(g)(2), we reduce HEDIS and CAHPS measures to 1 star when either

HEDIS measures used to populate the Star Ratings are not reported or for failure to adhere to CAHPS reporting requirements. For the 2021 Star Ratings, we will not reduce these measures to 1 star for failure to report the 2020 HEDIS or CAHPS data and is codifying that approach at §§ 422.166(j)(1)(iv) and 423.186(j)(1)(iii). We are amending §§ 422.166 and 423.186 by adding paragraph (j) to codify these various special rules for the 2021 Star Ratings.

c. Use of 2020 Star Ratings To Substitute for 2021 Star Ratings in the Event of Extraordinarily Compromised CMS Capabilities or Systemic Data Issues

There is great uncertainty about how the COVID–19 pandemic will evolve over the next 6 to 9 months, and the impact on the American population and institutions resulting from the pandemic. We have considered the normal activities required to prepare, calculate, and publish the Star Ratings, as well as finalize the ratings to be used as the basis for MA QBPs in the event that CMS' functions to calculate the 2021 Star Ratings are significantly impacted. The operational timelines for calculating the Star Ratings each year are extremely tight. For example, when we receive all of the measure-level data in early August, we have approximately 1 month to: Review the Star Ratings measure data for accuracy; prepare data and supportive material to provide plans with a preview period so they can review their numeric measure scores and raise issues to CMS; work with contractors to calculate the Star Ratings; prepare for a second preview period for plans to see their preliminary measure level and overall star ratings. This work must be completed in the months of August and September so that the Star Ratings are ready for public display on Medicare Plan Finder in early October for the Annual Enrollment Period. If the COVID–19 pandemic or actions necessary in connection with the PHE impact the ability of CMS and its contractors to complete these steps to calculate the 2021 Star Ratings, it would be impracticable and contrary to the public interest to begin rulemaking in August to adopt a policy for how to address such an unprecedented situation. The normal notice and comment rulemaking process would also prevent CMS from providing quality ratings to Medicare beneficiaries choosing a 2021 plan during the Annual Enrollment Period beginning in October and conflict with CMS providing MA organizations the opportunity to appeal their QBP ratings for 2022 payment in time for 2022 bid submissions. There would be insufficient time to engage in notice and comment rulemaking to make changes to the 2021 Star Ratings methodology in time to issue the Star Ratings on Medicare Plan Finder.

Star Ratings are used to identify which MA plans are eligible for a QBP and for a greater percentage of the amount by which the benchmark for the plan's service area exceeds the plan's bid for covering Part A and Part B benefits; the quality bonus results in an increase to the benchmark for an MA plan's service area and the percentage that determines the amount of the beneficiary rebate. See §§ 422.258(d)(7) and 422.260. Together, these financial consequences for a high Star Rating, can result in higher beneficiary rebates, which are used to pay for supplemental benefits and reductions in the Part B or Part D premium for enrollees in the plan. Given the impact the Star Ratings have on payment and the benefits offered to Medicare beneficiaries, it is critical that MA organizations have certainty in terms of how the ratings would be calculated if this situation should occur.

Adopting a provision to address such extraordinary circumstances before they come to pass in connection with the COVID–19 pandemic will ensure that Medicare health and drug plans and Medicare beneficiaries are aware of the steps CMS will take before those actions become necessary. This advance notice will alleviate uncertainty and provide stability for cost plans, MA organizations, and Part D sponsors so they can focus on continuing to ensure Medicare beneficiaries have access to needed medical care. In case the PHE for the COVID–19 pandemic gets to a point that CMS' functions become focused on only continued performance of essential agency functions or the agency and its contractors do not have the ability to calculate the 2021 Star Ratings, as part of this IFC, we are establishing rules for this circumstance. These rules would only be implemented for the 2021 Star Ratings if the impact of the PHE for the COVID–19 pandemic reaches a point where CMS and its contractors are compromised to the point the 2021 Star Ratings cannot be calculated using the methodology set forth in the April 2018 final rule and this IFC. Calculating the Star Ratings requires a full team of staff and contractors with specialized skill sets. If the PHE for the COVID–19 pandemic escalates, we will need to devote more resources to activities to address essential Agency functions so that adding staff or resources to calculate the Star Ratings would not be appropriate.

If CMS' resources become extraordinarily compromised, we will use the 2020 Star Ratings as the 2021 Star Ratings. This authority is codified at §§ 422.166(j)(1)(v) and 423.186(j)(1)(iv) and limited specifically to the COVID–19 pandemic.

We are also concerned, given the uncertainties ahead, whether CMS and plans will be able to safeguard against data quality issues for non-CAHPS and non-HEDIS measures for which CMS does not already have data for the 2021 Star Ratings. As an example, sponsors report Special Needs Plan (SNP) Care Management and Medication Therapy Management (MTM) data to CMS by March 2020, and these data undergo independent data validation beginning in April. While validation activities can be conducted remotely between the plans' staff and data validation reviewers, there may be other difficulties in completing the work this year on time and consistent with CMS requirements due to the significant impact of the PHE for the COVID–19 pandemic. Normally, as codified at §§ 422.164(b) and 423.184(b), we review the quality of the data before making a final determination about inclusion of the measures in each year's Star Ratings. Given the potential for multiple measures to have data quality issues across many plans as a result of COVID–19, we are addressing this possibility by adopting a rule to permit replacing the 2021 Star Ratings measure scores and stars with the 2020 Star Ratings measures scores and stars for the impacted measures for all plans rather than excluding multiple measures from the 2021 Star Ratings calculations. Removing multiple measures from the Star Ratings can cause unanticipated changes in the ratings which would create more instability for Medicare health and drug plan sponsors and could have significant impacts on MA QBPs at a time where MA organizations need stability in the ratings when they need to focus on caring for those impacted by COVID–19.

To be prepared if we have data quality issues for any non-HEDIS or non-CAHPS 2021 Star Ratings measures, we are adopting a specific rule limited to the PHE for the COVID–19 pandemic. At §§ 422.164(i) and 423.184(i), we are adopting authority for CMS to substitute the score and star for the measure used in the 2020 Star Ratings in the calculation of the 2021 Star Ratings when there is a systemic data quality issue for all plans as a result of the PHE for the COVID–19 pandemic. Therefore, in the above example, we would use sponsors' SNP Care Management and MTM Program Completion Rate for Comprehensive Medication Review measures' scores and stars from the

2020 Star Ratings as the sponsors' 2021 Star Ratings on those measures.

We are making these adjustments to the Star Ratings methodology since our inability to make calculations at a late stage in the annual Star Ratings publication process would severely jeopardize our ability to calculate 2022 MA payments accurately and consistent with the statutory QBP provision particularly since our ability to change other deadlines based on availability of the Star Ratings (for example, the bid deadline, Annual Election Period, and the start of the new plan benefit year) is limited but the Star Ratings are an integral part of those other activities. In extreme situations like the ones described above, the solicitation and consideration of public comments to establish how CMS should proceed would be impracticable since the process could not be completed in time to issue new Star Ratings that could be used to inform beneficiary choice during the Annual Election Period. The MA statute, at section 1851(d) of the Act, requires that information about plan quality and performance indicators be provided to Medicare beneficiaries to help them make informed plan choices. In addition, MA plans need to know their eligibility for QBPs in advance of the bid deadline to develop their bids; the bid deadline is also set by the statute, as the first Monday in the June prior to the coverage year. The 2021 Star Ratings will be the basis for 2022 QBPs so definitive Star Ratings need to be available to plans in advance of June 2021, to accommodate bid planning and to ensure that plans have the ability to appeal their QBP status if necessary. We understand that MA organizations begin developing and pricing their plan benefit packages well before the June bid deadline and depend on the release of Star Ratings in the preceding October as a critical milestone in their planning for an upcoming plan year. Adopting the new rule at §§ 422.164(i) and 423.184(i) to address measure-level substitutions of 2020 scores for data quality issues that impact the availability, accuracy, reliability and validity of the measure-level data that would otherwise be used for 2021 ratings will provide stability and certainty for the program. This approach will allow CMS and MA organizations to move seamlessly to a new basis for calculating QBPs in the event that the original one (that is, using the data about 2019 performance) is unavailable. It will also allow MA organizations to incorporate into their planning the possibility that they will be required to use the 2020 Star Ratings for some or all measures in developing their 2022 bids.

To codify these provisions, we are amending §§ 422.164 and 423.184 by adding a new paragraph (i) to each section, as well as by amending § 422.166 by adding a new paragraph (j)(1)(v) and amending § 423.186 by adding a new paragraph (j)(1)(iv).

d. 2022 Star Ratings

For the 2022 Star Ratings, we expect plans to submit HEDIS data in June 2021 and to administer the CAHPS survey in 2021 as usual. The majority of measures for the 2022 Star Ratings are based on the 2020 measurement year, which is ongoing during the PHE for the COVID–19 pandemic. We are using the IFC to make immediate changes to the methodology for the 2022 Star Ratings so as not to inappropriately incentivize actions by plans and healthcare providers that are not directly related to the PHE for the COVID–19 pandemic. By adopting these changes immediately, Medicare health and drug plans will be assured as quickly as possible about how performance changes driven or caused by the COVID–19 pandemic will be addressed in the Star Ratings that use this performance period. Except as addressed in this IFC, we anticipate that the 2022 Star Ratings will be implemented as codified at §§ 422.160, 422.162, 422.164, 422.166, 423.180, 423.182, 423.184, and 423.186.

i. Guardrails

We recognize that health and drug plans and their providers are needing to adapt their current care practices in light of the PHE for the COVID–19 pandemic and the need to care for the most vulnerable patients, such as the elderly and those with chronic health conditions; these changes in how plans and providers care for Medicare beneficiaries as a result of COVID–19 will impact performance for the 2020 measurement period which feeds into the 2022 Star Ratings. On March 18, 2020, we issued guidance (available on the CMS website at *https://www.cms.gov/files/document/31820-cms-adult-elective-surgery-and-procedures-recommendations.pdf)* to delay all non-essential planned surgeries and procedures, including dental, until further notice. Healthcare providers are being asked to encourage patients to remain at home, except for emergencies, to help curb the spread of COVID–19 and to help limit the exposure to the virus. Plans and their providers are focused primarily on providing urgent care to Medicare beneficiaries who may be infected by COVID–19. We realize that this will impact the data collected during the 2020 measurement year which will impact the 2022 Part C and D Star Ratings. Thus, as part of this IFC, we are making some adjustments to account for the potential decreases in measure-level scores so health plans can have some degree of certainty knowing that the Star Ratings will be adjusted and can focus right now on patients who are most in need.

To increase the predictability of the cut points used for measure-level ratings, we previously finalized that, starting with the 2022 Star Ratings, guardrails would be implemented for measures that have been in the program for more than 3 years. As specified at §§ 422.166(a)(2)(i) and 423.186(a)(2)(i), the guardrails ensure that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than 5 percentage points from one year to the next. As noted in the April 2019 final rule, the trade-off for the predictability provided by the bi-directional cap is the inability to fully keep pace with changes in performance across the industry. While cut points that change less than the cap would be unbiased and keep pace with changes in the measure score trends, changes in the overall performance that are greater than the cap would not be reflected in the new cut points. The performance that will be used for the 2022 Star Ratings is performance in 2020, that is, during the PHE for the COVID–19 pandemic. We anticipate that most, if not all, plans could have performance changes on certain measures as they deal with the demands the PHE for the COVID–19 pandemic will place on the health care system in the United States. Guardrails that prevent the cut points for measures from lowering, even when performance scores are lower across the board, will result in plans having similar low measure-level ratings even if their performance is relatively distinguishable.

Since the Star Ratings are used to calculate the payment to MA organizations by providing an increase in the benchmark against which MA organizations bid and in the portion of the savings between the bid and benchmark available to MA organizations to use as rebates, unanticipated significant declines in the Star Ratings would create significant uncertainty in the program and potential beneficiary access issues if ratings significantly decline across the cost plan, MA and Part D programs. Given the enormity of this situation we believe it is important for plans to be able to focus on patients that are in the most need during the outbreak, and our

guardrails, as currently constructed, could have unintended incentives to the contrary. In addition, adopting this policy as soon as possible will minimize incentives for plans and providers to focus on non-urgent care or administrative efforts, even if those issues are tied to existing Star Ratings measures, and focus their attention on urgent care issues. As such, in response to the PHE for the COVID–19 pandemic, we are delaying implementation of the guardrails so that cut points can change by more than 5 percentage points if national performance declines as a result of the PHE for the COVID–19 pandemic. We are modifying §§ 422.166(a)(2)(i) and 423.186(a)(2)(i) to delay the application of the guardrails beginning with the 2023 Star Ratings produced in October 2022. No other aspect of the guardrails policies finalized in the April 2019 final rule is changing with this modification.

ii. Improvement Measure

The existing Star Ratings system and regulations include a well-developed improvement measure and methodology for calculating and using it. However, because we anticipate that performance during the 2020 measurement period may decline for plans across the nation, we believe that it is appropriate to adopt a provision to minimize the negative effect of the improvement measure and improvement scores. As with the guardrails policy, this amendment to the existing regulations is designed to minimize or eliminate incentives in the Star Ratings that might be inconsistent with the steps necessary to address the COVID–19 pandemic. We are revising the methodology for the Part C and D improvement measure for the 2022 Star Ratings to expand the hold harmless rule to include all contracts at the overall and summary rating levels recognizing that the PHE for the COVID–19 pandemic may result in a decline in industry performance. Currently, for MA–PD contracts with an overall rating of 4 or more stars, if the inclusion of the improvement measure(s) reduces a contract's overall Star Rating, the Part C and D improvement measures are excluded from the overall Star Ratings calculations for that contract. Similarly, for MA-only contracts with 4 or more stars, if the inclusion of the Part C improvement measure reduces the Part C summary Star Rating, it is excluded from the calculations for that contract. Our revision will expand the current hold harmless rule and how it works to all contracts regardless of their ratings and also apply it to the Part C and D summary ratings for the 2022 Star Ratings only.

We are codifying a new paragraph (g)(3) at §§ 422.166 and 423.186 and adding text at the end of the existing text in §§ 422.166(f)(1)(i) and 423.186(f)(1)(i) to implement this new hold harmless provision for the 2022 Star Ratings only.

iii. Categorical Adjustment Index

Beginning with the 2017 Star Ratings, we implemented the Categorical Adjustment Index (CAI) that adjusts for the average within-contract disparity in performance associated with the percentages of enrollees who receive a low-income subsidy and/or are dual eligible (LIS/DE) and/or have disability status. For the 2022 Star Ratings, we will calculate the CAI as codified at §§ 422.166(f)(2) and 423.186(f)(2). The CAI values will be calculated based on the 2021 Star Ratings data which will use the older HEDIS and CAHPS data from the 2020 Star Ratings. For each measure, adjusted measure scores which are used to construct the CAI values will be calculated using the enrollment year associated with the year of data being used for that measure (that is, 2018 enrollment year data for HEDIS and CAHPS measures, 2019 enrollment year data for all other measures). Given we are following the rules codified in regulation, there are no changes to the regulatory text. We are providing this explanation to avoid uncertainty on this point for Medicare health and drugs plans.

iv. QBP Calculations for New Contracts

Under § 422.252, a new MA plan means an MA contract offered by a parent organization that has not had another MA contract in the previous 3 years. For just the 2022 QBP ratings that are based on 2021 Star Ratings, we are modifying this definition to treat an MA plan as a new MA plan if it is offered by a parent organization that has not had another MA contract for the previous 4 years. This change would account for how new plans that started in 2019 would have reported HEDIS and CAHPS data to CMS for the first time in 2020 for the 2021 Star Ratings; because of our elimination of the HEDIS and CAHPS data submissions to CMS, these plans will not have enough measures to calculate the 2021 Star Ratings and, consequently, the 2022 QBP rating. A new contract with an effective date of January 1, 2019 would normally be treated as new for purposes of QBPs for 2019, 2020, and 2021. The 2022 QBP rating would be based on the 2021 Star Ratings which these contracts will not have due to the elimination of HEDIS and CAHPS data.

Z. Changes To Expand Workforce Capacity for Ordering Medicaid Home Health Nursing and Aide Services, Medical Equipment, Supplies and Appliances and Physical Therapy, Occupational Therapy or Speech Pathology and Audiology Services

Title XIX of the Act requires that, to receive Federal Medicaid matching funds, a State must offer certain basic services to the categorically needy populations specified in the Act. Home health services for Medicaid-eligible individuals who are entitled to nursing facility services is one of these mandatory services. Individuals ''entitled to'' nursing facility services include the basic categorically needy populations that receive the standard Medicaid benefit package, and can include medically needy populations if nursing facility services are offered to the medically needy within a State. Home health services include part-time or intermittent nursing, home health aide services, medical supplies, equipment, and appliances, and may include therapeutic services. Current Medicaid regulations require an individual's physician to order home health services as part of a written plan of care. The plan of care must be reviewed every 60 days, except for medical supplies, equipment and appliances which must be reviewed by a physician annually.

We recognize that increased demand on the direct care services provided by physicians during the PHE for the COVID–19 pandemic could cause a delay in the availability of physicians to order home health services in the normal timeframe. In recognition of the critical need to expand workforce capacity, we are amending 42 CFR 440.70 to allow licensed practitioners practicing within their scope of practice, such as, but not limited to, NPs and PAs, to order Medicaid home health services during the existence of the PHE for the COVID–19 pandemic.

This change to § 440.70 will expand the workforce and is also a continuation of CMS' efforts to align with Medicare on who can order medical supplies, equipment, and appliances, and allowing smoother access to services for Medicaid beneficiaries, including those who are dually eligible. This alignment will also eliminate administrative burden to states and providers when dealing with inconsistencies in the practitioners who may order these items between the Medicare and Medicaid programs.

This change applies to who can order Medicaid home health nursing and aide services, medical supplies, equipment and appliances and physical therapy, occupational therapy or speech pathology and audiology services covered under § 440.70(b)(1), (2), (3), and (4).

This change does not expand the benefit categories where these items can be covered. States must continue to cover and claim home health nursing and aide services, medical supplies, equipment and appliances, and physical therapy, occupational therapy or speech pathology and audiology services (that are covered under the home health benefit) under the home health benefit, unless otherwise allowed by federal regulations.

AA. Origin and Destination Requirements Under the Ambulance Fee Schedule

Section 1861(s)(7) of the Act establishes an ambulance service as a Medicare Part B service where the use of other methods of transportation is contraindicated by the individual's condition, but only to the extent provided in regulations. We have established regulations at § 410.40 that govern Medicare coverage of ambulance services. Under § 410.40(e)(1), Medicare Part B covers ground (land and water) and air ambulance transport services only if they are furnished to a Medicare beneficiary whose medical condition is such that other means of transportation are contraindicated. The beneficiary's condition must require both the ambulance transportation itself and the level of service provided for the billed services to be considered medically necessary.

Under § 410.40(e)(1), nonemergency transportation by ambulance is appropriate if either the beneficiary is bed-confined, and it is documented that the beneficiary's condition is such that other methods of transportation are contraindicated; or, if his or her medical condition, regardless of bed confinement, is such that transportation by ambulance is medically required. That section further provides that bed confinement is not the sole criterion in determining the medical necessity of ambulance transportation but is one factor that is considered in medical necessity determinations. For a beneficiary to be considered bed-confined, § 410.40 (e)(1) states that all of the following criteria must be met: (1) The beneficiary is unable to get up from bed without assistance, (2) the beneficiary is unable to ambulate, and (3) the beneficiary is unable to sit in a chair or wheelchair.

The origin and destination requirements for coverage of ambulance services are addressed in our regulations at § 410.40(f). As provided in that section, Medicare covers the following ambulance transportation:

- From any point of origin to the nearest hospital, critical access hospital (CAH), or skilled nursing facility (SNF) that is capable of furnishing the required level and type of care for the beneficiary's illness or injury. The hospital or CAH must have available the type of physician or physician specialist needed to treat the beneficiary's condition;
- From a hospital, CAH, or SNF to the beneficiary's home;
- From a SNF to the nearest supplier of medically necessary services not available at the SNF where the beneficiary is a resident, including the return trip; and
- For a beneficiary who is receiving renal dialysis for treatment of ESRD, from the beneficiary's home to the nearest facility that furnishes renal dialysis, including the return trip.

We continue to believe that our current regulatory requirements governing coverage of ambulance services are appropriate under normal circumstances. However, in the context of the PHE for the COVID–19 pandemic, we recognize that providers and suppliers furnishing ground ambulance services and other health care professionals are faced with new challenges regarding potential exposure risks, for Medicare beneficiaries and for members of the community at large.

Therefore, on an interim basis, we will expand the list of destinations at § 410.40(f) for which Medicare covers ambulance transportation to include all destinations, from any point of origin, that are equipped to treat the condition of the patient consistent with Emergency Medical Services (EMS) protocols established by state and/or local laws where the services will be furnished. The EMS protocols are recognized operating procedures that all emergency service professionals such as emergency medical technicians (EMTs) and paramedics must follow for patient assessment, treatment, transportation and delivery to definitive care. These protocols are designed by national, state and/or local medical authorities and institutions. Based on these protocols, a patient suspected of having COVID–19 that requires a medically necessary transport may be transported to a testing facility to get tested for COVID–19 instead of a hospital in an effort to prevent possible exposure to other patients and medical staff.

These destinations may include, but are not limited to: Any location that is an alternative site determined to be part of a hospital, CAH or SNF, community mental health centers, FQHCs, RHCs, physicians' offices, urgent care facilities, ambulatory surgery centers (ASCs), any location furnishing dialysis services outside of an ESRD facility when an ESRD facility is not available, and the beneficiary's home. This expanded list of destinations will apply to medically necessary emergency and non-emergency ground ambulance transports of beneficiaries during the PHE for the COVID–19 pandemic. Consistent with section 1861(s)(7) of the Act, there must be a medically necessary ground ambulance transport of a patient in order for an ambulance service to be covered.

We are revising, on an interim basis, § 410.40 to add a new paragraph (f)(5), to state that during the PHE for the COVID–19 pandemic only, a covered destination includes a ground ambulance transport from any point of origin to a destination that is equipped to treat the condition of the patient consistent with state and local EMS protocols where the services will be furnished. These destinations include, but are not limited to, any location that is an alternative site determined to be part of a hospital, CAH or SNF, community mental health centers, FQHCs, RHCs, physician offices, urgent care facilities, ASCs, any location furnishing dialysis services outside of an ESRD facility when an ESRD facility is not available, and the beneficiary's home. Home may be an appropriate destination for a COVID–19 patient who is discharged from the hospital to home to be under quarantine (as noted above, there must be a medically necessary ground ambulance transport of a patient in order for an ambulance service to be covered).

BB. Merit-Based Incentive Payment System (MIPS) Updates

1. MIPS Improvement Activities Inventory Update

The CY 2018 Quality Payment Program final rule (82 FR 53660) finalized that we would add new improvement activities or make modifications to existing improvement activities in the Improvement Activities Inventory through notice-and-comment rulemaking. An improvement activity means an activity that relevant MIPS eligible clinician, organizations and other relevant stakeholders identify as improving clinical practice or care delivery and that the Secretary determines, when effectively executed,

is likely to result in improved outcomes. We refer readers to Table H in the Appendix of the CY 2017 Quality Payment Program final rule (81 FR 77177 through 77199), Tables F and G in the Appendix of the CY 2018 Quality Payment Program final rule (82 FR 54175 through 54229), Tables A and B in the Appendix 2 of the CY 2019 PFS final rule (83 FR 60286 through 60303), and Tables A, B, and C in the Appendix 2 of the CY 2020 PFS final rule (84 FR 63514 through 63538) for our previously finalized Improvement Activities Inventory. We also refer readers to the Quality Payment Program website at *https://qpp.cms.gov/* for a complete list of the most current list of improvement activities.

The COVID–19 pandemic has been deemed a PHE by the Secretary of the Department of Health and Human Services. Information regarding the PHE for the COVID–19 pandemic may be found at *https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.* In this IFC, we are adding one new improvement activity to the Improvement Activities Inventory for the CY 2020 performance period in response to this PHE. We refer readers to Table 1 for a full description which includes the type of action that would qualify for this improvement activity. This improvement activity promotes clinician participation in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection.[20] To receive credit for this clinical improvement, clinicians must report their findings through an open source clinical data repository or clinical data registry. When utilizing the term ''open source'' we mean making available to the public the results of research, including publications and scientific data, which enables reuse, increases transparency, and facilitates reproductibility of research results.[21]

We believe that participation in this activity is likely to result in improved outcomes by improving the collection of data clinicians use for the care of their patients as they monitor and manage COVID–19 and drive care improvements. We believe that encouraging clinicians to utilize an open source clinical data repository or clinical data registry for data reporting will bring the results of their research to the forefront of healthcare far quicker than if it goes through the cycle of peer review and publishing. In addition, we believe that this could improve clinical practice and care delivery, a relevant stakeholder donated a database for the pandemic so that health officials/clinicians/the public could track patients and drugs that work to better improve outcomes of COVID–19 patients.

In the CY 2019 PFS (83 FR 59778 through 59782), we provided details regarding the Annual Call for Activities and how stakeholders submit potential improvement activities. In general, to nominate a new activity or request a modification to an existing improvement activity, a stakeholder must submit a nomination form available at *www.qpp.cms.gov* during the Annual Call for Activities. For this new improvement activity, we are making a one-time exception from our established Annual Call for Activities timeframe and processes due to this PHE.

New improvement activities should meet one or more criteria to be included in the Improvement Activities Inventory (82 FR 53660). We believe that this activity meets the improvement activities submission criteria of a ''public health emergency as determined by the Secretary,'' which was finalized in the 2019 PFS final rule (83 FR 59779). As noted in the CY 2017 Quality Payment Program final rule, we use the criteria for nominating new improvement activities in selecting improvement activities for inclusion in the program (82 FR 53659). We also clarified that those criteria are but one factor in determining which improvement activities we ultimately proposed (83 FR 59780). For MIPS eligible clinicians who wish to submit this new improvement activity, we refer readers to the CY 2019 PFS final rule (83 FR 59778 through 59782) for our previously finalized improvement activities submission requirements. Table 1 displays the new improvement activity.

TABLE 1—NEW IMPROVEMENT ACTIVITY FOR THE MIPS CY 2020 PERFORMANCE PERIOD

Improvement activity	
Activity ID:	IA_ERP_XX.
Subcategory:	Emergency Response And Preparedness.
Activity Title:	COVID–19 Clinical Trials.
Activity Description:	To receive credit for this activity, a MIPS-eligible clinician must participate in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection and report their findings through a clinical data repository or clinical data registry for the duration of their study. For more information on the COVID–19 clinical trials we refer readers to the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19.*
Weighting:	High.

2. MIPS Applications for Reweighting Based on Extreme and Uncontrollable Circumstances

As a result of the PHE for the COVID–19 pandemic, we are applying the MIPS automatic extreme and uncontrollable circumstances policy at § 414.1380(c)(2)(i)(A)(*8*) and (c)(2)(i)(C)(*3*) to MIPS eligible clinicians for the 2019 MIPS performance period/2021 MIPS payment year. We believe that this application of the policy is appropriate given the impact COVID–19 will likely have on the ability of many MIPS eligible clinicians to complete data submission for the MIPS program for the 2019 MIPS performance period because most of those submissions will occur during CY 2020.

Due to the timing of the PHE, we realize that there may be scenarios where MIPS-eligible clinicians are not covered by the automatic extreme and uncontrollable circumstances policy. For example, as we stated in the CY 2019 PFS final rule, the automatic extreme and uncontrollable circumstances policy does not apply to groups or virtual groups (83 FR 59874

[20] For more information on the COVID–19 clinical trials we refer readers to the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19.*

[21] More information on open source is available at *https://www.nlm.nih.gov/NIHbmic/nih_data_sharing_repositories.html; https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.*

and 59875); however, under § 414.1380(c)(2)(i), individual clinicians, groups and virtual groups could submit an application for reweighting the performance categories based on extreme and uncontrollable circumstances. To provide additional relief to individual clinicians, groups, and virtual groups for whom sufficient MIPS measures and activities may not be available for the 2019 MIPS performance period due to the PHE for the COVID–19 pandemic, we are extending the deadline to submit an application for reweighting the quality, cost, and improvement activities performance categories based on extreme and uncontrollable circumstances (§ 414.1380(c)(2)(i)(A)(*6*)) and the Promoting Interoperability performance category based on extreme and uncontrollable circumstances (§ 414.1380(c)(2)(i)(C)(*2*)) from December 31, 2019 to April 30, 2020, or a later date that we may specify. This extended deadline of April 30, 2020 mirrors the MIPS data submission deadline extension. The extended deadline is available only for applications that demonstrate the clinician has been adversely affected by the PHE for the COVID–19 pandemic.

We are also modifying our existing policy for the 2019 performance period/2021 MIPS payment year so that if a MIPS eligible clinician, group, or virtual group submits an application for reweighting based on the PHE for the COVID–19 pandemic by the extended deadline, any MIPS data they have submitted or will submit would not effectively void their application. Under § 414.1380(c)(2)(i)(A)(*6*) and (c)(2)(i)(C), if an application for reweighting the performance categories based on extreme and uncontrollable circumstances is submitted, but data on measures or activities for a performance category are also submitted, a MIPS eligible clinician will be scored on the submitted data, and the performance categories for which data are submitted will not be reweighted. However, for the 2019 performance period we believe it is appropriate to modify this policy, because we believe it is possible that a MIPS eligible clinician, group, or virtual group could have submitted some MIPS data prior to the PHE for the COVID–19 pandemic, but due to circumstances related to the PHE for the COVID–19 pandemic, are not able to complete their submission such that the data they submitted may not reflect their actual performance on the measures and activities. As a result, we are modifying the policy at § 414.1380(c)(2)(i)(A)(*6*) to create an exception for the 2019 performance period/2021 MIPS payment year only, such that if a MIPS eligible clinician demonstrates through an application submitted to CMS that they have been adversely affected by the PHE for the COVID–19 pandemic, but also submits data for the quality, cost, or improvement activities performance categories, the performance categories for which data are submitted would still be reweighted (subject to CMS' approval of the application), and the data submission would not effectively void the application for reweighting. We are also modifying the policy at § 414.1380(c)(2)(i)(C) to create a similar exception for the Promoting Interoperability performance category for the 2019 performance period/2021 MIPS payment year only.

CC. Inpatient Hospital Services Furnished Under Arrangements Outside the Hospital During the Public Health Emergency (PHE) for the COVID–19 Pandemic

1. Overview for Inpatient Hospital Services

For purposes of Medicare payment, section 1861(b) of the Act defines inpatient hospital services in part as the following items and services furnished to an inpatient of a hospital and (except as provided in paragraph (3)) by the hospital: (1) Bed and board; (2) such nursing services and other related services, such use of hospital facilities, and such medical social services as are ordinarily furnished by the hospital for the care and treatment of inpatients, and (3) such other diagnostic or therapeutic items or services, furnished by the hospital or by others under arrangements with them made by the hospital, as are ordinarily furnished to inpatients either by such hospital or by others under such arrangements.

Routine services in the hospital setting are those described in sections 1861(b)(1) and (b)(2) of the Act. Under our current policy for hospital services furnished under arrangements that we adopted in the FY 2012 IPPS/LTCH PPS rulemaking (76 FR 51714), routine services cannot be provided under arrangement outside the hospital. Only the therapeutic and diagnostic services described in section 1886(b)(3) of the Act can be provided under arrangement outside the hospital.

We continue to believe that our current policy prohibiting routine services from being provided under arrangement outside the hospital is consistent with the statute and appropriate for the reasons discussed in the FY 2012 IPPS/LTCH PPS rulemaking. However, we wish to give hospitals that provide services to Medicare beneficiaries flexibility to respond effectively to the serious public health threats posed by COVID–19. Recognizing the urgency of this situation, and understanding that our current policy may inhibit use of capacity in settings that might otherwise be effective in the efforts to mitigate the impact of the pandemic on Medicare beneficiaries and the American public, we are changing our under arrangements policy during the PHE for the COVID–19 pandemic so that hospitals are allowed broader flexibilities to furnish inpatient services, including routine services outside the hospital.

2. Prior Rulemaking

In the FY 2012 IPPS/LTCH PPS rulemaking (76 FR 51711), we noted that the statute specifies that ''routine services,'' for example, bed, board, nursing and other related services, except those specified at paragraph (3) of section 1861(b) of the Act are to be provided by ''the hospital,'' and not just ''a hospital.'' Similarly, we noted that our implementing regulations at § 409.12 indicate that Medicare pays for nursing and related services, use of hospital facilities, and medical social services as inpatient hospital services or inpatient CAH services only if those services are ordinarily furnished by the hospital or CAH. We pointed out that, consistent with section 1861(b)(3) of the Act, only with regard to other diagnostic or therapeutic services do the regulations at § 409.16 state that Medicare will also pay for these services if furnished ''by others under arrangements made by the hospital or CAH.''

Under our current policy adopted in the FY 2012 IPPS/LTCH PPS rulemaking, if routine services, that is, services described in sections 1861(b)(1) and (b)(2) of the Act, are provided in the hospital, they are considered as being provided ''by the hospital.'' We stated that we believe this policy is consistent with the statute because the statutory language specifying that the routine services described in sections 1861(b)(1) and (b)(2) of the Act be provided ''by the hospital'' suggests that the hospital is required to exercise professional responsibility over the services, including quality controls. In situations in which certain routine services are provided through arrangement ''in the hospital,'' for example, contracted nursing services, we stated that we believe the arrangement generally results in the hospital exercising the same level of control over those services as the hospital does in situations in

which the services are provided by the hospital's salaried employees.

Therefore, if routine services are provided in the hospital to its inpatients, we consider the service as being provided by the hospital. However, if these services are provided to its patients outside the hospital, the services are considered as being provided under arrangement, and not by the hospital. Therefore, consistent with the statute, we stated that only therapeutic and diagnostic services can be provided under arrangement outside the hospital.

Some commenters during the FY 2012 IPPS/LTCH PPS rulemaking stated that our policy to limit the services a hospital may provide under arrangements is not required by the statute or regulations. Some commenters also believed that CMS' proposed reading of the statutory definition of inpatient hospital services is only one possible interpretation of the statute.

In our response to these comments, we noted that we focused on section 1861(b) of the Act because it provides the statutory basis for our policy to limit the services that may be furnished under arrangement. As we noted in that rulemaking, the reference to diagnostic or therapeutic items or services in section 1861(b)(3) of the Act is to services furnished by the hospital or by others under arrangements. Therefore, we stated that we believe it is consistent with the statutory language to limit the services that may be furnished outside of a hospital under arrangement to only diagnostic and therapeutic services.

We noted that our policy does not alter the definition of inpatient hospital services, but instead limits the services a hospital may provide under arrangements outside the hospital. If a patient of Hospital A is in Hospital B receiving routine services, the patient will still be an ''inpatient,'' but the services will not be considered ''inpatient hospital services'' furnished by the hospital for purposes of payment for services defined under section 1861(b) of the Act. If the patient is admitted to Hospital B, then the patient would be an ''inpatient'' of Hospital B and the routine services furnished to that individual would meet the definition of ''inpatient routine services'' under section 1861(b) of the Act.

We also discussed in the FY 2012 IPPS/LTCH PPS rulemaking the policy considerations supporting this change. We stated that we became aware that some hospitals were furnishing certain routine services, including ICU services, under arrangement. For example, under certain arrangements, if an inpatient of an IPPS-excluded hospital (''hospital A'') required ICU services, and the IPPS-excluded hospital could not provide these services, the patient was moved to an IPPS hospital (''hospital B'') that could furnish the ICU services. In these situations, the patient was not transferred to hospital B but was moved from an inpatient bed of hospital A to an inpatient bed of hospital B. However, the IPPS-excluded hospital treated these services as being provided under arrangement and included the cost of those services on its cost report. We found it problematic that the patient was, at all times, considered an inpatient of hospital A even though the patient occupied an inpatient bed at hospital B.

Because the two hospitals in the example above are under two different payment systems, we stated that we believe this arrangement can result in inappropriate and potentially excessive Medicare payments. The IPPS-excluded hospital, hospital A, is paid on a reasonable cost basis, subject to a ceiling. In most cases, this payment is greater than if the hospital were paid under the IPPS for the same patient. Furthermore, although there is a ceiling on the amount of Medicare payment for hospital A, there are also provisions that allow hospital A to receive adjustments to its ceiling in certain circumstances, which in the absence of our policy could allow payment to hospital A above those allowed by its ceiling. Therefore, in the absence of our policy these arrangements could allow hospital A to request an adjustment to its ceiling because its ICU costs had increased beyond what is allowed. In that case, hospital A would receive additional payments beyond its ceiling. We stated that we believe that by limiting the furnishing of routine services under arrangements to situations in which the services are furnished in hospital A, we reduce the opportunity for gaming. In these more limited situations, hospital A exercises sufficient control over the use of hospital resources when furnishing these services such that the services are appropriately included in hospital A's cost report.

Under our current policy adopted in that rulemaking, if hospital A did not have the resources to treat a patient, it would transfer the patient to hospital B for ICU services, and hospital B would bill Medicare consistent with the IPPS provisions. Hospital A would be paid for an inpatient discharge.

3. Inpatient Hospital Services Furnished Under Arrangements Outside the Hospital During the PHE for the COVID–19 Pandemic

As noted earlier in this section, we continue to believe that our current policy is consistent with the statute and appropriate for the reasons discussed in the FY 2012 IPPS/LTCH PPS rulemaking. However, we wish to give hospitals that provide services to Medicare beneficiaries additional flexibilities to respond effectively to the serious public health threats posed by the spread of COVID–19. Recognizing the urgency of this situation, and understanding that some pre-existing Medicare payment rules may inhibit use of capacity that might otherwise be effective in the efforts to mitigate the impact of the pandemic on Medicare beneficiaries and the American public, we are changing our under arrangements policy during the PHE for the COVID–19 pandemic beginning March 1, 2020, so that hospitals are allowed broader flexibilities to furnish inpatient services, including routine services outside the hospital.

We believe that our concerns articulated in the FY 2012 rulemaking regarding gaming of routine services provided outside the hospital for payment reasons are significantly mitigated by the existence of the PHE. Hospitals would be treating patients in locations outside the hospital for a variety of reasons, including limited beds and/or limited specialized equipment such as ventilators, and for a limited time period. We do not expect that during the PHE for the COVID–19 pandemic hospitals would be treating patients outside the hospital for gaming reasons.

As noted, we continue to believe that our current policy of limiting the services that may be provided under arrangements outside of the hospital to therapeutic and diagnostic items and services is consistent with the statute and supported by the policy considerations discussed in the FY 2012 IPPS/LTCH PPS final rule. However, we do not believe that the statute would preclude this change in policy to allow routine services to also be provided under arrangements outside the hospital, in light of the compelling circumstances and the need for additional, short-term flexibility during the current PHE for the COVID–19 pandemic. Consistent with this, and as previously summarized in section II.BB.2 of this IFC, we note that we received comments during the FY 2012 rulemaking that our policy to limit the services a hospital may provide under

arrangements is not required by the statute and that CMS' reading of the statutory definition of inpatient hospital services is only one possible interpretation of the statute.

While we are changing our under arrangements policy during the PHE for the COVID–19 pandemic to allow hospitals broader flexibilities in furnishing inpatient services, we emphasize that we are not changing our policy that a hospital needs to exercise sufficient control and responsibility over the use of hospital resources in treating patients, as discussed in the FY 2012 IPPS/LTCH PPS final rule and Section 10.3 of Chapter 5 of the Medicare General Information, Eligibility, and Entitlement Manual (Pub. 100–01). Nothing in the current PHE for the COVID–19 pandemic has changed our policy or thinking with respect to this issue and we are making no modifications to this aspect of the policy. Hospitals need to continue to exercise sufficient control and responsibility over the use of hospital resources in treating patients regardless of whether that treatment occurs in the hospital or outside the hospital under arrangements. If a hospital cannot exercise sufficient control and responsibility over the use of hospital resources in treating patients outside the hospital under arrangements, the hospital should not provide those services outside the hospital under arrangements.

For the reasons set forth above, effective for services provided for discharges for patients admitted to the hospital during the PHE for COVID–19 beginning March 1, 2020, if routine services are provided under arrangements outside the hospital to its inpatients, these services are considered as being provided by the hospital.

DD. Advance Payments to Suppliers Furnishing Items and Services Under Part B

In an effort to be able to be more responsive to situations in which Part B suppliers could request advance payments from CMS, we are making modifications to existing advance payments rules found in 42 CFR 421.214. Currently, § 421.214 limits CMS' ability to make advance payments in situations where a CMS contractor is unable to process claims within established time limits. In light of the PHE Declaration related to COVID–19 and the inability to project the impact it may have in the future on CMS' abilities to ensure timely payment and the potential challenges for suppliers to prepare and submit claims to CMS contractors, we are revising the definition of advance payment in § 421.214(b). Currently, paragraph (b) defines advance payment as a conditional partial payment made by the *carrier* in response to a claim that it is unable to process within established time limits. We are revising this definition to state that the conditional partial payment will be made by the ''contractor'' (not the carrier) except as provided in paragraph (j). We are also adding language to permit payments under an exception at § 421.214(c). In addition, we are also adding paragraph (j) to specifically address emergency situations in which it will be able to make advance payments. Additionally, existing rules limit CMS to no more than 80 percent of the anticipated payment for that claim based upon the historical assigned claims payment data for claims paid to the supplier. Under exceptional circumstances as outlined in paragraph (j), we are increasing this limit to 100 percent of the anticipated payment for that claim based upon the historical assigned claims payment data for claims paid to the supplier in paragraph (f)(1)(i). We are also adding a criterion to § 421.214 that suppliers in bankruptcy would not be eligible to receive advance payments to ensure that, with such expanded authority, CMS is able to appropriately pay and recover advance payments made to Part B suppliers.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule before the provisions of the rule take effect, in accordance with 5 U.S.C. 553(b) of the Administrative Procedure Act (APA) and section 1871 of the Act. Specifically, section 553(b) of the APA requires the agency to publish a notice of the proposed rule in the **Federal Register** that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Section 553(c) of the APA further requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and a period of not less than 60 days for public comment. Section 553(b)(3)(B) of the APA and section 1871(b)(2)(C) of the Act authorize the agency to waive these procedures, however, if the agency finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

Section 553(d) of the APA ordinarily requires a 30-day delay in the effective date of a final rule from the date of its publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds good cause to support an earlier effective date. Section 1871(e)(1)(B)(i) of the Act also prohibits a substantive rule from taking effect before the end of the 30-day period beginning on the date the rule is issued or published. Section 1871(e)(1)(B)(ii) of the Act permits a substantive rule to take effect before 30 days if the Secretary finds that a waiver of the 30-day period is necessary to comply with statutory requirements or that the 30-day delay would be contrary to the public interest. Furthermore, section 1871(e)(1)(A)(ii) of the Act permits a substantive change in regulations, manual instructions, interpretive rules, statements of policy, or guidelines of general applicability under Title XVIII of the Act to be applied retroactively to items and services furnished before the effective date of the change if the failure to apply the change retroactively would be contrary to the public interest.

The nation is experiencing an emergency of unprecedented magnitude. Ensuring the health and safety of Medicare beneficiaries, Medicaid recipients, and healthcare workers is of primary importance. As this IFC directly supports that goal by offering healthcare professionals flexibilities in furnishing services while combatting the COVID–19 pandemic and ensuring that sufficient health care items and services are available to meet the needs of individuals enrolled in the Medicare and Medicaid programs, it is critically important that we implement this IFC as quickly as possible. As we are in the midst of a PHE, we find good cause to waive notice and comment rulemaking as we believe it would be contrary to the public interest for us to undertake normal notice and comment rulemaking procedures. For the same reasons, because we cannot afford any delay in effectuating this IFC, we find good cause to waive the 30-day delay in the effective date and, moreover, to make this IFC effective as of March 1, 2020—the date the President of the United States declared to be the beginning of the national emergency concerning the COVID–19 outbreak.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health

Organization (WHO) declared the outbreak of the 2019 Novel Coronavirus (COVID–19) to be a Public Health Emergency of International Concern.[22] On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a Public Health Emergency (PHE) [23] under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID–19. On March 11, 2020, the WHO publicly declared COVID–19 to be a pandemic.[24] On March 13, 2020, the President declared that the COVD–19 outbreak in the United States constitutes a national emergency,[25] beginning March 1, 2020. This declaration, along with the Secretary's January 30, 2020 declaration of a PHE, conferred on the Secretary certain waiver authorities under section 1135 of the Act. On March 13, 2020, the Secretary authorized waivers under section 1135 of the Act, effective March 1, 2020.[26]

In support of the imperative to contain and combat the virus in the United States, this IFC will give health care workers and hospitals additional flexibility to respond to the virus and continue caring for patients while minimizing exposure. CDC guidelines are clear that public exposure greatly increases the overall risk to public health and they stress the importance of containment and mitigation strategies to minimize public exposure and the spread of COVID–19. As of March 29th, the CDC reports 122,653 cases of COVID–19 in the United Sates and 2,112 deaths.[27] Individuals such as healthcare workers who come in close contact with those infected with COVID–19 are at an elevated risk of contracting the disease. To minimize these risks, the CDC has urged healthcare professionals to make every effort to distance themselves from those who are potentially sick with COVID–19 by using modalities such as telephonic interviews, text monitoring systems, or video conference.[28] As the healthcare community works to establish and implement infection prevention and control practices, CMS is also working to revise and implement regulations that function in concert with those healthcare community infection prevention and treatment practices.

This IFC offers flexibilities in certain Medicare and Medicaid regulations that support measures to combat the COVID–19 pandemic and safeguard all interests by protecting healthcare providers and vulnerable beneficiaries. The provisions of this IFC better enable and facilitate physicians and other clinicians, to focus on caring for these beneficiaries during this PHE for the COVID–19 pandemic and minimize their own risks to COVID–19 exposure. For example, by increasing access to telehealth and testing in a patient's home, and improving infection control, this IFC will provide flexibilities for Medicare beneficiaries to be able to receive medically necessary services without jeopardizing their health or the health of those who are providing those services, in turn minimizing public exposure and the overall risk to public health. Moreover, changes to Medicare payment rules will confer on practitioners and other healthcare providers the broadest flexibility to use remote communications technology to avoid exposure risks to themselves, their patients, and communities. These changes include greater flexibilities to use communications technology to interact with patients directly and to supervise care directly provided by other clinicians. This IFC alters the applicable payment rules to provide specimen collection fees for independent laboratories collecting specimens from beneficiaries who are homebound or inpatients (not in a hospital) for COVID–19 testing. Additionally, certain new model-specific requirements for Innovation Center Models and program-specific requirements for the Quality Payment Program will reduce or prevent practices that might inappropriately incentivize cost considerations over patient safety. Changes to the calculation of the 2021 and 2022 Part C and D Star Ratings will address the expected disruption to data collection and measure scores posed by the COVID–19 pandemic, and amendments to the Medicaid home health regulations will enable other licensed practitioners to order services, equipment, and therapy they otherwise could not.

We believe it would be contrary to the public interest for us to undertake normal notice and comment procedures and to delay the effective date of this IFC. We find good cause to waive notice of proposed rulemaking under section 553(b)(3)(B) of the APA and section 1871(b)(2)(C) of the Act, and, for the reasons stated, we find that it would be contrary to the public interest to delay the effective date of this IFC, under section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act.

Furthermore, the President declared that the COVID–19 outbreak in the United States constituted a national emergency beginning March 1, 2020. To ensure the consistent availability throughout the national emergency period of measures we are taking to address the COVID–19 pandemic, we believe it is vital that the effective date of this IFC align with the first day of the national emergency. It is also important to ensure the health care providers that acted expeditiously to implement appropriate physical and operational changes to their practices to adapt to emergency conditions, even in the absence of changes in our policies to address them, are not disadvantaged relative to other health care providers, and will not be discouraged from taking similar appropriate actions in the future. March 1, 2020 precedes the date of publication of this IFC in the **Federal Register**, which means this rule has a retroactive effect. However, section 1872(e)(1)(A)(ii) of the Act permits the Secretary to issue a rule with retroactive effect if the failure to do so would be contrary to the public interest. As we have explained above, we believe it would be contrary to the public interest not to implement this IFC as soon as we are authorized to do so under the authority of section 1871(e)(1)(A)(ii) of the Act, that is, retroactively to March 1, 2020. We are providing a 60-day public comment period for this IFC as specified in the **DATES** section of this document.

IV. Collection of Information Requirements

For IFC changes to the MA and Part D Star Ratings program, the elimination of the requirement to collect and submit data for OMB control numbers 0938–1028 (HEDIS) and 0938–0732 (CAHPS) will reduce some burden. Those collections are approved for 164,200 hours and 123,375 hours annually, respectively. Due to the ongoing nature of these information collections, it is difficult to determine the extent of the burden. However, the burden estimates for the HEDIS and CAHPS information collection requests are approved

[22] *https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).*

[23] *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

[24] *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.*

[25] *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[26] *https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx.*

[27] *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.*

[28] *https://www.cdc.gov/coronavirus/2019-ncov/php/guidance-evaluating-pui.html.*

through November 30, 2020 and April 30, 2021, respectively. Upon resubmission for OMB approval, we will revise both information collections to more accurately account for the burden decreases.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

Executive Order 12866 and other laws and Executive orders require economic analysis of the effects of proposed and final (including interim final) rules.[29] The Office of Management and Budget has designated this rulemaking as ''economically significant'' under E.O. 12866 and also major under the Congressional Review Act. This IFC's designation under Executive Order 13771, titled ''Reducing Regulation and Controlling Regulatory Costs'' (82 FR 9339), which was issued on January 30, 2017, will be informed by public comments received.

A. Statement of Need

Throughout this IFC, we discuss several changes to payment and coverage policies intended to allow health care providers maximum flexibility to minimize the spread of COVID–19 among Medicare and Medicaid beneficiaries, health care personnel, and the community at large and increase capacity to address the needs of their patients. The flexibilities and changes contained within this IFC are responsive to this developing pandemic emergency. Given the potentially catastrophic impact to public health, it is difficult to estimate the economic impact of the spread of COVID–19 under current payment rules compared to the rules issued in this IFC.

We believe that the needs of Medicare patients will likely test the capacity of the health care system over the coming months. Our policies during the PHE for the COVID–19 Pandemic will allow home health agencies and hospices more flexibility to furnish services via telecommunications technologies to minimize exposure risks to patients, clinicians and the general public; and there would be no change in Medicare payment rates or change in the types of patients treated under these policies compared to the absence of these policy changes.

Our additions to the list of Medicare telehealth services will allow more physicians' services to be furnished in a manner that reduces the exposure risk to patients and physicians. To the extent that physicians utilize these new flexibilities for patients that would have been treated in more traditional offices or hospital settings without this policy change, given the competing demand for physicians' services during the pandemic this additional flexibility would not result in any significant change in aggregate Medicare payments for physicians' services.

Still, it is possible that the flexibilities and changes contained within this IFC would increase aggregate Medicare payments. For example, if its protections against exposure risk are effective, providers may maintain their own health and thus be available to provide more medical treatment overall. Improvements in both provider and/or patient health are intended benefits of this IFC.

We anticipate that the change in the site of service payment amount for telehealth services under the PHE along with the changes that allow for broader flexibilities in supervision will allow physicians and other practitioners to better maintain overall level of needed care to Medicare beneficiaries in the face of exposure risks and competing demands for health care providers.

Finally, the changes to Medicaid's regulations to expand the scope of certain providers are anticipated to eliminate some burdens on providers and beneficiaries.

The modifications to the calculations for the 2021 and 2022 Part C and D Star Ratings to address the expected disruption to data collection and measure scores posed by the PHE for the COVID–19 pandemic should not have a significant impact on the distribution of ratings across Part C and D sponsors. Consequently, there should be negligible impacts on payments for MA organizations from these modifications.

B. Special Requirements for Psychiatric Hospitals

In section II.P. of this final rule, we note that existing requirements for psychiatric hospitals specify that progress notes must be recorded by the physician(s), psychologists, or other licensed independent practitioner(s) responsible for the care of the patient. We believe that this provision requires clarification and revision since the regulatory language is inconsistent with other recent changes finalized throughout the hospital CoPs as this provision applies to APPs, including PAs, NPs, psychologists, and CNSs.

Continued use of this outdated term may inadvertently exacerbate workforce shortage concerns, might unnecessarily impose regulatory burden on hospitals, especially psychiatric hospitals, by restricting a hospital's ability to allow APPs to operate within the scope of practice allowed by state law. We believe that the existing regulation fails to recognize the benefits to patient care that might be derived from fully utilizing APPs and their clinical skills to the highest levels of their training, education, and experience as allowed by hospital policy in accordance with state law.

Therefore, we are removing the term ''licensed independent practitioner(s)'' from the regulations. We believe that this revision is non-controversial, and that the public interest will be served by permitting a greater scope of practice for professionals in the psychiatric hospital context and further believe that these trained and qualified practitioners, when acting in accordance with State law, their scope of practice, and hospital policy, should have the authority to record progress notes of psychiatric patients for whose care they are responsible.

At § 482.61(d), we are allowing NPPs, or APPs, to document progress notes in accordance with State laws and scope-of-practice requirements. We believe that clarification of the intent of the regulation is necessary and will result in NPPs (specifically PAs, NPs, and CNSs) documenting in the progress notes for patients receiving services in psychiatric hospitals.

We estimate that MDs/DOs currently spend approximately 30 minutes documenting progress notes in psychiatric hospitals, and that 33 percent of this time would be covered by NPPs. Of the 4,823 Medicare participating hospitals, approximately 620 (or 13 percent) are psychiatric hospitals. According to AHA, there were 36,510,207 inpatient hospital stays in 2017, and therefore, an estimated 13 percent of these stays were at psychiatric hospitals. The change will result in a savings of $153.5 million (4,746,327 psychiatric hospital stays × 2 progress notes per stay × 0.5 hours of physician/psychiatrist time × $98 per

[29] Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–04, enacted on March 22, 1995) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2020, that amount is approximately $156 million. This IFC does not mandate, on an unfunded basis, any requirements for State, local, or tribal governments, or for the private sector.

hourly wage difference between physicians/psychiatrists ($198) and NPPs ($100, the average wage between NPs and PAs) × 33 percent of physician time spent writing progress notes covered by NPPs, or APPs).

C. Anticipated Effects of Changes to the MDPP Expanded Model

1. Effects on Beneficiaries

In section II.Q. of this IFC, we are amending the MDPP expanded model to modify certain requirements of the model in an emergency area during an emergency period, as those terms are defined in section 1135(g) of the Act, for which the Secretary has issued a waiver under section 1135 of the Act. Specifically, as the Secretary has issued a waiver under section 1135 of the Act, certain MDPP beneficiaries will be permitted to obtain the set of MDPP services more than once per lifetime, the number of virtual make-up sessions is increased, and certain MDPP suppliers will be permitted to deliver time limited virtual MDPP sessions. These changes apply only to MDPP beneficiaries (as defined in § 410.79(b)) who were receiving the MDPP set of services during the emergency period, as defined under section 1135(g) of the Act.

We believe that during this COVID–19 pandemic, Medicare beneficiaries will not be able to attend in-person classes. Because we do not want to disrupt their progress and we want to promote both MDPP beneficiary and MDPP supplier retention, we have modified how the set of services can be delivered to make the program accessible to currently enrolled MDPP beneficiaries during this national emergency. Our policies during the PHE for the COVID–19 Pandemic will allow enrolled MDPP suppliers with active MDPP cohorts more flexibility to furnish virtual sessions, as described by the CDC's DPRP Standards.

With the exception of the requirement for in-person attendance and the in-person body weight measurement at the first core-session, the in-person attendance requirements are waived. MDPP suppliers shall not start any new cohorts with MDPP beneficiaries throughout the COVID–19 PHE period in the geographic area, as defined under section 1135(g) of the Act, given that most beneficiaries cannot receive in-person services right now.

During the emergency period, the number of virtual make-up sessions is waived for MDPP suppliers, with an MDPP supplier offering MDPP beneficiaries no more than 15 weekly virtual make-up sessions during the core session period, no more than 6 monthly virtual make-up sessions during the core maintenance session interval period, no more than 12 monthly virtual make-up sessions during the ongoing maintenance session interval periods. All flexibilities described in this IFC will cease to be available as of the effective end date of the PHE. When in-person classes resume, the CDC is allowing suppliers to pick up where they left off, or to restart the program from week one. It is our intent to conform with the CDC guidance where feasible, with the overall intent to minimize disruption of services for MDPP suppliers and MDPP beneficiaries; by allowing MDPP beneficiaries to maintain their eligibility. In this IFC, we are amending the MDPP regulations to provide for changes as described in section II.Q.1 of this IFC, including allowing MDPP suppliers to either deliver MDPP services virtually or suspend delivery and resume services at a later date, in an emergency area and during this COVID–19 PHE period, as those terms are defined in section 1135(g) of the Act, for which the Secretary has authorized a waiver under section 1135 of the Act and the Secretary has declared a PHE. In addition, these changes permit certain MDPP beneficiaries to obtain the set of MDPP services more than once per lifetime, for the limited purposes of allowing a pause in service and allow MDPP beneficiaries to maintain eligibility for MDPP services despite a break in service, attendance, or weight loss achievement. These changes will have a positive impact on affected MDPP beneficiaries, as it will allow them to maintain eligibility for the expanded model, and request virtual make-up sessions if needed for successful completion of attendance and weight loss milestones.

2. Effects on the Market

Currently, more than 196 organizations nationally are enrolled as MDPP suppliers. There are approximately 798 locations. We anticipate that of the 1,818 beneficiaries identified through our monitoring data and the CDC's Diabetes Prevention Recognition Program (DPRP) data, 1,358 beneficiaries may be impacted by allowing both the once-per-lifetime benefit and the minimum weight loss requirement to be waived for those beneficiaries in the first 12 months of MDPP.

TABLE 2

Recommended waivers	Cost impact
Adjust the limit to the # Virtual Make-up sessions	$—
Waive the once per lifetime requirement	279,748.00
Waive the minimum weight loss requirement for OM	53,301.50
Waive the MDPP services time periods and intervals	—
Average Y1 MDPP Payments (Y1) with no COVID action	177,898.00
Total cost of COVID–19 response	333,049.50

Assumptions:
—Average MDPP payments in Year 1: $412, assuming that beneficiaries attended 9 sessions, and reached the 5 percent weight loss during interval 1 of the core maintenance session
—Average MDPP payments in Year 1 with no COVID–19 action: $131, assuming beneficiaries attended 2 ongoing maintenance sessions

D. Modification to the Extreme and Uncontrollable Circumstances Policy Under the Shared Savings Program

In section II.V. of this IFC, we discuss a modification to the extreme and uncontrollable circumstances policy under the Shared Savings Program. The current Medicare Shared Savings Program extreme and uncontrollable circumstances policy for purposes of determining an ACO's quality score for use in determining shared savings or shared losses applies if twenty percent or more of an ACO's assigned beneficiaries or its legal business entity are located in an area identified under the Quality Payment Program as being affected by an extreme and uncontrollable circumstance, during the performance year, including the applicable quality data reporting period for the performance year if, the quality reporting period is not extended. In response to the National Emergency for

the COVID–19 pandemic declared on March 13, 2020, we have determined that the 2019 MIPS data submission deadline will be extended by 30 days until April 30, 2020, to give eligible clinicians more time to report quality and other data for purposes of MIPS. This extended timeline also applies to Shared Savings Program ACOs because they are required to report quality data via the CMS Web Interface and we align the Shared Savings Program data submission timeline with the timeline for MIPS data submission. As currently written, our extreme and uncontrollable circumstances policy cannot be applied to waive the quality reporting requirements under the Shared Savings Program because the quality data submission period has been extended.

The PHE for the COVID–19 pandemic applies to all counties in the United States, and we think it is appropriate to offer relief under the Shared Savings Program extreme and uncontrollable circumstances policy to all Shared Savings Program ACOs that are unable to completely and accurately report quality for 2019 by the extended deadline. Accordingly, in this IFC, we are revising the regulation at § 425.502(f) to remove the restriction which prevents the application of the Shared Savings Program extreme and uncontrollable circumstances policy for disasters that occur during the quality period if the reporting period is extended, to offer relief under the Shared Savings Program to all ACOs that may be unable to completely and accurately report quality for 2019 due to the PHE for the COVID–19. As currently written, our extreme and uncontrollable circumstances policy cannot be applied to waive the quality reporting requirements under the Shared Savings Program because the quality data submission period has been extended.

The PHE for the COVID–19 pandemic applies to all counties in the United States, and we think it is appropriate to offer relief under the Shared Savings Program extreme and uncontrollable circumstances policy to all Shared Savings Program ACOs that are unable to completely and accurately report quality for 2019 by the extended deadline, Accordingly, in this interim final rule, we are revising the regulation at § 425.502(f) to remove the restriction which prevents the application of the Shared Savings Program extreme and uncontrollable circumstances policy for disasters that occur during the quality period if the reporting period is extended, in order to offer relief under the Shared Savings Program to all ACOs that may be unable to completely and accurately report quality for 2019 due to the PHE for the COVID–19 pandemic.

We estimate based on patterns evident in the financial reconciliation for performance year 2018 that this change would allow roughly 100 ACOs that achieve savings either to qualify to receive shared savings or to receive a higher effective sharing rate. We estimate the average resulting benefit to such ACOs ranging from $150,000 to $200,000 per ACO. The total impact of extending the extreme and uncontrollable circumstances policy despite the extension of the quality reporting period for 2019 is therefore estimated to be $20 million with a range of uncertainty in such estimate spanning $15 million to $25 million.

E. Anticipated Effects of Changes to the Quality Payment Program

Since it is not possible to comprehensively predict the impact of the evolving PHE for the COVID–19 pandemic at this time, the Office of the Actuary was unable to calculate a discrete impact estimate for the effect of extending CJR PY 5 an additional 3 months. However, given the previous estimate for PY 5 in the ''Comprehensive Care for Joint Replacement Model Three-Year Extension and Changes to Episode Definition and Pricing'' proposed rule (CMS–5529–P), we anticipate the impact of the additional 3 months could range between $0 and $1.2 million. We will continue to refine this analysis and will provide a more detailed estimate in the final rule if available. Table 3 summarizes the financial impact of extending PY 5 an additional 3 months. Table 3 includes the full amount of FFS episode payments and also includes any reconciliation payments related to the model. Table 3 also shows costs/savings (costs are represented as positive amounts and savings as negative amounts) imposed on non-federal entities (that is, participating medical facilities), as well as net transfers of federal funds (that is, increases in Medicare program expenditures are indicated as positive amounts and decreases in Medicare program expenditures are indicated as negative amounts).

TABLE 3—FINANCIAL IMPACT OF EXTENDING PY 5 AN ADDITIONAL 3 MONTHS

Scenario	Costs/benefits	Transfers (millions)
Net financial impact of extending CJR model PY 5 by 3 additional months		1.2

F. Overall Impact

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than $8.0 million to $41.5 million in any one year). Individuals and states are not included in the definition of a small entity. As its measure of significant economic impact on a substantial number of small entities, HHS uses an adverse change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the provisions in this IFC.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This IFC will not have a significant impact on the operations of a substantial number of small rural hospitals.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This IFC does not have a substantial direct cost impact on state or local governments, preempt state law, or otherwise have federalism implications.

Under 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). As such, this rule has been transmitted to the Congress and the Comptroller General for review.

List of Subjects

42 CFR Part 400

Grant programs—health, Health facilities, Health maintenance organizations (HMO), Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 405

Administrative practice and procedure, Diseases, Health facilities, Health insurance, Health professions, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 410

Diseases, Health facilities, Health professions, Laboratories, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 414

Administrative practice and procedure, Biologics, Diseases, Drugs, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 415

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 417

Administrative practice and procedure, Grant programs—health, Health care, Health insurance, Health maintenance organizations (HMO), Loan programs—health, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 421

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 422

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 425

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 440

Grant programs—health, Medicaid.

42 CFR Part 482

Grant programs—health, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 510

Administrative practice and procedure, Health facilities.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 400—INTRODUCTION; DEFINITIONS

■ 1. The authority citation part 400 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh, and 44 U.S.C. Chapter 35.

■ 2. Section 400.200 is amended by adding the definition of ''Public Health Emergency'' in alphabetical order to read as follows:

§ 400.200 General definitions.

* * * * *

Public Health Emergency (PHE) means the Public Health Emergency determined to exist nationwide as of January 27, 2020, by the Secretary pursuant to section 319 of the Public Health Security Act on January 31, 2020, as a result of confirmed cases of COVID–19, including any subsequent renewals.

* * * * *

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 3. The authority citation part 405 continues to read as follows:

Authority: 42 U.S.C. 263a, 405(a), 1302, 1320b–12, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr, and 1395ww(k).

■ 4. Section 405.2416 is amended by adding paragraph (a)(5) to read as follows:

§ 405.2416 Visiting nurse services.

(a) * * *

(5) During a PHE, as defined in § 400.200 of this chapter, an area typically served by the RHC, and an area that is included in the FQHC's service area plan, is determined to have a shortage of home health agencies, and no request for this determination is required.

* * * * *

PART 409—HOSPITAL INSURANCE BENEFITS

■ 5. The authority citation for part 409 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 6. Section 409.43 is amended by revising paragraph (a)(3) to read as follows:

§ 409.43 Plan of care requirements.

(a) * * *

(3) The plan of care must include the identification of the responsible discipline(s) and the frequency and duration of all visits, as well as those items listed in § 484.60(a) of this chapter that establish the need for such services. All care provided must be in accordance with the plan of care. During a PHE, as defined in § 400.200 of this chapter, the plan of care must include any provision of remote patient monitoring or other services furnished via a telecommunications system and such services must be tied to the patient-specific needs as identified in the comprehensive assessment, cannot substitute for a home visit ordered as part of the plan of care, and cannot be considered a home visit for the purposes of patient eligibility or payment. The plan of care must include a description of how the use of such technology will help to achieve the goals outlined on the plan of care.

* * * * *

PART 410—SUPPLEMENTARY MEDICAL INSURANCE (SMI) BENEFITS

■ 7. The authority citation for part 410 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395m, 1395hh, 1395rr, and 1395ddd.

■ 8. Section 410.27 is amended by revising paragraphs (a)(1)(iv)(D) and (E) to read as follows:

§ 410.27 Therapeutic outpatient hospital or CAH services and supplies incident to a physician's or nonphysician practitioner's service: Conditions.

(a) * * *

(1) * * *

(iv) * * *

(D) For pulmonary rehabilitation, cardiac rehabilitation, and intensive cardiac rehabilitation services, direct supervision must be furnished by a doctor of medicine or a doctor of osteopathy, as specified in §§ 410.47 and 410.49, respectively. For purposes of this section, direct supervision means that the physician or nonphysician practitioner must be immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician or nonphysician practitioner must be present in the room when the procedure is performed. During a Public Health Emergency, as defined in § 400.200 of this chapter, the presence of the physician includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider; and

(E) For nonsurgical extended duration therapeutic services (extended duration services), which are hospital or CAH outpatient therapeutic services that can last a significant period of time, have a substantial monitoring component that is typically performed by auxiliary personnel, have a low risk of requiring the physician's or appropriate nonphysician practitioner's immediate availability after the initiation of the service, and are not primarily surgical in nature, Medicare requires a minimum of direct supervision during the initiation of the service which may be followed by general supervision at the discretion of the supervising physician or the appropriate nonphysician practitioner. Initiation means the beginning portion of the nonsurgical extended duration therapeutic service which ends when the patient is stable and the supervising physician or the appropriate nonphysician practitioner determines that the remainder of the service can be delivered safely under general supervision. During a Public Health Emergency, as defined in § 400.200 of this chapter, Medicare requires a minimum level of general supervision for the entire service; and

* * * * *

■ 9. Section 410.28 is amended by revising paragraph (e)(1) to read as follows:

§ 410.28 Hospital or CAH diagnostic services furnished to outpatients: Conditions.

* * * * *

(e) * * *

(1) For services furnished directly or under arrangement in the hospital or in an on-campus or off-campus outpatient department of the hospital, as defined in § 413.65 of this chapter, ''direct supervision'' means that the physician must be immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room where the procedure is performed. During a Public Health Emergency, as defined in § 400.200 of this chapter, the presence of the physician includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider.

* * * * *

■ 10. Section 410.32 is amended by revising paragraph (b)(3)(ii) to read as follows:

§ 410.32 Diagnostic x-ray tests, diagnostic laboratory tests, and other diagnostic tests: Conditions.

* * * * *

(b) * * *

(3) * * *

(ii) *Direct supervision* in the office setting means the physician must be present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed. During a PHE, as defined in § 400.200 of this chapter, the presence of the physician includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider.

* * * * *

■ 11. Section 410.40 is amended by adding paragraph (f)(5) to read as follows:

§ 410.40 Coverage of ambulance services.

* * * * *

(f) * * *

(5) During a Public Health Emergency, as defined in § 400.200 of this chapter, a ground ambulance transport from any point of origin to a destination that is equipped to treat the condition of the patient consistent with any applicable state or local Emergency Medical Services protocol that governs the destination location. Such destinations include, but are not limited to, alternative sites determined to be part of a hospital, critical access hospital or skilled nursing facility, community mental health centers, federally qualified health centers, rural health clinics, physician offices, urgent care facilities, ambulatory surgical centers, any location furnishing dialysis services outside of an ESRD facility when an ESRD facility is not available, and the beneficiary's home.

* * * * *

■ 12. Section 410.67(b) is amended in paragraphs (3) and (4) of the definition of ''Opioid use disorder treatment service'' by adding a sentence at the end of each paragraph to read as follows:

§ 410.67 Medicare coverage and payment of Opioid use disorder treatment services furnished by Opioid treatment programs.

* * * * *

(b) * * *

Opioid use disorder treatment service

* * *

(3) * * * During a Public Health Emergency, as defined in § 400.200 of this chapter, where audio/video communication technology is not available to the beneficiary, the counseling services may be furnished using audio-only telephone calls if all other applicable requirements are met.

(4) * * * During a Public Health Emergency, as defined in § 400.200 of this chapter, where audio/video communication technology is not available to the beneficiary, the therapy services may be furnished using audio-only telephone calls if all other applicable requirements are met.

* * * * *

■ 13. Section 410.78 is amended by—

■ a. Adding paragraph (a)(3)(i) and reserved paragraph (a)(3)(ii); and

■ b. Revising paragraph (b) introductory text.

The additions and revision read as follows:

§ 410.78 Telehealth services.

(a) * * *

(3) * * *

(i) *Exception.* For the duration of the Public Health Emergency as defined in § 400.200 of this chapter, *Interactive telecommunications system* means multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site physician or practitioner.

(ii) [Reserved]

* * * * *

(b) *General rule.* Medicare Part B pays for covered telehealth services included

on the telehealth list when furnished by an interactive telecommunications system if the following conditions are met, except that for the duration of the Public Health Emergency as defined in § 400.200 of this chapter, Medicare Part B pays for office and other outpatient visits, professional consultation, psychiatric diagnostic interview examination, individual psychotherapy, pharmacologic management and end stage renal disease related services included in the monthly capitation payment furnished by an interactive telecommunications system if the following conditions are met:

* * * * *

■ 14. Section 410.79 is amended by adding paragraph (e) to read as follows:

§ 410.79 Medicare Diabetes Prevention Program expanded model: Conditions of coverage.

* * * * *

(e) *MDPP expanded model emergency policy.* (1) Notwithstanding paragraphs (a) through (d) of this section, the policies described in this paragraph (e) apply during the Public Health Emergency (PHE), as defined in § 400.200 of this chapter.

(2) MDPP requirement changes described in paragraph (e)(1) of this section are applicable to:

(i) Organizations that are enrolled as an MDPP supplier as defined in paragraph (b) of this section, as of March 1, 2020; and

(ii) MDPP beneficiaries as defined in paragraph (b) of this section, who are receiving the MDPP set of services as of March 1, 2020.

(3) The following changes apply under this paragraph (e):

(i) The in-person attendance requirements of paragraphs (c)(1)(ii)(A), (c)(1)(iii)(A), and (c)(3)(ii) of this section are waived. MDPP suppliers shall not start new cohorts with MDPP beneficiaries who are unable to attend the first core session in-person;

(ii) The limit described in paragraphs (d)(2) and (d)(3)(i) and (ii) of this section to the number of virtual make-up sessions is waived for MDPP suppliers with capabilities to provide services virtually so long as the provision of virtual services complies with the following:

(A) The curriculum furnished during the virtual make-up session must address the same CDC-approved DPP curriculum topic as the regularly scheduled session;

(B) The MDPP supplier furnishes to the MDPP beneficiary a maximum of one session on the same day as a regularly scheduled session;

(C) The MDPP supplier furnishes to the MDPP beneficiary a maximum of one virtual make-up session per week;

(D) Virtual make-up sessions must be furnished in a manner consistent with the DPRP standards for virtual sessions;

(E) Virtual make-up sessions can only be furnished to achieve attendance goals and cannot be furnished to achieve weight-loss goals;

(F) An MDPP supplier can only offer virtual make-up sessions upon an individual MDPP beneficiary's request; and

(G) An MDPP supplier can offer to an MDPP beneficiary:

(*1*) No more than 15 virtual make-up sessions offered weekly during the core session period, months 1 through 6 of the MDPP services period;

(*2*) No more than 6 virtual make-up sessions offered monthly during the core maintenance session interval periods, months 7 through 12 of the MDPP services period; and

(*3*) No more than 12 virtual make-up sessions offered monthly during the ongoing maintenance session interval periods, months 13 through 24;

(iii) The once per lifetime requirement as described in paragraph (c)(1)(i)(B) of this section is waived to permit MDPP beneficiaries whose sessions were paused or cancelled due to the PHE to obtain the set of MDPP services more than once per lifetime by electing to restart the MDPP set of services or resume with the most recent attendance session of record;

(iv) The minimum weight loss requirements for beneficiary eligibility in the ongoing maintenance session intervals described in paragraphs (c)(1)(ii)(B) and (c)(1)(iii)(B) of this section are waived; and

(v) MDPP suppliers may pause or delay the delivery of the MDPP set of services and subsequently resume services on a delayed schedule. The time periods and intervals must be consistent with the MDPP requirements as described in paragraphs (c)(1)(i)(B), (c)(1)(ii)(A), (c)(1)(iii)(A), (c)(2)(i)(A) and (B), and (c)(3)(i) and (ii) of this section.

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 15. The authority citation for part 412 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 16. Section 412.29 is amended by revising paragraph (e) to read as follows:

§ 412.29 Classification criteria for payment under the inpatient rehabilitation facility prospective payment system.

* * * * *

(e) Have in effect a procedure to ensure that patients receive close medical supervision, as evidenced by at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process, except that during a Public Health Emergency, as defined in § 400.200 of this chapter, such visits may be conducted using telehealth services (as defined in section 1834(m)(4)(F) of the Act).

* * * * *

■ 17. Section 412.622 is amended by revising paragraphs (a)(3)(iv) and (a)(4)(ii) introductory text to read as follows:

§ 412.622 Basis of payment.

(a) * * *

(3) * * *

(iv) Requires physician supervision by a rehabilitation physician. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process, except that during a Public Health Emergency, as defined in § 400.200 of this chapter, such visits may be conducted using telehealth services (as defined in section 1834(m)(4)(F) of the Act). The post-admission physician evaluation described in paragraph (a)(4)(ii) of this section may count as one of the face-to-face visits.

(4) * * *

(ii) A post-admission physician evaluation that meets all of the following requirements, except for the duration of the Public Health Emergency, as defined in § 400.200 of this chapter—

* * * * *

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 18. The authority citation for part 414 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395hh, and 1395rr(b)(l).

■ 19. Section 414.1380 is amended by—

■ a. Revising paragraphs (c)(2)(i)(A)(*6*) and (c)(2)(i)(C) introductory text; and

■ b. Adding paragraph (c)(2)(i)(C)(*11*).

The revisions and addition read as follows:

§ 414.1380 Scoring.

* * * * *

(c) * * *

(2) * * *

(i) * * *

(A) * * *

(*6*) Beginning with the 2020 MIPS payment year, for the quality, cost, and improvement activities performance categories, the MIPS eligible clinician demonstrates through an application submitted to CMS that they were subject to extreme and uncontrollable circumstances that prevented the clinician from collecting information that the clinician would submit for a performance category or submitting information that would be used to score a performance category for an extended period of time. Beginning with the 2021 MIPS payment year, in the event that a MIPS eligible clinician submits data for the quality, cost, or improvement activities performance categories, the scoring weight specified in paragraph (c)(1) of this section will be applied and its weight will not be redistributed, unless an exception applies. Exception: for the 2021 MIPS payment year only, if a MIPS eligible clinician demonstrates through an application submitted to CMS that they have been adversely affected by the Public Health Emergency for the COVID–19 pandemic and also submits data for the quality, cost, or improvement activities performance categories, the preceding sentence will not apply.

* * * * *

(C) Under section 1848(o)(2)(D) of the Act, a significant hardship exception or other type of exception is granted to a MIPS eligible clinician based on the following circumstances for the Promoting Interoperability performance category. Except as provided in paragraphs (c)(2)(i)(C)(*10*) and (*11*) of this section, in the event that a MIPS eligible clinician submits data for the Promoting Interoperability performance category, the scoring weight specified in paragraph (c)(1) of this section will be applied and its weight will not be redistributed.

* * * * *

(*11*) For the 2021 MIPS payment year only, the MIPS eligible clinician demonstrates through an application submitted to CMS that they have been adversely affected by the Public Health Emergency for the COVID–19 pandemic.

* * * * *

PART 415—SERVICES FURNISHED BY PHYSICIANS IN PROVIDERS, SUPERVISING PHYSICIANS IN TEACHING SETTINGS, AND RESIDENTS IN CERTAIN SETTINGS

■ 20. The authority citation for part 415 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 21. Section 415.172 is amended by revising paragraphs (a) introductory text, (a)(2), and (b) to read as follows:

§ 415.172 Physician fee schedule payment for services of teaching physicians.

(a) *General rule.* If a resident participates in a service furnished in a teaching setting, physician fee schedule payment is made only if a teaching physician is present during the key portion of any service or procedure for which payment is sought. During the Public Health Emergency, as defined in § 400.200 of this chapter, if a resident participates in a service furnished in a teaching setting, physician fee schedule payment is made if a teaching physician is present during the key portion of the service using interactive telecommunications technology for any service or procedure for which payment is sought.

* * * * *

(2) In the case of evaluation and management services, the teaching physician must be present during the portion of the service that determines the level of service billed. (However, in the case of evaluation and management services furnished in hospital outpatient departments and certain other ambulatory settings, the requirements of § 415.174 apply.) During a Public Health Emergency, as defined in § 400.200 of this chapter, the teaching physician may be present during the portion of the service that determines the level of service billed using interactive telecommunications technology. (However, in the case of evaluation and management services furnished in hospital outpatient departments and certain other ambulatory settings, the requirements of § 415.174 apply.)

(b) *Documentation.* Except for services furnished as set forth in §§ 415.174 (concerning an exception for services furnished in hospital outpatient and certain other ambulatory settings), 415.176 (concerning renal dialysis services), and 415.184 (concerning psychiatric services), the medical records must document the teaching physician was present at the time the service is furnished. The presence of the teaching physician during procedures and evaluation and management services may be demonstrated by the notes in the medical records made by the physician or as provided in § 410.20(e) of this chapter. During a Public Health Emergency, as defined in § 400.200 of this chapter, except for services furnished as set forth in §§ 415.174 (concerning an exception for services furnished in hospital outpatient and certain other ambulatory settings), 415.176 (concerning renal dialysis services), and 415.184 (concerning psychiatric services), the medical records must document if the teaching physician was physically present or if the teaching physician was present through interactive telecommunications technology at the time the service is furnished. The presence of the teaching physician during procedures and evaluation and management services may be demonstrated by the notes in the medical records made by the physician or as provided in § 410.20(e) of this chapter.

* * * * *

■ 22. Section 415.174 is amended by adding paragraph (b) to read as follows:

§ 415.174 Exception: Evaluation and management services furnished in certain centers.

* * * * *

(b) During a Public Health Emergency, as defined in § 400.200 of this chapter, carriers may make physician fee schedule payment for a service furnished by a resident if the teaching physician is present through interactive telecommunications technology.

■ 23. Section 415.180 is revised to read as follows:

§ 415.180 Teaching setting requirements for the interpretation of diagnostic radiology and other diagnostic tests.

(a) *General rule.* Physician fee schedule payment is made for the interpretation of diagnostic radiology and other diagnostic tests if the interpretation is performed or reviewed by a physician other than a resident. During a Public Health Emergency, as defined in § 400.200 of this chapter, physician fee schedule payment may also be made for the interpretation of diagnostic radiology and other diagnostic tests if the interpretation is performed by a resident when the teaching physician is present through interactive telecommunications technology.

(b) [Reserved]

■ 24. Section 415.184 is revised to read as follows:

§ 415.184 Psychiatric services.

To qualify for physician fee schedule payment for psychiatric services furnished under an approved GME

program, the physician must meet the requirements of §§ 415.170 and 415.172, including documentation, except that the requirement for the presence of the teaching physician during the service in which a resident is involved may be met by observation of the service by use of a one-way mirror, video equipment, or similar device. During a Public Health Emergency, as defined in § 400.200 of this chapter, the requirement for the presence of the teaching physician during the service in which a resident is involved may be met by direct supervision by interactive telecommunications technology.

■ 25. Section 415.208 is amended by revising paragraph (b)(2) introductory text to read as follows:

§ 415.208 Services of moonlighting residents.

* * * * *

(b) * * *

(2) Services of residents that are not related to their approved GME programs and are performed in an outpatient department or emergency department of a hospital in which they have their training program are covered as physician services and payable under the physician fee schedule if criteria in paragraphs (b)(2)(i) through (iii) of this section are met. During a Public Health Emergency, as defined in § 400.200 of this chapter, the services of residents that are not related to their approved GME programs and are furnished to inpatients of a hospital in which they have their training program are covered as physician services and payable under the physician fee schedule if criteria in paragraphs (b)(2)(i) through (iii) of this section are met.

* * * * *

PART 417—HEALTH MAINTENANCE ORGANIZATIONS, COMPETITIVE MEDICAL PLANS, AND HEALTH CARE PREPAYMENT PLANS

■ 26. The authority citation for part 417 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh, and 300e, 300e–5, and 300e–9, and 31 U.S.C. 9701.

■ 27. Section 417.472 is amended by revising paragraphs (i) and (j) to read as follows:

§ 417.472 Basic contract requirements.

* * * * *

(i) *HMOs and CMPs.* The HMO or CMP must comply with the requirements at § 422.152(b)(5) and (6) of this chapter.

(j) *Coordinated care and cost contracts.* Subject to paragraph (i) of this section, all coordinated care contracts (including local and regional PPOs, contracts with exclusively SNP benefit packages, private fee-for-service contracts, and MSA contracts), and all cost contracts under section 1876 of the Act, with 600 or more enrollees in July of the prior year, must contract with approved Medicare Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey vendors to conduct the Medicare CAHPS satisfaction survey of Medicare plan enrollees in accordance with CMS specifications and submit the survey data to CMS.

* * * * *

PART 418—HOSPICE CARE

■ 28. The authority citation for part 418 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 29. Section 418.22 is amended by—

■ a. Redesignating the text of paragraph (a)(4) as paragraph (a)(4)(i); and

■ b. Adding paragraph (a)(4)(ii).

The addition reads as follows:

§ 418.22 Certification of terminal illness.

(a) * * *

(4) * * *

(ii) During a Public Health Emergency, as defined in § 400.200 of this chapter, if the face-to-face encounter conducted by a hospice physician or hospice nurse practitioner is for the sole purpose of hospice recertification, such encounter may occur via a telecommunications technology and is considered an administrative expense. *Telecommunications technology* means the use of interactive multimedia communications equipment that includes, at a minimum, the use of audio and video equipment permitting two-way, real-time interactive communication between the patient and the distant site hospice physician or hospice nurse practitioner.

* * * * *

■ 30. Section 418.204 is amended by adding paragraph (d) to read as follows:

§ 418.204 Special coverage requirements.

* * * * *

(d) *Use of technology in furnishing services during a Public Health Emergency.* When a patient is receiving routine home care, during a Public Health Emergency as defined in § 400.200 of this chapter, hospices may provide services via a telecommunications system if it is feasible and appropriate to do so to ensure that Medicare patients can continue receiving services that are reasonable and necessary for the palliation and management of a patients' terminal illness and related conditions. The use of such technology in furnishing services must be included on the plan of care, meet the requirements at § 418.56, and must be tied to the patient-specific needs as identified in the comprehensive assessment and the plan of care must include a description of how the use of such technology will help to achieve the goals outlined on the plan of care.

PART 421—MEDICARE CONTRACTING

■ 31. The authority citation for part 421 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 32. Section 421.214 is amended by—

■ a. Revising paragraphs (b) and (c) introductory text;

■ b. Adding paragraph (d)(5);

■ c. Revising paragraph (f)(1)(i); and

■ d. Adding paragraph (j).

The revisions and additions read as follows:

§ 421.214 Advance payments to suppliers furnishing items and services under Part B.

* * * * *

(b) *Definition.* As used in this section, *advance payment* means a conditional partial payment made by the contractor in response to a claim that it is unable to process within established time limits except as provided in paragraph (j) of this section.

(c) *When advance payments may be made.* Unless otherwise qualified under paragraph (j) of this section, an advance payment may be made if all of the following conditions are met:

* * * * *

(d) * * *

(5) Is in bankruptcy.

* * * * *

(f) * * *

(1) * * *

(i) Unless otherwise qualified under paragraph (j) of this section, a contractor must calculate an advance payment for a particular claim at no more than 80 percent of the anticipated payment for that claim based upon the historical assigned claims payment data as defined in paragraph (f)(1)(ii) of this section for claims paid to the supplier. For suppliers qualifying and approved for advance payments under paragraph (j) of this section, a contractor may calculate an advance payment for a particular claim at up to 100 percent of the anticipated payment for that claim based upon the historical assigned claims payment data as defined in paragraph (f)(1)(ii) of this section for claims paid to the supplier.

* * * * *

(j) *Advanced payments in exceptional circumstances.* CMS may approve, in writing to the contractor, the making of advance payments during the period of a Public Health Emergency, as defined in § 400.200 of this chapter, or during the period under a Presidential Disaster Declaration, under the following exceptional conditions:

(1) The contractor is unable to process the claim timely, or is at risk of being untimely in processing the claim; or

(2) When the supplier has experienced a temporary delay in preparing and submitting bills to the contractor beyond its normal billing cycle.

PART 422—MEDICARE ADVANTAGE PROGRAM

■ 33. The authority citation for part 422 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 34. Section 422.152 is amended by adding paragraph (b)(6) to read as follows:

§ 422.152 Quality improvement program.

* * * * *

(b) * * *

(6) For 2021 Star Ratings only, MA organizations are not required to submit HEDIS and CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings.

* * * * *

■ 35. Section 422.164 is amended by adding paragraph (i) to read as follows:

§ 422.164 Adding, updating, and removing measures.

* * * * *

(i) *Special rule for 2021 Star Ratings only.* In the event that the threat to health and safety posed by the COVID–19 pandemic compromises the quality of the data, or ability to validate such data for all plans used to calculate a particular measure, CMS will substitute and use the 2021 Star Ratings measure score and Star Rating with the 2020 Star Ratings measure score and Star Rating.

■ 36. Section 422.166 is amended—

■ a. By revising paragraph (a)(2)(i);

■ b. In paragraph (f)(1)(i), by adding a sentence to the end of the paragraph; and

■ c. By adding paragraphs (g)(3) and (j).

The revision and additions read as follows:

§ 422.166 Calculation of Star Ratings.

(a) * * *

(2) * * *

(i) The method maximizes differences across the star categories and minimizes the differences within star categories using mean resampling with the hierarchal clustering of the current year's data. Effective for the Star Ratings issued in October 2022 and subsequent years, CMS will add a guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from one year to the next. The cap is equal to 5 percentage points for measures having a 0 to 100 scale (absolute percentage cap) or 5 percent of the restricted range for measures not having a 0 to 100 scale (restricted range cap). New measures that have been in the Part C and Part D Star Rating program for 3 years or less use the hierarchal clustering methodology with mean resampling with no guardrail for the first 3 years in the program.

* * * * *

(f) * * *

(1) * * *

(i) * * * For the 2022 Star Ratings only, since all contracts may have the improvement measure(s) excluded in the determination of their highest rating and summary rating(s), each contract's weighted variance and weighted mean are calculated both with and without the improvement measures.

* * * * *

(g) * * *

(3) For 2022 Star Ratings only, CMS runs the calculations twice for the highest rating for each contract-type (overall rating for MA–PD contracts and Part C summary rating for MA-only contracts) and Part C summary rating for MA–PDs with all applicable adjustments (CAI and the reward factor), once including the improvement measure(s) and once without including the improvement measure(s). In deciding whether to include the improvement measures in a contract's highest and summary rating(s), CMS applies the following rules:

(i) For MA–PDs and MA-only contracts, a comparison of the highest rating with and without the improvement measure is done. The higher rating is used for the highest rating.

(ii) For MA–PDs, a comparison of the Part C summary rating with and without the improvement measure is done. The higher rating is used for the summary rating.

* * * * *

(j) *Special rules for 2021 and 2022 Star Ratings only.* (1) For the 2021 Star Ratings:

(i) The measures calculated based on HEDIS data are calculated based on data from the 2018 performance period.

(ii) The measures calculated based on CAHPS data are calculated based on survey data collected from March through May 2019.

(iii) The measure-level change score calculation described at § 422.164(f)(4)(i) is not applied for HEDIS and CAHPS measures and the measure-level change score used for the 2020 Star Ratings is applied in its place for all HEDIS and CAHPS-based measures.

(iv) The provisions of § 422.164(g)(1) and (2) are not applied for the failure to submit HEDIS and CAHPS-based measures.

(v) In the event that there are extraordinary circumstances resulting from the COVID–19 pandemic that compromise CMS resources to the extent that CMS cannot calculate or issue 2021 Star Ratings by October 2020, CMS will adopt the 2020 Star Ratings as the 2021 Star Ratings.

(2) For the 2022 Star Ratings:

(i) In the event that the threat to health and safety posed by the COVID–19 pandemic compromises the ability to collect the Health Outcomes Survey in 2020, CMS will adopt the 2021 Star Ratings and measure scores for the measures that come from the Health Outcomes Survey as the 2022 Star Ratings and measures scores for the measures that come from the Health Outcomes Survey.

(ii) [Reserved]

■ 37. Section 422.252 is amended by revising the definition of ''New MA plan'' to read as follows:

§ 422.252 Terminology.

* * * * *

New MA plan means a MA contract offered by a parent organization that has not had another MA contract in the previous 3 years. For purposes of 2022 quality bonus payments based on 2021 Star Ratings only, new MA plan means an MA contract offered by a parent organization that has not had another MA contract in the previous 4 years.

* * * * *

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 38. The authority for part 423 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395w–101 through 1395w–152, and 1395hh.

■ 39. Section 423.156 is amended by adding a sentence at the end of the paragraph to read as follows:

§ 423.156 Consumer satisfaction surveys.

* * * Part D sponsors are not required to submit CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings.

■ 40. Section 423.182 is amended by adding paragraph (c)(3) to read as follows:

§ 423.182 Part D Prescription Drug Plan Quality Rating System.

* * * * *

(c) * * *

(3) For 2021 Star Ratings only, Part D sponsors are not required to submit CAHPS data that would otherwise be required for the calculation of the 2021 Star Ratings.

■ 41. Section 423.184 is amended by adding paragraph (i) to read as follows:

§ 423.184 Adding, updating, and removing measures.

* * * * *

(i) *Special rule for 2021 Star Ratings only.* In the event that the threat to health and safety posed by the COVID–19 pandemic compromises the quality of the data, or ability to validate such data, for all plans, used to calculate a particular measure, CMS will substitute and use the 2021 Star Ratings measure score and Star Ratings with the 2020 Star Ratings measure score and Star Rating.

■ 42. Section 423.186 is amended—

■ a. By revising paragraph (a)(2)(i);

■ b. In paragraph (f)(1)(i), by adding a sentence to the end of the paragraph; and

■ c. By adding paragraphs (g)(3) and (j).

The revision and additions read as follows:

§ 423.186 Calculation of Star Ratings.

(a) * * *

(2) * * *

(i) The method maximizes differences across the star categories and minimizes the differences within star categories using mean resampling with the hierarchal clustering of the current year's data. Effective for the Star Ratings issued in October 2022 and subsequent years, CMS will add a guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from one year to the next. The cap is equal to 5 percentage points for measures having a 0 to 100 scale (absolute percentage cap) or 5 percent of the restricted range for measures not having a 0 to 100 scale (restricted range cap). New measures that have been in the Part C and D Star Rating program for 3 years or less use the hierarchal clustering methodology with mean resampling with no guardrail for the first 3 years of the program.

* * * * *

(f) * * *

(1) * * *

(i) * * * For the 2022 Star Ratings only, since all contracts may have the improvement measure(s) excluded in the determination of their highest rating and summary rating(s), each contract's weighted variance and weighted mean are calculated both with and without the improvement measures.

* * * * *

(g) * * *

(3) For 2022 Star Ratings only, CMS runs the calculations twice for the highest rating for each contract-type (overall rating for MA–PD contracts and Part D summary rating for PDPs) and Part D summary rating for MA–PDs with all applicable adjustments (CAI and the reward factor), once including the improvement measure(s) and once without including the improvement measure(s). In deciding whether to include the improvement measures in a contract's highest and summary rating(s), CMS applies the following rules:

(i) For MA–PDs and PDPs, a comparison of the highest rating with and without the improvement measure is done. The higher rating is used for the highest rating.

(ii) For MA–PDs, a comparison of the Part D summary rating with and without the improvement measure is done. The higher rating is used for the summary rating.

* * * * *

(j) *Special rules for 2021 Star Ratings only.* (1) For the 2021 Star Ratings:

(i) The measures calculated based on CAHPS data are calculated based on survey data collected from March through May 2019.

(ii) The measure-level change score calculation described at § 423.184(f)(4)(i) is not applied for CAHPS measures and the measure-level change score used for the 2020 Star Ratings is applied in its place for all CAHPS-based measures.

(iii) The provisions of § 423.184(g)(2) are not applied for failure to submit CAHPS-based measures.

(iv) In the event that there are extraordinary circumstances resulting from the COVID–19 pandemic that compromise CMS resources to the extent that CMS cannot calculate or issue 2021 Star Ratings by October 2020, CMS will adopt the 2020 Star Ratings as the 2021 Star Ratings.

(2) [Reserved]

PART 425—MEDICARE SHARED SAVINGS PROGRAM

■ 43. The authority citation for part 425 continues to read as follows:

Authority: 42 U.S.C. 1302, 1306, 1395hh, and 1395jjj.

§ 425.502 [Amended]

■ 44. Section 425.502 is amended in paragraph (f) introductory text by removing the phrase ''if the quality reporting period is not extended''.

PART 440—SERVICES: GENERAL PROVISIONS

■ 45. The authority citation for part 440 is revised to read as follows:

Authority: 42 U.S.C. 1302.

■ 46. Section 440.70 is amended by revising paragraphs (a)(2), (b)(1)(ii), and (b)(3)(iii) and (iv) to read as follows:

§ 440.70 Home health services.

(a) * * *

(2) On his or her physician's orders as part of a written plan of care that the physician reviews every 60 days for services described in paragraphs (b)(1), (2), and (4) of this section, or, for the period of the Public Health Emergency, as defined in § 400.200 of this chapter, orders written by an other licensed practitioner of the healing arts acting within the scope of practice authorized under State law, as part of a written plan of care that the ordering practitioner reviews every 60 days for services described in paragraphs (b)(1), (2), and (4) of this section.

(b) * * *

(1) * * *

(ii) Receives written orders from the patient's physician or, for the period of the Public Health Emergency, as defined in § 400.200 of this chapter, other licensed practitioner of the healing arts acting within the scope of practice authorized under State law;

* * * * *

(3) * * *

(iii) A beneficiary's need for medical supplies, equipment, and appliances must be reviewed by a physician or, for the period of the Public Health Emergency, as defined in § 400.200 of this chapter, an other licensed practitioner of the healing arts acting within the scope of practice authorized under State law, annually.

(iv) Frequency of further physician or, for the period of the Public Health Emergency, as defined in § 400.200 of this chapter, an other licensed practitioner review of a beneficiary's continuing need for the items is determined on a case-by-case basis based on the nature of the item prescribed.

* * * * *

PART 482—CONDITIONS OF PARTICIPATION FOR HOSPITALS

■ 47. The authority citation for part 482 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395hh, 1395rr, and 1395lll unless otherwise noted.

■ 48. Section 482.61 is amended by revising paragraph (d) to read as follows:

§ 482.61 Condition of participation: Special medical record requirements for psychiatric hospitals.

* * * * *

(d) *Standard: Recording progress.* Progress notes for the patient must be documented, in accordance with applicable State scope-of-practice laws and hospital policies, by the following qualified practitioners: Doctor(s) of medicine or osteopathy, or other licensed practitioner(s), who is responsible for the care of the patient; nurse(s) and social worker(s) (or social service staff) involved in the care of the patient; and, when appropriate, others significantly involved in the patient's active treatment modalities.

The frequency of progress notes is determined by the condition of the patient but must be recorded at least weekly for the first 2 months and at least once a month thereafter and must contain recommendations for revisions in the treatment plan as indicated, as well as precise assessment of the patient's progress in accordance with the original or revised treatment plan.

* * * * *

PART 510—COMPREHENSIVE CARE FOR JOINT REPLACEMENT MODEL

■ 49. The authority citation of part 510 is revised to read as follows:

Authority: 42 U.S.C. 1302, 1315a, and 1395hh.

■ 50. Section 510.2 is amended by revising the definition of ''Performance year'' to read as follows:

§ 510.2 Definitions.

* * * * *

Performance year means one of the years in which the CJR model is being tested. Performance years for the model correlate to calendar years with the exceptions of performance year 1, which is April 1, 2016 through December 31, 2016 and performance year 5, which is January 1, 2020 through March 31, 2021.

* * * * *

§ 510.200 [Amended]

■ 51. Section 510.200 is amended in paragraph (a) by removing the phrase ''before December 31, 2020'' and adding in its place the phrase ''before March 31, 2021''.

■ 52. Section 510.305 is amended by adding paragraphs (k)(3) and (4) to read as follows:

§ 510.305 Determination of the NPRA and reconciliation process.

* * * * *

(k) * * *

(3) The following is an extreme and uncontrollable circumstances adjustment for 2019 Novel Coronavirus (previously referred to as 2019–nCoV, now as COVID–19):

(i) The episode spending adjustments specified in paragraph (k)(4) of this section apply for a participant hospital that has a CCN primary address that is located in an emergency area during an emergency period, as those terms are defined in section 1135(g) of the Act, for which the Secretary issued a waiver or modification of requirements under section 1135 of the Act on March 13, 2020.

(ii) [Reserved]

(4) For a fracture or non-fracture episode with a date of admission to the anchor hospitalization that is on or within 30 days before the date that the emergency period (as defined in section 1135(g) of the Act) begins or that occurs through the termination of the emergency period (as described in section 1135(e) of the Act), actual episode payments are capped at the target price determined for that episode under § 510.300.

Dated: March 24, 2020.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: March 26, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Construction of the Port of Alaska's Petroleum and Cement Terminal, Anchorage, Alaska; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XR027]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Construction of the Port of Alaska's Petroleum and Cement Terminal, Anchorage, Alaska

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

ACTION: Notice; issuance of incidental harassment authorizations.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued two successive incidental harassment authorizations (IHA) to the Port of Alaska (POA), authorizing the take of small numbers of marine mammals incidental to construction of the Petroleum and Cement Terminal (PCT), Anchorage, Alaska.

DATES: The Phase 1 IHA is effective April 1, 2020 through March 31, 2021. The Phase 2 IHA is effective April 1, 2021 through March 31, 2022.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

Electronic copies of the POA's application, issued IHAs, and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

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. Under the MMPA, ''take'' is defined as meaning to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

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.

Summary of Request

On November 28, 2018, NMFS received a request from the POA for an IHA to take marine mammals incidental to pile driving associated with the construction of the PCT. The POA submitted a new application on July 19, 2019 due to a modified construction schedule (two phases instead of one) and a revised application on August 9, 2019. We deemed the application adequate and complete on August 28, 2019. The POA submitted a subsequent revised application on October 15, 2019, which is available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* The POA's request is for take of small numbers of six species of marine mammals, by Level B harassment. Four of the species could also be taken by Level A harassment. Neither the POA nor NMFS expects serious injury or mortality to result from this activity; therefore, an IHA is appropriate.

NMFS previously issued IHAs and Letters of Authorization (LOAs) to the POA for pile driving (73 FR 41318, July 18, 2008; 74 FR 35136, July 20, 2009; and 81 FR 15048; March 21, 2016). The POA complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of all previous incidental take authorizations and did not exceed authorized take. Summaries of previous monitoring reports may be found in the *Effects of the Specified Activity on Marine Mammals and their Habitat* and *Estimated Take* sections.

Description of Proposed Activity

We provided a detailed description of the POA's PCT activities in the notice of proposed IHAs (84 FR 72154, December 30, 2019). Since that time, the POA has modified the design. While the overall plan for the terminal layout and construction methods are the same, the POA has considered NMFS's recommendations during the proposed IHAs phase and made the following adjustments. In February, 2020, the POA indicated to NMFS they have removed the use of battered piles in Phase 1. As indicated in the notice of proposed IHAs, a bubble curtain could not be used on battered piles due to the angle of their installation. With the removal of battered piles from Phase 1, all piles in Phase 1 will now be plumb and be installed and removed using a bubble curtain. The POA retains installing six 24-inch (in) battered piles in Phase 2 but will continue to investigate if these can be replaced with plumb piles. Although our analysis related to the Phase 2 IHA assumes that these six piles will be battered piles and therefore installed without use of the bubble curtain, it is possible that this will change and the effects associated with installation of those piles will be less than what is analyzed herein. The POA has also indicated to NMFS it is likely going to reduce the number of temporary piles in Phase 1 by approximately 11 piles; however, in the case of unforeseen circumstances, those additional piles may be necessary. Therefore, despite the POA likely driving and removing 11 fewer piles in Phase 1, we have continued to evaluate the project based on the original total number of piles.

A significant change in POA's project is the use of a confined bubble curtain in Phase 1. This confined bubble curtain is expected to result in less noise propagating into the marine environment than an unconfined system. Despite the expected reduction of noise, we maintain the estimated source levels used in the notice of proposed IHAs, meaning that our analysis likely represents an overestimate of potential effects. We have updated the pile details (Table 1) and included a detailed description of the confined bubble curtain below.

TABLE 1—PCT CONSTRUCTION PILE DETAILS AND ESTIMATED EFFORT REQUIRED FOR PILE INSTALLATION AND REMOVAL

Pipe pile diameter	Structural feature	Number of piles	Total number of piles	Average embedded depth (feet)	Vibratory duration per pile (minutes)	Impact strikes per pile	Estimated total number of hours	Production rate piles per day (range)	Days of installation and removal
Phase 1									
48-in	Loading Platform	45	71	100	30 10% (7 piles):	2,300 (50 restrikes each for 4 piles).	73	1.5 (1–3)	30.
	Access Trestle	26		130		3,000 (50 restrikes each for 3 piles).	56		17.
36-in	Temporary Construction Work Trestle.	26	30	115	75	50 restrikes for 10 piles.	33	3 (2–4)	9 installation. 9 removal.
	Temporary Derrick Barge/Vessel Mooring.	4		40	75	NA	5	4	1 installation. 1 removal.
24-in	Temporary Construction Work Trestle.	34	81	140	75	50 restrikes for 10 piles.	90	3 (2–4)	15 installation. 15 removal.
	Temporary Construction Access Trestle and Loading Platform Templates.	38		105	75	NA	90	3 (2–4)	12 installation. 12 removal.
	Temporary mooring for construction vessels.	9		50	30	NA	12	3	3 installation. 3 removal.
Phase 1 Construction Totals			182 piles				359		127.
Phase 2									
24-in	Temporary Dolphins for mooring construction vessels.	3	9	50	30	NA	3	3	1 installation. 1 removal.
	Temporary Dolphins for mooring construction vessels, Battered.	6		50	30	NA	9	3	2 installation. 2 removal.
36-in	Temporary Construction Dolphin Template.	72	76	115	75	NA	180	3 (2–4)	24 installation. 24 removal.
	Temporary Derrick Barge.	4		40	75	NA	5	4	1 installation. 1 removal.
144-in	Mooring Dolphin	6	9	140	45 10% (1 pile)	5,000 (1,500 first day, 3,500 second day).	21	0.5	13.
	Breasting Dolphin	3		135			11	(0.3 or 0.7)	6.
Phase 2 Construction Totals			94 piles				229		75.
PCT Construction Totals [e]			276 piles				588		202 days of installation and removal.

The estimated source levels for each pile type and installation method are provided in Table 2. These source levels are from the acoustic monitoring during the POA's 2016 Test Pile Program (TPP) (for 48-in piles) and investigation of existing literature related to studies at other locations for non-48-in piles. We note the source level measured during installation of the 48-in piles was actually less than that used here (approximately 190 dB) and the POA is now confining the bubble curtain with a solid pile. However, as a conservative approach to our analysis, we are assuming higher source levels here. We note that the hydroacoustic monitoring plan will commence as soon as pile driving begins; therefore, any necessary modifications to harassment isopleths will be made within the first weeks of pile driving, when marine mammal presence in the project area is low.

TABLE 2—ESTIMATED PILE SOURCE LEVELS WITH AND WITHOUT BUBBLE CURTAINS

Method and pile size	Sound level at 10 m						Data source
Vibratory	Unattenuated			Bubble curtain [1]			
	db rms			7 dB reduction, dB rms			
144-in	178			171			Caltrans 2015.
48-in	168			161			Austin et al. 2016.
36-in	166			159			Navy 2015.
24-in	161			154			Navy 2015.
Impact	Unattenuated			Bubble curtain			
	dB rms	dB SEL	dB peak	dB rms	dB SEL	dB peak	
144-in	209	198	220	202	191	213	Caltrans 2015.
48-in	200	187	215	193	180	208	Austin et al. 2016.
36-in	194	184	211	187	177	204	Navy 2015.
24-in	193	181	210	186	174	203	Navy 2015.

[1] In Phase 1, POA will drive all piles with a confined bubble curtain.

Bubble Curtain

In Phase 1, the POA, at the request of NMFS, has further improved their bubble curtain design to include a confined bubble curtain. If this system is proven successful through hydroacoustic monitoring, the POA and NMFS will consult to determine if its use in Phase 2 is appropriate. The POA has indicated this system may be used in Phase 2; however, at this time, NMFS is limiting its required use to Phase 1. For Phase 1 PCT construction, the construction contractor has provided a detailed confined bubble curtain system, as discussed below. For Phase 2 PCT construction, the construction contractor is not scheduled to be selected until approximately the third quarter of 2020; therefore, a similar level of detail and specificity is not currently available. NMFS will continue to work with POA during 2020 and final bubble curtain requirements will be made prior to work commencing in April 2021 pending review of success in Phase 1. However, at minimum, an unconfined bubble curtain is required on installation and removal of all plumb piles (*i.e.,* all piles except for the six battered piles) during Phase 2.

During the PCT Project, an air bubble curtain noise attenuation system (bubble curtain) will be used during installation and removal of all plumb piles when water depth is great enough (approximately 3 m) to deploy the bubble curtain. If the six battered piles (piles installed at an angle) are used in Phase 2, a bubble curtain will not be used due to the angle of installation. It may not be possible to use a bubble curtain on piles installed or removed in shallow water and piles installed or removed ''in the dry,'' (*e.g.,* when piles are installed above the water line). The tides at the POA have a mean range of about 8.0 meters (26 feet)(NOAA 2019), and low water levels will prevent proper deployment and function of the bubble curtain system. When the water is too shallow for deployment of a bubble curtain, the harassment zones for unattenuated impact pile installation will be monitored.

For Phase 1, the POA will use a confined bubble curtain on all piles. We note a confined system was briefly tested during the 2016 TPP project; however, the sleeve (or pile casing) used during that test contained gaps that likely contributed to less sound absorption. Here, the sleeve is a solid steel pile; therefore, no gaps are present.

The bubble curtain air flows and annular space will conform to the guidance outlined in the National Marine Fisheries Service and U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office document dated October 31, 2006 titled ''Impact Pile Driving Sound Attenuation Specification'' (USFWS 2006).

In Phase 1, all 24-in diameter temporary piles will have a 48-in diameter confinement casing, and all 36-in diameter temporary piling will have a 60-in diameter confinement casing. Multiple confinement casings with bubble curtain hardware will be employed to the extent required if multiple pile driving is occurring concurrently. Temporary piles and the confinement casing, with installed bubble curtain hardware, will be lofted together with the piles in a concentric arrangement, and allowed to drop onto the seafloor. The weight of the configuration will embed the arrangement into the seafloor at an estimated shallow depth. The specific depth of penetration from self-weight varies depending on water depth, substrate, weight of pile, tidal stage resistance, and other physical factors present, but the contractor has estimated a minimum of a couple or few feet.

There will be an arrangement of spacers that center the piling within the confinement casing. These spacers will likely be resilient materials such as rubber spacers or air filled cushions, as called out in the USFWS/NMFS Bubble Curtain Specifications, to prevent metal-to-metal contact between the confinement casing and the pile. The amount of self-weight penetration into sediment is somewhat variable but is expected to be several feet. The lowest bubble ring will be within one to two feet of the seafloor. Figure 1 illustrates this concentric arrangement.

Once the bubble curtain is operational, the temporary pile will be driven with a combination of vibratory and impact methods within the confinement casing; after pile driving, the confinement casing will be lifted off of the temporary pile. For removal of the temporary piling, the confinement casing, with installed bubble curtain, will be re-deployed over the pile. The temporary piles will be removed with a vibratory hammer while the bubble curtain is operational. Once the temporary pile is extracted, both the temporary pile and bubble curtain sleeve will be removed at the same time. A vibratory hammer will not be required to remove the bubble curtain sleeve—it will be directly pulled.

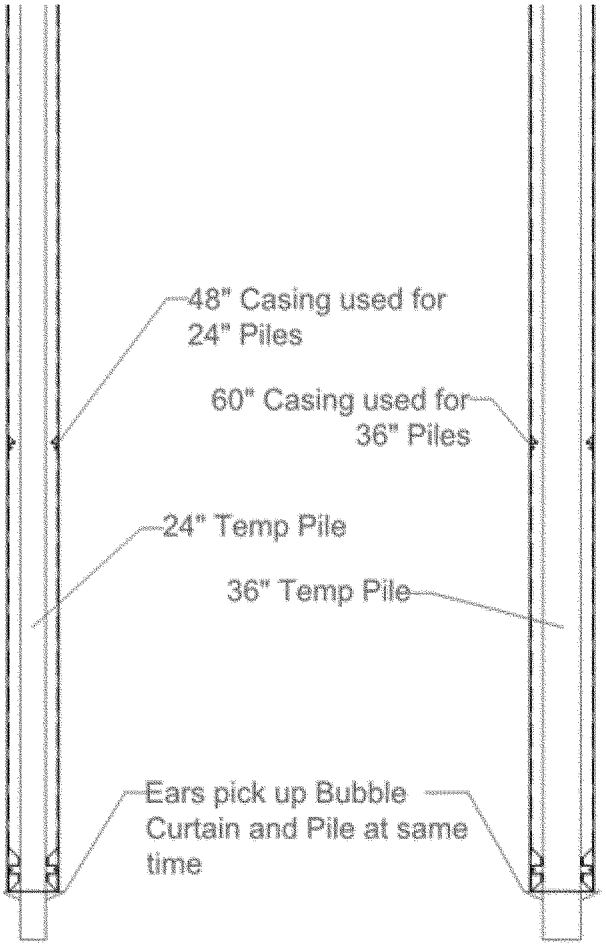

Figure 1. Diagram of temporary pile and confinement system, demonstrating concentric arrangement that can be lifted and dropped onto the seafloor together.

The 48-in piles are much heavier and longer than the 24- and 36-in piles; therefore, the method of lofting the 48-in piles and concentric confinement casing together is not feasible. The 48-in piles in Phase 1 will be fitted with a 72-in diameter confinement casing. The confinement casing with installed bubble curtain hardware will be lofted through a template to the sea floor and then will be driven to a nominal depth of 10 feet using vibratory methods.

To install the casing piles when driving the 48-in piles, a vibratory hammer may be used. However, this would occur for a very limited amount of time (one to three minutes per confinement casing) with a total maximum time of less than four hours during Phase 1 (April through November). This is a very short duration of unattenuated vibratory sound in contrast to the estimated 129 hours of impact driving using this noise attenuation system, which is expected to be highly effective. Use of a vibratory hammer is necessary in order to stabilize the pile using the sea floor embedment and the template, so that the confinement casing can be released from the crane without endangering personnel or property. Once the confinement casing is in place, the permanent pile will be lofted through the casing and allowed to self-weight into the sea floor. The bubble curtain will be activated and then the permanent pile will be driven using impact methods (or vibratory methods in cases of pile driving difficulties or obstructions as discussed elsewhere in the work description). After driving to depth, the confinement casing will be lifted off of the pile. This will not require vibratory energy to remove because of the shallow embedment. Figure 2 illustrates the arrangement for installation of the permanent piles and confinement system.

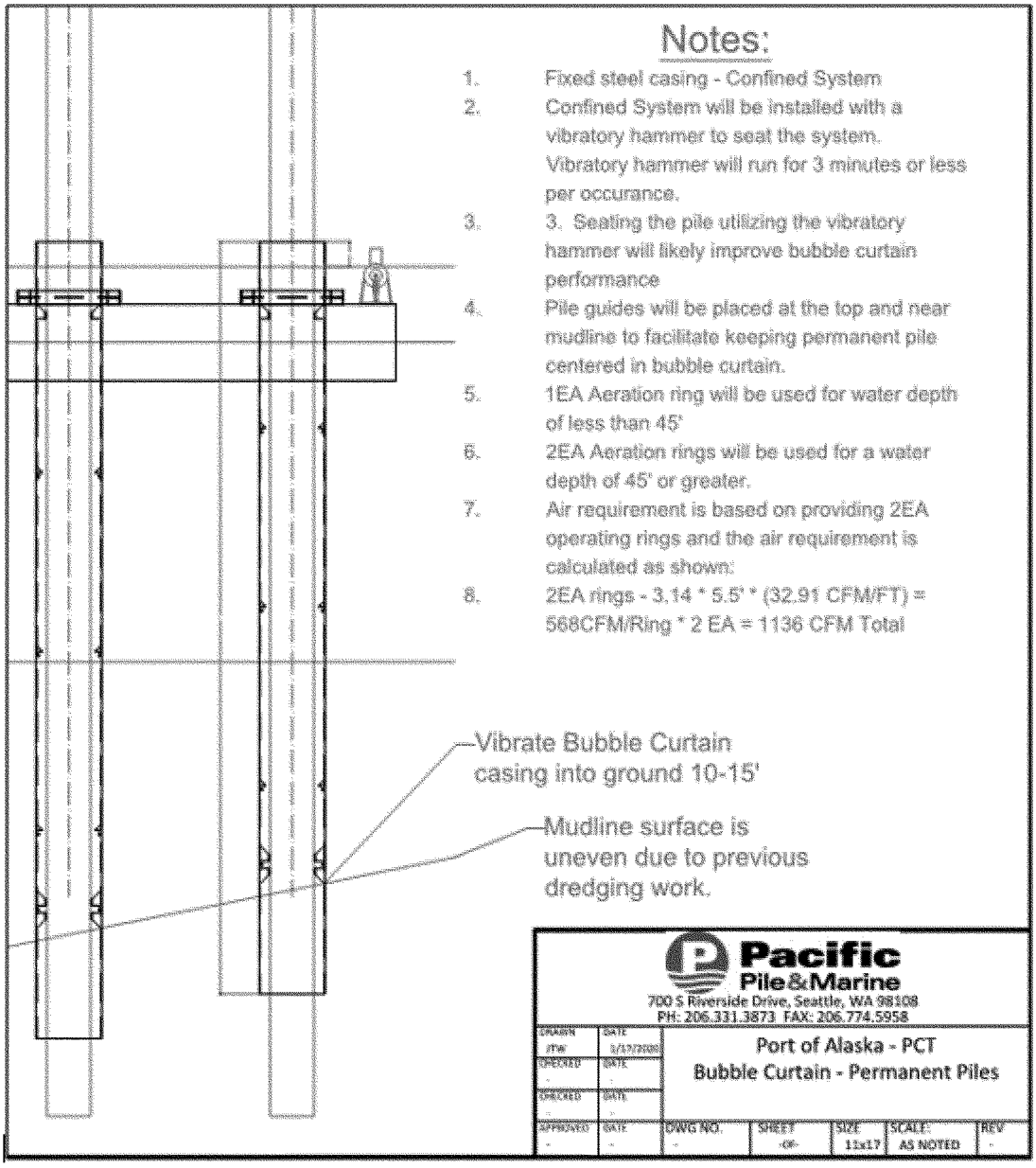

Figure 2. Diagram of pile and confinement system for the 48-in piles, showing arrangement requiring vibratory installation of confinement and separate advancement of pile.

A certain number of the 48-in piles will require a short duration re-strike pile driving event to prove pile axial capacity (or the maximum load which the pile can carry without failure or excessive settlement of the ground). This is planned for up to seven events. For these events the confinement casing will be lowered over the permanent pile and allowed to self-weight into the sea floor sediments; the bubble curtain will be activated and then the pile re-struck with the impact hammer. Once the axial capacity is determined, the confinement casing will be lifted off of the pile. During restrikes, the confinement casing doesn't need to be vibratory hammered in because the permanent pile will provide a safe condition since the bubble curtain sleeve can be set onto the rigidity of the permanently installed 48-in pile. The sleeve will not need to be free standing as in the case of initial installation.

Mitigation, monitoring, and reporting measures are described in detail later in this document (please see *Mitigation* and *Monitoring and Reporting* sections below).

Changes From Proposed to Final

As described above, the POA has made some modifications to the work plan (*e.g.,* confined bubble curtain and all plumb piles for Phase 1); however, we have determined that our original acoustic assessment, as described in the notice of proposed IHAs remains an accurate approach to estimate potential impacts to marine mammals and their habitat, with the exception of impact driving 48-in piles, for which we have adjusted the Level B harassment zone from 629 m to 824 m based on data contained within Austin et al. (2016).

This is a conservative approach as the confined bubble curtain will likely further reduce noise propagation beyond that measured with the bubble curtains used during the TPP (Austin et al., 2016). We also note that this change does not affect our take numbers because our estimate does not rely on the size of the Level B harassment zones for any species (see Estimated Take section). Finally, as described in the notice of proposed IHAs, hydroacoustic monitoring will commence at the onset of pile driving; therefore, any shutdown and monitoring zones may be adjusted promptly after the initial interim report.

NMFS also corrected an error in the take table for humpback whales. The text in the notice of proposed IHAs indicated we were authorizing 5 humpback whale takes in Phase 2 (75 days x 1 whale every 16 days), but we mistakenly indicated a total of six humpback whales in the take table. The take tables have been adjusted in both this final notice and the Phase 2 IHA.

Finally, NMFS has clarified some of the mitigation measures in the final IHAs, and the POA will now employ a fourth monitoring station at Ship Creek to further ensure marine mammal detections. In addition, if POA is conducting non-PCT-related in-water work that includes PSOs, the PCT PSOs must be in real-time contact with those PSOs, and both sets of PSOs must share all information regarding marine mammal sightings with each other. The POA has also updated its hydroacoustic monitoring plan to include more specific goals relevant to the project (*e.g.,* removed bubble curtain effectiveness tests and refined locations of hydrophones and sampling methods), and NMFS is requiring all in-water work occurring in the area during PCT hydroacoustic monitoring (*e.g.,* dredging, other in-water work at the POA, vessel transit) to be documented (*e.g.,* type of activity, location relative to recordings, date/time) and reported in the acoustic monitoring report.

Comments and Responses

A notice of NMFS' proposal to issue two successive IHAs to POA was published in the **Federal Register** on December 30, 2019 (84 FR 72154). That notice described, in detail, POA's proposed activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, proposed amount and manner of take, and proposed mitigation, monitoring and reporting measures. During the 30-day public comment period, NMFS received comment letters from the Marine Mammal Commission (Commission) and the Center for Biological Diversity (CBD). A summary of each comment and our full response is provided here. Full comments have been posted online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* Please see the comment letters for full detail of the comments and underlying justification.

We note that the Defenders of Wildlife (Defenders) submitted comments to NMFS on February 21, 2020, approximately 3 weeks after the close of the comment period. Although NMFS is not obligated to consider comments submitted following the close of the comment period, we reviewed the letter for pertinent information. Defenders questioned our negligible impact and small numbers findings; however, we have addressed similar concerns in our response to comments from the Commission and CBD. We have also updated the EA so that it accurately reflects our impact and take estimate analysis described in the IHAs (*e.g.,* consideration of group size in beluga whale take estimates) and provides a more comprehensive cumulative impact section. Overall, the Defenders letter does not provide information that leads us to change our analysis or findings and we do not address the comments individually here.

Comment 1: The Commission recommends that, in the **Federal Register** notice for POA's authorization, if issued, and all future **Federal Register** notices involving the taking of species that also are hunted for subsistence purposes, NMFS (1) include the standard verbiage regarding the definitions of unmitigable adverse impact under NMFS's implementing regulations; (2) specify whether the proposed activities overlap in time and space with known hunting activities, whether the local Native Alaskan communities that hunt marine mammals were contacted, whether any concerns were conveyed, whether additional mitigation measures are necessary, and whether a Plan of Cooperation (POC) is being or was developed; and (3) if a POC is necessary, ensure that it contains all of the relevant information.

Response: NMFS has included the standard definition of unmitigable adverse impact, as suggested by the Commission. The information regarding subsistence use for each affected species was contained within the notice of proposed IHAs, specifically noting which species are not hunted (*i.e.,* Cook Inlet beluga whale (CIBW), humpback whales, killer whales, and harbor porpoise) and which are taken by subsistence hunters (*i.e.,* harbor seals, Steller sea lions)—see Description of Marine Mammals and Their Habitat section in that notice. In addition to the information in the *Proposed Mitigation* section of the proposed notice (including background on how mitigation for subsistence use is a consideration), we included an evaluation of how we reached our determination in the Unmitigable Adverse Impact Analysis and Determination section. We have included additional information to more clearly relate the information in the Description of Marine Mammals and Their Habitat section with our determinations in this final notice of issuance; however, our findings remain the same. Regarding time and space overlap of subsistence hunts with the activity, Cook Inlet subsistence activities that may overlap with the POA activities were described in the *Description of Marine Mammals in the Area of Specified Activities* section of the **Federal Register** notice of proposed IHAs (84 FR 72161, December 30, 2019) and we refer the reader to that information.

The Commission also recommended we include information about whether local Native Alaskan communities that hunt marine mammals were contacted, any concerns were conveyed, whether a Plan of Cooperation (POC) was being developed and whether additional mitigation measures are necessary. For this project, on January 9, 2020, the POA informed NMFS that they sent a letter to 14 tribes informing them of the public comment period on the proposed IHAs. No tribal comments were received. No POC was necessary or developed for this action.

Comment 2: The Commission provided the following comments related to the issuance of incidental take authorizations in Cook Inlet where take of beluga whales is proposed for authorization. These are (1) NMFS defer issuance of the final incidental harassment authorizations to POA or any other applicant proposing to conduct sound-producing activities in Cook Inlet until NMFS has a reasonable basis for determining that authorizing any additional incidental harassment takes of Cook Inlet beluga whales would not contribute to or exacerbate the stock's decline; (2) NMFS defer issuance of POA's final incidental harassment authorizations until all activities for which incidental take authorizations or regulations have been or are expected to be issued are considered with respect to their anticipated, cumulative take of Cook Inlet beluga whales, as part of a

PEIS; and (3) Given the number of sound-producing activities expected to occur in Cook Inlet and the potential impact of such activities on beluga whales, the Commission also reiterates its recommendation that NMFS establish annual limits on the total number and types of takes that are authorized for all sound-producing activities in Cook Inlet before issuing the final authorizations.

Response: In accordance with our implementing regulations at 50 CFR 216.104(c), we use the best available scientific evidence to determine whether the taking by the specified activity within the specified geographic region will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. Based on the scientific evidence available, NMFS determined that the impacts of the authorized take incidental to pile driving would result in a negligible impact and no unmitigable adverse impact on availability of marine mammals for subsistence uses. Moreover, NMFS has required rigorous mitigation and monitoring measures in the IHAs to reduce impacts to CIBWs, including use of a bubble curtain, shutdown at the Level B harassment zone if pile driving is occurring, and establishing a pre-pile driving clearance zone (*i.e.,* the area must be clear before pile driving commences) that essentially encompasses all of lower Knik Arm and beyond into upper Cook Inlet. These noise attenuation devices and CIBW shutdown measures are more restrictive than the standard shutdown measures typically applied. These measures are expected to reduce both the scope and severity of potential harassment takes by transmitting less noise into the marine environment and reducing the potential for exposure above harassment thresholds. In addition to the mitigation measures, the POA will monitor from elevated platforms at four locations dispersed throughout lower Knik Arm. All stations will have at least two NMFS-approved observers on-watch at any given time. Therefore, marine mammal detection effectiveness is expected to be high.

Further, as described in the **Federal Register** notice of proposed IHAs (84 FR 72154, December 30, 2019), data from several years of scientific monitoring at the POA during previous work involving pile driving (occurring April through November) demonstrate there is no significant difference in beluga whale sightings during and in absence of pile driving (Kendell and Cornick, 2016). While we do anticipate some behavioral modifications to occur, these will likely be limited to increased travel speeds, reduced vocalizations, and potentially traveling in more cohesive groups (Kendell and Cornick, 2016). However, we anticipate behavior will return to normal after the whales move past the POA (*e.g.,* when they reach productive foraging grounds north of the POA) as these areas would not be ensonified by pile driving noise. There is no evidence beluga whales have abandoned foraging in Knik Arm due to pile driving noise or exposure to pile driving noise has resulted in more than a negligible impact to the CIBW population. In light of the mitigation and monitoring measures and scientific data to date, we anticipate the impacts of any harassment to CIBWs will be limited to short-term, mild to moderate behavioral changes and will not affect the fitness of any individuals. Therefore, NMFS has a reasonable basis for determining that authorizing take incidental to the PCT project will not contribute to or exacerbate the stock's decline. Additionally, the ESA Biological Opinion determined that the issuance of the IHAs is not likely to jeopardize the continued existence of the CIBWs or destroy or adversely modify CIBW critical habitat.

The cumulative effects of the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions (as well as the effects of climate change) were evaluated against the appropriate resources and regulatory baselines in our final Environmental Assessment (EA) for the issuance of the IHAs to the POA (available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*). The best available science and a comprehensive review of past, present, and reasonably foreseeable actions (including other noise-generating activities such as other construction projects and oil and gas exploration in Cook Inlet) was used to develop the Cumulative Impacts analysis. This analysis is contained in Chapter 4 of the aforementioned EA. As required under NEPA, the level and scope of the analysis is commensurate with the scope of potential impacts of the action and the extent and character of the potentially impacted resources, as reflected in the resource-specific discussions in Chapter 3 (Affected Environment) of the EA. Past and present actions are also included in the analytical process as part of the affected environmental baseline conditions presented in Chapter 3 of the EA, in accordance with 1997 Council on Environmental Quality (CEQ) guidance. Per the guidance, a qualitative approach and best professional judgment are appropriate where precise measurements are not available. Where precise measurements and/or methodologies were available they were used. Therefore, NMFS has analyzed the cumulative effects of the action on CIBWs (as recommended by the Commission) which supports a Finding of No Significant Impact (FONSI). Therefore, an EIS is not required.

We do recognize, however, that NMFS previously declared its intent to prepare an EIS to address MMPA Incidental Take Authorizations (ITAs) for oil and gas activities in Cook Inlet, Alaska (79 FR 61616; October 14, 2014). However, in a 2017 **Federal Register** notice (82 FR 41939; September 5, 2017), NMFS indicated that due to a reduced number of ITA requests in the region, combined with funding constraints at that time, we were postponing any potential preparation of an EIS for oil and gas activities in Cook Inlet. As stated in the 2017 **Federal Register** notice, should the number of ITA requests (for any type of activities), or anticipated requests, notably increase, NMFS will re-evaluate whether preparation of an EIS is necessary. Currently, the number of ITA requests for activities that may affect marine mammals in Cook Inlet is at such a level that preparation of an EIS is not necessary. Nonetheless, as described above, under NEPA, NMFS is required to consider cumulative effects of other potential activities in the same geographic area, and these are discussed in greater detail in the Final EA prepared for this issuance of two successive IHAs to POA for the PCT project, which supports our finding that NMFS' issuance of the POA IHAs will not have a significant impact on the human environment.

With respect to capping the number of takes authorized across all activities, the MMPA states that, upon request, NMFS shall authorize, for periods of not more than one year, the incidental taking by harassment of small numbers of marine mammals if NMFS finds that such harassment during each period concerned will have a negligible impact on such species or stocks and will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. Section 101(a)(5)(A) of the MMPA addresses the analysis and authorization of take from a ''specified activity'' and, therefore, setting limits on the number and types of CIBW takes across all activities in Cook Inlet would not be an appropriate requirement of an MMPA incidental

take authorization. Further, NMFS here has factored into its negligible impact analyses the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.,* as reflected in the density/distribution and status of the species, population size and growth rate, and relevant stressors (such as incidental mortality in commercial fisheries, UMEs, and subsistence hunting)). See the *Negligible Impact Analyses and Determinations* section of this notice of issuance.

Separately, setting blanket take limits may not be meaningful, as the nature and intensity of impacts from a given activity can vary widely. For example, an animal exposed to noise levels just above our harassment threshold in a non-critical area may experience a small behavioral change with no biological consequence while an animal exposed to very loud noise levels (but lower than levels that would result in PTS) in an area where active critical foraging occurs could result in behavioral changes that may be more likely to impact fitness. While both of these examples would be characterized as Level B harassment, the resulting impact on the population could be different. Context differences such as these are analyzed in our negligible impact analysis for each application under the MMPA.

As described above, this does not mean the cumulative impacts of other actions are not considered, as we have captured past and current actions in our baseline under the MMPA and all past, present and reasonably foreseeable future actions under NEPA. Finally, the reasonably foreseeable cumulative effects to ESA-listed species, including CIBWs, from other activities are considered in the analyses conducted in the biological opinion per the ESA. The biological opinion, issued March 23, 2020 found NMFS' issuance of the IHAs to POA would not jeopardize the continued existence of CIBWs or destroy or adversely modify their critical habitat. For these reasons, we have not implemented the Commission's recommendation to cap the number of authorized takes of CIBWs across all activities for which take is requested.

Comment 3: The Commission recommends that, until such time that POA conducts hydroacoustic monitoring to confirm the extents of the Level A and B harassment zones, NMFS (1) use 1,174 m rather than 629 m for the Level B harassment zone during attenuated impact pile driving of 48-in piles and 3,502 rather than 2,247 m during attenuated vibratory pile driving of 48-in piles based on the extents of the Level B harassment zones presented in Tables 12 and 13, respectively, of Austin et al. (2016), (2) re-estimate the Level A harassment zones during attenuated impact installation of 48-in piles based on the attenuated source level of 190 dB re 1 μPa at 10 m and 15 log R and during attenuated vibratory installation of 48-in piles based on the attenuated source level of 159.5 dB re 1 μPa at 10 m and 14.67 log R, and (3) re-estimate the Level A and B harassment zones during attenuated impact and vibratory impact installation of 24-, 36-, and 144-in piles based on the unattenuated source levels in Table 2 and 6 of the **Federal Register** notice, if it intends to use the unattenuated propagation loss factors presented in the notice.

Response: Austin et al. (2016, Table 12) provided estimated median ranges to the 160 dB rms isopleth during installation of 48-in piles using a bubble curtain by applying best-fit transmission loss (TL) coefficients. It is important to note these distances were modeled from data collected at 10 m and 1,000 m and were not measured at exactly those locations. The estimated median distances to the 160 dB isopleth (which NMFS uses as a Level B harassment threshold for impact pile driving) for four piles ranged from 578 m to 1100 m for an average median distance of 824 m. The notice of proposed IHAs used an approach that estimated the distance to the 160 dB isopleth at 629 m as a result of applying unattenuated source levels with an assumed effective attenuation of 7 dB due to use of an unconfined bubble curtain. Since issuance of the notice of proposed IHAs, the POA is now going to deploy a confined bubble curtain (as described above) on all piles in water depths suitable for a bubble curtain in Phase 1 which is expected to further increase sound attenuation. The casing sleeve pile is a solid steel pile with interior cushions or air pockets. This sleeve surrounds the bubble curtain and will be embedded in sediment several feet. This design is anticipated to further reduce both water and sediment-born sound propagation into the marine environment. Despite use of this system, we agree with the Commission that using the bubble curtain pile data is more appropriate to estimate the initial distances to harassment isopleths (which will then be verified *in situ*). However, in lieu of the Commission's recommended approach of using a practical spreading loss model to a lower source level, we have relied on the data directly presented in Austin et al. (2016) and have therefore adjusted the Level B harassment zone for 48-in piles to 824 m during impact pile driving.

For vibratory driving and removal, we have determined that adjustments at this stage are not necessary. Blackwell (2005) reported a drop-off rate of 22 dB to 29 dB per doubling of distance for vibratory pile driving. URS (2007) applied a 25 dB drop-off to vibratory sheet pile driving at the POA for a distance to the 120dB isopleth of 800 m. The source levels for driving 24-in and 36-in piles are estimated to be similar as those measured during sheet pile driving (154–171 dB for the PCT vs 168 dB during sheet pile driving). While we have applied a 122.2 dB Level B harassment threshold, our estimated distances using the approach in the notice of proposed IHAs exceeds those estimated during sheet pile installation. The Level B harassment isopleths estimated for vibratory driving 24 to 48-in piles with similar source levels as the sheet pile project far exceed 800 m (846–2,247m). The distance to Level B harassment isopleth for vibratory driving 144-in piles is over 9 kms. No changes are necessary for 144-in piles since not only will there be minimal use of the vibratory hammer (one pile), *in situ* acoustic data from Phase 1 will be used to estimate transmission loss rates, assisting in the verification of analysis for Phase 2. Therefore, we find no adjustments the Level B harassment zone during vibratory driving are necessary at this time.

For similar reasons, it is also not necessary to recalculate Level A harassment zones. The Commission is correct that the median source level for impact hammer is 190 dB; however, this is a sound pressure level (SPL) of 190 dB rms (Table 16 in Austin et al. 2016). For Level A harassment calculations we apply sound exposure levels (SEL) values. In our analysis, the estimated sound pressure level (SPL) is 193 dB rms and 180 dB SEL. To be conservative, we maintain the higher source level than that recommended by the Commission. Again, during Phase 1, the bubble curtain will be encased by a casing pile, further attenuating noise. The acoustic monitoring plan is designed to measure both source levels (near-field) and far field received levels; therefore, zones can be adjusted accordingly. Finally, the Level A zones represent the distance at which an animal would have to remain during the duration of driving or removing the number of piles considered in the analysis. This is already a conservative approach and for the reasons listed above, there is no need to adjust Level A harassment zones.

More important than estimating harassment zones is the fact that these zones (which, for CIBWs, equate to shutdown zones) may very well be adjusted at the onset of pile driving once the initial interim acoustic monitoring report is reviewed by NMFS. Again, harassment zones do not influence take numbers for any marine mammal species; therefore, the number of takes estimated or authorized would not change. There are multiple ways to model noise levels (as demonstrated by the various approaches from the POA, the Commission, and NMFS' approach) with no single method necessarily being more accurate than others, especially given the complex acoustic environment in Knik Arm. While data to date demonstrate our acoustic analysis provides an adequate and realistic estimate, a major goal in the hydroacoustic monitoring plan is to refine these zones as soon as possible with real data. The Commission agrees with us on this when they state elsewhere in their letter that the extents of the larger Level A harassment zones and the Level B harassment zones are best measured *in-situ.* As was described in the notice of proposed IHAs, POA will begin conducting acoustic monitoring at the onset of pile driving (in April when beluga whale presence is scarce) and will provide an interim report to NMFS within 10 days for 24 to 48-in piles and 72 hours for 144-in piles. The hydroacoustic monitoring plan made available for public comment in association with the notice of proposed IHAs indicated that measurements would be taken at various distances representing both near-field source levels and far-field received levels. These far-field distances ranged from 300m–1 km (where the majority of impact pile driving harassment isopleths have been estimated) and 3km+. Therefore, distances to the Level B harassment isopleth will indeed be identified. Therefore, while we appreciate the Commission's recommendations, at this time we find our acoustic analysis is appropriate with the exception of slight adjustments to the 48-in pile Level B harassment zone. NMFS will adjust all Level A harassment and Level B harassment isopleths, if appropriate, based on the new, more relevant hydroacoustic data collected as POA installs piles with a confined bubble curtain. For Phase 2, it is still currently unknown if a confined or unconfined bubble curtain will be used. Because our analysis reflects previously collected data, we do not find any adjustments to Phase 2 zones are necessary at this time. Again, the POA will conduct hydroacoustic monitoring at the onset of pile driving during both Phase 1 and Phase 2 and Level A harassment and Level B harassment isopleths will be refined with in situ data. Finally, any adjustments to the harassment zones do not change any take numbers for any marine mammal species as take estimates are not based on the size of the harassment zones (*e.g.,* CIBW takes are based on sighting rates (whale per hour) throughout Knik Arm and other species take estimates are based on presence/absence regardless of zone size).

Comment 4: The Commission recommends that NMFS refrain from using the 7–dB source level reduction in these authorizations and all future proposed incidental take authorizations, and recommends that NMFS consult with the relevant experts regarding the appropriate source level reduction factor to use to minimize far-field effects on marine mammals for all relevant incidental take authorizations and, until the experts have been consulted, refrain from using a source level reduction factor when bubble curtains are to be implemented.

Response: The use of a confined bubble curtain provides further justification for use of the 7dB reduction to source levels as proposed in the notice of proposed IHAs. Not only will the bubbles be confined but the pile will be set several feet into the substrate. In its comments, the Commission asserted that the bubble curtain deployed during the 2016 TPP project was not effective. However, the bubble curtain resulted in reduced source levels during testing of the TPP (see Table 12 in Austin et al. 2016). For example, the POA measured source levels during installation of 48-in piles that were unattenuated and were installed with bubble curtains; source levels were consistently equal to or greater than 7–dB less when bubble curtains were applied with the exception of one pile where the bubble curtain was turned on and off (versus comparing piles with and without bubble curtains).

Overall, the Commission has made this comment on previous IHAs and NMFS has responded accordingly. For example, we refer the reader to our previous, more general response in our notice of issuance of a previous IHA (84 FR 64483, November 29, 2019). Finally, as described above, *in situ* measurements will be taken upon the onset of pile driving and harassment zones will be adjusted accordingly. At this time, the existing data support the accuracy of our analysis.

Comment 5: The Commission recommends that in the **Federal Register** notice for POA's authorizations, if issued, and the final authorizations, NMFS: (1) (a) Fix select issues regarding inconsistencies and errors in Tables 1–2, 2, 6, 7, and 8 of the **Federal Register** notice for unattenuated and attenuated vibratory installation of 24-in piles, unattenuated impact installation of 24-in piles, and attenuated vibratory installation of 48-in piles, and (b) ensure that all of the Level A and B harassment zones, along with the shut-down and monitoring zones, are correct based on all the various assumptions; and (2) use 209.5 rather than 202 dB re 1 μPa at 10 m as the assumed source level for attenuated impact installation of 144-in piles and increase the Level B harassment zone from 1,945 to 4,984 m.

Response: NMFS has clarified Table 7 to reflect Table 1–2. Despite multiple hammers working at once, no more than the number of piles represented in Table 7 would be installed on any given day. The maximum amount of piles installed on any given day is four. We have also updated the amount of time of vibratory driving per pile to reflect the maximum amount of time estimated by the POA (*i.e.,* 75 minutes instead of the 100 minutes in the notice of proposed IHAs). We note that these minor changes are insignificant in that all vibratory driving results in very small harassment zones for all hearing groups and all are less than the 100 m shutdown requirement.

NMFS notes the other items that the Commission asserts to be errors or inconsistencies are actually correct and no adjustments are necessary. The Commission noted differences between Tables 1–2 and 7 for the amount of 48-in piles driven by a vibratory hammer in one day (one pile versus the 1–3 piles for impact hammering) and claims we have thus underestimated noise levels. However, the Commission mistakenly assumed equal distribution between impact and vibratory pile driving 48-in piles. As noted in the POA's application and NMFS' notice of proposed IHAs, the POA anticipates using the vibratory hammer sparingly during installation of permanent piles. That is, the one to three 48-in piles per day installed with an impact hammer reflected in Table 1–2 and one pile per day for vibratory installation in Table 7 are both correct. Hence, the resulting Level A harassment isopleths (Table 8) are also correct. In addition, all 24-in piles except six in Phase 2 will be driven using the bubble curtain.

As for the assumed source level and estimated Level B harassment distance

for impact driving 144-in piles, NMFS' original analysis is accurate. The Commission suggests we should use an unattenuated source level to estimate distance to the Level B harassment zone. However, the 144-in piles would be installed using a bubble curtain and, therefore, we disagree with the Commission that the unattenuated source level is appropriate. Regarding what the starting source level should be, we find the Commission's concern regarding a 0.5 dB difference in source level is non-substantive when considering source variability and model regressions. Further, the first installation of a 144-in pile will be accompanied by acoustic monitoring in both the near and far-field. An interim report will be sent to NMFS within 72 hours and zones will be adjusted accordingly, if warranted. Again, we note the amount of take and pre-pile driving clearance zones are unaffected by any changes recommended by the Commission.

NMFS acknowledges a typographical error in Table 7 that indicates the source levels for 48-in piles is 171 dB rms when it should reflect 161 dB rms, as correctly indicated elsewhere in the notice of proposed IHAs (and as provided in the POA's application and Austin et al. 2016). We have also corrected Table 6 and 7 to reflect that only up to 4 24-in piles could be driven on any given day. We note these differences result in minor differences in Level A harassment zones and the 100 m shutdown zone remains appropriate.

Comment 6: The Commission recommends that NMFS continue to make the 24-hour Level A harassment approach a priority to resolve in the near future and consider incorporating animat modeling into its user spreadsheet.

Response: NMFS has previously informed the Commission of its efforts to develop a method for more accurately assessing the potential for Level A harassment from acoustic sources such as pile driving. NMFS is continuing that effort.

Comment 7: The Commission agrees that NMFS's assumption to reduce the number of takes based on the maximum percentage of beluga whales previously taken at the POA is justifiable, but questions the underlying take estimates. The Commission recommends that NMFS revise its take estimates based on the maximum density estimate in the project area of 0.236 whales/km^2 from Goetz et al. (2012), the revised ensonified areas based on the Commission's recommendations herein, the numbers of days of the various activities from Table 6–2 in POA's application, and an assumed maximum take rate of 59 percent based on Table 10 of the notice of proposed IHAs. If the number of revised beluga whale takes during either Phase 1 or 2 exceeds NMFS's assumed one third of the population estimate (83 FR 63376), the Commission recommends that NMFS deny the authorization(s) outright.

Response: NMFS provided its rationale in the notice of proposed IHAs for why the Goetz et al. (2012) data was not applied to estimate CIBW take, and that rationale remains appropriate. We do not agree our method underestimates take and are confident it more accurately reflects expected take than the Commission's approach. The Commission asserts NMFS used sightings rates that have no spatial dimension and are not applicable for species that routinely occur in the project area and for activities with larger ensonified areas than were observed during POA's 2016 monitoring efforts. We strongly disagree. The sighting rate of CIBWs is derived from scientific monitoring spanning several years (Kendell and Cornick 2015). The data set covers all months the POA would be conducting pile driving over several years and is based on all animals observed during scientific monitoring regardless of distance (the authors did not report sighting distances but were equipped with 7 x 50 binoculars and theodolites). Therefore, the take calculation inherently assumes any CIBW within lower Knik Arm could be taken during pile driving. This will not be the case, given the impact pile driving harassment zones are much smaller than the width of Knik Arm. As described previously and in our notice of proposed IHAs, harassment areas are not used to estimate take for any marine mammal species for this project. More importantly, the Commission fails to recognize the mitigation measures prescribed by NMFS are more stringent than those in any previous incidental take authorization issued to the POA and are designed to avoid all take of CIBWs. However, we have authorized some take as a precaution. The amount of take authorized in each IHA is no more than 20 percent of the population. In summary, the Commission does not provide sufficient reason why using a single density estimate from June aerial surveys is more accurate than using several years of scientific monitoring data, spanning all months in which the POA would be working, and which considers all whales observed. We have maintained both our CIBW take method and take amount in the final IHAs.

Comment 8: The Commission recommends that NMFS increase the numbers of total harbor seal takes from 1,016 to at least 1,566 takes during Phase 1 and from 600 to at least 999 takes during Phase 2, if NMFS does not revise the extent of the Level B harassment zone for vibratory installation of 144-in piles based on the Commission's recommendation, or to at least 1,863 seals if it does. They then recommended NMFS reduce the total Level B harassment takes in Phase 1 and 2 by 30 percent to account for Level A harassment takes.

Response: First, we note the POA allows for the installation of only one of the nine 144-in piles by vibratory pile driving; therefore, this activity is extremely limited in time. NMFS agrees with the Commission that the maximum number of harbor seals on any given day observed during the TPP was 9 seals. The Commission assumes equal abundance at greater distances and suggests we double that number when vibratory pile driving Level B harassment zones extend beyond 2km (since all harbor seal sightings were within 2kms, likely due to sightability). We believe the Commission's approach is overly conservative as it uses maximum abundance throughout the construction season despite data indicating no harbor seals were observed from August through November 2005–2007. More importantly, it does not consider that over 8 years of data spanning April through November, a maximum of 57 total harbor seals (range 0–57) were observed in any given year and that both scientific and construction monitoring typically covered the entire construction season. For example, in 2009, construction monitoring efforts spanned 209 days from March through December and over 3,322 hours. During that time, only 34 harbor seals were observed. Therefore, the Commission's suggestion that 1,016 harbor seal takes in Phase 1 and 600 harbor seal takes in Phase 2 is not adequate is not justified by the years of previous monitoring data. For these reasons, we maintain our original harbor seal take estimates and have authorized those takes.

Comment 9: The Commission recommends that NMFS re-estimate the numbers of Level A and B harassment takes for harbor porpoises and humpback whales based on 50 percent of the takes being Level A harassment, which would result in 32 Level A harassment and 32 Level B harassment takes of harbor porpoises and 4 Level A harassment and 4 Level B harassment takes of humpback whales.

Response: Similar to the harbor seal take recommendation, the Commission fails to consider observation data and also does not consider context around the outputs of the user spreadsheet. Humpback whales and harbor porpoise are rarely observed in upper Cook Inlet and are not expected to remain for any meaningful duration. Therefore, we maintain that the estimates of Level A harassment and Level B harassment takes in our notice of the proposed IHAs are accurate representations of the likely potential occurrences of Level A harassment and Level B harassment.

Comment 10: The Commission recommends that in the **Federal Register** notice for POA's authorizations, if issued, and the final authorizations, NMFS: (1) Specify a clearance time of 30 rather than 15 minutes for beluga whales; (2) specify that delay procedures must be implemented if a beluga whale is observed (a)(i) within 1 km of the mouth of Knik Arm to the south and Green Lake Creek to the north during all activities except vibratory installation and removal of 144-in piles and (ii) within 2 km of the mouth of Knik Arm to the south and Mule Creek to the north during vibratory installation and removal of 144-in piles and (b) activities cannot commence until the whale has moved at least 100 m beyond the Level B harassment zone and is transiting away from the zone; (3) include the measures for bubble curtain performance standards; (4) include the requirement that pile driving and removal can occur only during daylight hours; (5) specify the number of each pile size and installation method that would be monitored acoustically; (6) include the requirement that POA must include in the draft and final hydroacoustic monitoring reports the (a) substrate type(s), (b) number of strikes per pile or strikes per day and pulse durations associated with impact pile driving, (c) spectra for all pile sizes, installation methods, and with and without the bubble curtain, and (d) amount of time the bubble curtain was turned on and off; (7) include the requirements for POA to extrapolate Level A and B harassment takes to the unobserved portions of the Level A and B harassment zones and to include the raw PSO sightings datasheets in the draft and final marine mammal monitoring reports; and (8) require POA to alert NMFS when the total number of takes, including observed and extrapolated takes, for any species reaches 80 percent of those authorized per year.

Response: NMFS has reviewed the Commission's specific suggestions. First, we note, as described above, the bubble curtain will not be turned on and off; therefore, those comments do not apply. We address the other recommendations in order: (1) The clearance time is 30 minutes; (2) NMFS has delineated both inbound and outbound clearance zones (see Figure 1 in the IHAs) and included the Commission's recommended language that activities cannot commence until the whale has moved at least 100 m beyond the Level B harassment zone and is moving away from the zone; (3) the confined and unconfined bubble curtain measures, which are included in in the IHAs, reflect those previously established by the USFWS and NMFS; (4) as described in POA's application and notice of proposed IHAs, the IHAs now specifically include the measure that pile driving may only be conducted during daylight hours; (5 and 6) the hydroacoustic monitoring plan identifies the number of piles to be monitored while the IHAs contain specific reporting requirements including strikes per pile, pulse duration, and spectra; (7) the requirements to report extrapolated takes was contained within the proposed IHAs and NMFS has added the requirement that POA must submit data sheets; and (8) because pile driving cannot be conducted if the Level B harassment zone is not visible, then the need to extrapolate takes is not applicable to Phase 1. In Phase 2, vibratory driving of 144-in piles would only occur if impact driving is not successful (which is conservatively estimated for one of the nine piles). In such case, the POA would extrapolate takes of marine mammals for the portion of Level B harassment zone that is not able to be observed. The requirement for reporting to NMFS when 80 percent of CIBW take was reached was contained within the notice of proposed IHAs and the draft IHAs and we maintain that measure for the final IHAs. The Commission suggested this should be applied to all marine mammals, without providing justification. The only other marine mammal species with some reasonable level of occurrence is the harbor seal. NMFS has conservatively authorized take for this species that is 10 to 17 times the amount of take expected based on previous monitoring data. NMFS does not adopt the recommendation to require the POA report to NMFS when takes are 80 percent of all marine mammals.

Comment 11: The Commission recommends that NMFS remove measure 4(g) from the 2020 final authorization and include the Level A harassment zones in both final authorizations.

Response: NMFS concurs and has adopted the recommendations.

Comment 12: The Commission recommends that NMFS include in the final authorizations a requirement that POA provide the Level A and B harassment zones measured in-situ for each pile size rather than just the source levels and if the Level A or B harassment zones exceed those included in the final authorization, either (1) increase the Level A and B harassment zones accordingly or (2) require POA to implement an additional sound attenuation device and verify that the resulting Level A and B harassment zones are equal to or less than those included in the final authorization.

Response: The hydroacoustic monitoring plan is designed to more accurately verify harassment zones. We have included a requirement in the IHAs to report estimated harassment zones based on acoustic measurements. Condition 4(f) of the draft IHAs indicated NMFS may adjust the zones accordingly. While the Commission's comment only addressed whether the zones are larger than expected, it is also possible that the zones will in fact be smaller, especially in light of the application of a confined bubble curtain. In the unlikely case the zones are larger than estimated, NMFS will not require additional noise attenuation, but instead will adjust shutdown and monitoring zones accordingly.

Comment 13: The Commission recommends that NMFS ensure that POA (1) is aware that the number of piles of each pile size that are to be monitored must actually be driven to depth and sound levels associated with piles installed at a level of refusal are not appropriate and do not count toward the numbers of piles to be monitored and (2) conducts measurements during the installation of the entire pile rather than just a portion of the installation (*e.g.,* 5 of 60 minutes).

Response: The POA has submitted an updated hydroacoustic monitoring plan based on both comments from the public and NMFS' acoustic experts. Nowhere in the POA's original plan did it indicate noise levels only associated with the level of refusal would be used or that measurements would only be made for 5 of 60 minutes. Regardless, the POA has clarified in its updated plan that measurements will be made during the entirety of pile driving any given pile.

Comment 14: The Commission commented that if POA intends to determine the effectiveness of the bubble curtain (or other sound

attenuation device), the Commission recommends that NMFS advise POA to (1) conduct measurements during vibratory installation of two 24- and two 36-in piles and impact installation of two 48-in piles and two 144-in piles with and without the bubble curtain, (2) alternate whether the bubble curtain is on or off when pile driving begins for each pile size, if POA still plans to turn the bubble curtain on and off for the same pile, and (3) ensure that the bubbles are dissipated fully before making measurements with the bubble curtain turned off.

Response: The purpose of testing effectiveness of a bubble curtain would be to determine how much noise reduction the bubble curtain is achieving. Data such as these can help inform future management actions. However, NMFS believes that testing the effectiveness of the bubble curtain by either turning it on or off or installing piles without a bubble curtain is not warranted and would result in unnecessarily high noise levels, further disturbing marine mammals. We note that during Phase 1, the bubble curtain would be confined and NMFS is also not requiring the POA to test the effectiveness of this design. The POA will; however, conduct both sound source verification measurements (approximately 10 m from the pile) and far-field acoustic measurements to determine what the actual noise levels generated from the activity will be. The acoustic monitoring data will verify if the actual source levels and received levels are within the bounds estimated in our analysis. Therefore, we find the Commission's experimental design of installing piles with and without bubble curtains is not warranted and could result in greater impacts to marine mammals.

Comment 15: The Commission recommends that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated **Federal Register** notice process. The Commission recommends that NMFS ensure that the current renewal terms and conditions are included in section 8(a) of the final authorization, if issued and notwithstanding the Commission's recommendation to refrain from issuing renewals. The Commission further suggested that if NMFS chooses to continue proposing to issue renewals, the Commission recommends that it (1) stipulate that a renewal is a one-time opportunity (a) in all **Federal Register** notices requesting comments on the possibility of a renewal, (b) on its web page detailing the renewal process, and (c) in all draft and final authorizations that include a term and condition for a renewal and, (2) if NMFS refuses to stipulate a renewal being a one-time opportunity, justify why it will not do so in its **Federal Register** notices, on its web page, and in all draft and final authorizations.

Response: NMFS does not agree with the Commission and, therefore, does not adopt the Commission's recommendation. NMFS will provide a detailed explanation to the Commission of its decision within 120 days, as required by section 202(d) of the MMPA.

Comment 16: The Commission recommends that NMFS either make its determinations regarding negligible impact, small numbers, and unmitigable adverse impact on subsistence use based on the total number and type of taking for each species or stock for both authorizations combined or delay the Phase 2 activities until 2022 if a renewal authorization is issued for the Phase 1 activities.

Response: The MMPA is clear that NMFS shall authorize, for periods of not more than 1 year, the incidental taking, by harassment, of small numbers of marine mammals if we find that such harassment *during that period concerned* will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock, and the authorization for such activity shall prescribe certain methods and measures.

The POA has indicated to NMFS it is confident that all Phase 1 work will be completed in 2020. If the POA requests a renewal, NMFS will consider all relevant criteria and data collected during 2020 to assess if the renewal is appropriate. We may also modify, suspend, or withdraw any IHA if the holder fails to abide by the conditions prescribed in the IHA, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals (see condition 7 of the IHAs). In any case, should the POA request a renewal of the Phase 1 IHA (again, they have indicated this is unlikely), we will consider our established criteria for issuing a renewal, all data collected, and the potential impacts (both beneficial and adverse) to determine if a renewal is appropriate. Further, we note the Biological Opinion associated with this action limits the amount of take, as defined under the ESA, of CIBWs in any given year to 55 take incidents; therefore, the POA is constrained by this evaluation.

Finally, the Commission asserts that neither a negligible impact nor a small number determination may be able to be made on the authorizations separately, let alone combined. We disagree with the former as we have fully explained our rationale for making both the negligible impact and small numbers findings for each IHA. We have prescribed mitigation and monitoring measures that are the most restrictive of any pile driving IHA issued, as required in this case to meet the MMPA's least practicable adverse impact standard. We have both reduced the amount of noise entering the marine environment (*i.e.,* requiring the POA to use a confined bubble curtain) and reduced the risk of CIBWs being exposed to any noise that may cause harassment (again, the takes authorized are provided for circumstances where a whale enters the harassment zone before pile driving can be shut down). With respect to implementation of the MMPA, the Commission makes an accusation that our process of issuing two successive IHAs is a ''a way to subvert the authorization process under 101(a)(5)(D) of the MMPA and authorize the taking under two separate authorizations that could not be issued under a single authorization.'' This is an incorrect assessment of NMFS' motives for using this approach.

The MMPA clearly states an IHA may not exceed one year. The issuance of successive IHAs allows us to evaluate the project in its entirety and ensure approaches to marine mammal conservation (*e.g.,* mitigation and monitoring measures) are consistent across years, while also allowing for some administrative streamlining, which provides efficient processing of IHAs, allowing resources to be focused on marine mammal conservation and protection. Should any information be identified in Phase 1 that suggests our analysis should be updated, we have both the authority and responsibility to ensure the required findings continue to be met or, as described in condition 7 of the IHAs, we may modify, revoke, or suspend the IHAs. We do note; however, that even if we did consider the total amount of CIBW take over 2 years (n = 90), this is 32.2 percent of the population (279 whales) (if assumed that each incident occurs to a unique individual). Earlier in its letter (see Comment 7), the Commission stated ''*If the number of revised beluga whale takes during either Phase I or II exceeds NMFS's assumed one third [33%] of the population estimate (83 FR 63376) of 327, the Commission recommends that NMFS deny the authorization(s) outright.*'' In summary, NMFS has made our findings relative to each IHA; however, our issuance of two successive

IHAs is both more efficient, effective, and provides consistent conservation value to the species than if we would have received an application for an IHA from the POA in late 2020 for work in 2021.

Comment 17. The Commission recommends that NMFS (1) consult with POA regarding the numerous issues raised in the Commission's letter and direct the applicant to revise the application accordingly and (2) publish revised proposed authorizations prior to issuance of any final authorization or authorizations.

Response: What the Commission claims are ''numerous omissions, inconsistencies, ambiguities, and incorrect information and assumptions identified'' are, for the most part, differences of opinion on how available data should be applied to our analysis and, in each case, we have presented reasons why we disagree with specific recommendations. If we did agree that there actually was an error (*e.g.,* listing 171 dB in Table 7 instead of 161 dB) or the Commission's logic is more appropriate to implement (*e.g.,* use 48-in bubble curtain data to establish initial Level B harassment zones), we have made the recommended changes. We note many of the recommendations by the Commission are detail-oriented and, in NMFS' view, do not provide additional conservation value. NMFS disagrees that the information presented in association with the proposed IHAs was insufficient to facilitate public review and comment, as the Commission implies. Further, in the notice of proposed IHAs, NMFS clearly identified where we did not agree with the POA's analysis in their application and presented alternative approaches which better reflect the best available science. Following receipt of an adequate and complete application, it would be inappropriate for NMFS to demand further revised versions of the application to reflect NMFS' own analysis or additional mitigation prescriptions beyond those that the applicant proposes.

Finally, NMFS has been in constant coordination with the POA to improve upon both the noise attenuation devices and marine mammal and acoustic monitoring plans throughout the IHA process in an effort to minimize impacts of the project on CIBWs to meet MMPA mandates. This notice of issuance describes the benefits realized from those communications and clearly identifies any changes from the proposed IHAs phase. Overall, there are no substantial changes or new information that would lead us to reach any other conclusions regarding the impact to marine mammals. In fact, the addition of a confined bubble curtain and implementation of a fourth monitoring station only strengthens our findings regarding negligible impact and unmitigable adverse impact on subsistence use. For these reasons, NMFS is not republishing a notice of proposed IHAs.

Comment 18: The CBD asserts that NMFS's negligible impact determination is arbitrary and capricious and that the specified activities would have greater than a negligible impact on CIBWs. The CBD suggest (1) NMFS underestimated the impacts of pile driving on CIBWs, (2) there were flaws in take estimate methodology, (3) NMFS should apply the 120dB threshold to all noise sources, (3) the proposed project does not avoid or impose any specific mitigation, (4) NMFS only counts one take exposure per day, but the animals may be exposed as they travel in and out of Knik Arm, (5) in-air noise impacts to seals and sea lions were not addressed and (6) the conclusion that there is no harassment or ship strike potential from vessels is wrong.

Response: For clarity, NMFS' authorization does not ''approve activities''; that permitting responsibility lies with the U.S. Army Corps of Engineers. As described above in response to comments from the Commission, NMFS has not underestimated the impacts of pile driving on marine mammals, there are no flaws in the take estimate methodology, and the IHAs indeed provide extensive mitigation (and is actually some of the most stringent mitigation in any pile driving-related IHA). We do not repeat our reasons why we disagree with CBD here but refer the reader to the relevant responses to the Commission.

We do note CBD appears to have misunderstood the monitoring data when suggesting that 59 percent of takes only occurred in July. In fact, this amount was derived from monitoring occurring from March through December 2009 (20 takes total out of the 34 allocated); the same time over which the POA would be conducting the POA project. It is unclear why CBD suggests monitoring only occurred in July- this is inaccurate and all the monitoring reports were made available on our website during the public comment period. In addition, group size (n=11) was not actually a factor in our final take estimates but a means by which to determine if the total take authorized would allow for the take of larger group sizes. This was fully described in the notice of proposed IHAs but we recognize the draft EA was not updated to reflect this approach. We have since updated the EA to clarify group size was not ultimately used as a correction factor or in take calculations. The CBD also claims we entirely discounted the estimated take but this is also not accurate. We applied a 59 percent correction factor to the calculated take to account for the extensive mitigation measures we prescribe in the IHAs and to reflect the monitoring data.

CBD believes we should apply a 120 dB threshold for Level B harassment based on beluga hearing sensitivity. We disagree. First, any dB-based threshold itself is a step-function approach (*i.e.,* animals exposed to received levels above the threshold are considered to be ''taken'' and those exposed to levels below the threshold are not); but, in reality, it is in fact intended as a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of a specific dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different received levels in our discussion and analysis.

To establish the appropriate Level B harassment threshold in a noisy environment such as upper Cook Inlet, NMFS reviewed data recently collected at the POA. During the 2016 TPP project, the POA conducted ''ambient'' acoustic monitoring, in accordance with accepted methodology for characterizing ambient noise levels. Ambient noise levels (in the absence of pile driving) were 122.2 dB. We described this analysis in our notice of proposed IHAs. Therefore, it is reasonable to establish a 122.2 dB Level B harassment threshold at the POA.

With respect to exposures, nowhere does NMFS indicate that an individual whale could not be exposed upon entering and exiting Knik Arm on a given day. Our take estimates are based on sighting rates regardless of direction or if the whales observed were previously observed that day. Further, the POA would document take for any whale entering the Level B harassment zone as it is nearly impossible to distinguish individuals in the field. Finally, our small numbers determination is based on an assumption that the take estimate represents number of individuals, rather

than instances, which is a conservative assumption. Further, we re-iterate information on page 72182 of our notice of proposed IHAs wherein we described that acoustic data indicate beluga whales move through lower Knik Arm relatively quickly, when entering or exiting the arm, and remain in the upper arm for several days, or weeks, before moving back out into Cook Inlet (Castellote et al., 2020). Satellite telemetry data indicate such a movement pattern may be common. Specifically, a beluga instrumented with a satellite link time/depth recorder entered Knik Arm on August 18th and remained in Eagle Bay until September 12th (Ferrero et al. 2000). Therefore, movement by any given whale in and out of Knik Arm on a single day is not a likely scenario.

Comment 19: CBD postulates that NMFS' small numbers determination is invalid because the amount of take proposed to be authorized is greater than 10 percent of the CIBW population and that NMFS' definition of small numbers conflates this criterion with the negligible impact requirement. CBD claims the incidental harassment authorizations here violate the MMPA because it does not guarantee that only small numbers of CIBWs and the other marine mammals impacted by the Port of Alaska's activities will be taken.

Response: CBD suggests that by defining small numbers to be relative to the overall population the criterion ends up being similar to the negligible impact finding and that Congress's intent was that the MMPA protect not only populations, but individual marine mammals. We disagree that small numbers is conflated with our negligible impact finding. While ''small numbers'' is simply a percent of the population, our negligible impact finding considers a number of parameters including, but not limited to, the nature of the activities (*e.g.,* duration, sound source), effects/intensity of the taking, the context of takes, and mitigation.

The reference to a ''court concluded'' take limit of 12 percent for small numbers likely comes from a 2003 district court opinion (*Natural Resources Defense Council* v. *Evans,* 279 F.Supp.2d 1129 (N.D. Cal. 2003)). However, given the particular administrative record and circumstances in that case, including the fact that our small numbers finding for the challenged incidental take rule was based on an invalid regulatory definition of small numbers, we view the district court's opinion regarding 12 percent as *dicta.* Moreover, since that time the Ninth Circuit Court of Appeals has upheld a small numbers finding that was not based on a quantitative calculation (*Center for Biological Diversity* v. *Salazar,* 695 F.3d 893 (9th Cir. 1012)), and NMFS has more recently authorized take of up to one-third of a population abundance and considers this small.

Comment 20: CBD suggests NMFS has failed to implement ''means of effecting the least practicable adverse impact'' on marine mammals. CBD asserts that NMFS relies on visual monitoring that is known to be ineffective and inadequate to protect marine mammals. CBD suggests lookouts are not as effective in mitigating acoustic impacts as time-area restrictions. They also suggest NMFS failed to consider many other mitigation measures to reduce the proposed activities' impacts to the least practicable level.

Response: NMFS disagrees for several reasons. The POA has added a fourth monitoring station (at Ship Creek) since the notice of proposed IHAs were disseminated for review. At each station, there will be two PSOs on watch at any given time. Further, the PSO stations range from Point Woronzof to the most northern end of the port's property (just south of Cairn Point) allowing for broad coverage of the entirety of lower Knik Arm. This is the most extensive monitoring coverage at the POA to date and NMFS is confident that whales, if present, will be detected. Most of the Level B harassment zones are less than 1 km and the greatest, with the exception of the single 144-in pile that may be driven with a vibratory hammer, the Level B harassment zone is estimated to be approximately 2.2 kms. During the Hilcorp Cook Inlet Pipeline Project, marine mammal observers we able to easily observe CIBWs at this distance and had detections at greater than 8 kms (Sitkiewicz et al., 2018). Further, there are mitigation measures preventing pile driving from occurring if visibility in any portion of the Level B harassment area is obscured by weather or sea state. Therefore, we find the visual monitoring plan is an effective tool at detecting marine mammals, ensuring the mitigation measures are adhered to. These measures effect the least practicable adverse impact on marine mammals.

CDB also suggests we failed to consider other mitigation measures. In the POA's application, they proposed a 100 m shutdown for all marine mammals, including CIBWs, and use of an unconfined bubble curtain. However, our IHAs require much more extensive mitigation. These measures include not starting pile driving if CIBWs are entering Knik Arm, shutting down pile driving if whales approach the Level B harassment zone (which is much greater than 100 m), not vibratory driving 144-in piles in August (a time-area restriction that the CBD claims we did not consider), and employing a confined bubble curtain/casing pile noise attenuation system during Phase 1.

Comment 21: CBD asserts that the proposed activities will have an unmitigable adverse impact on subsistence uses. CBD believes the proposed activities are stressors on beluga whales, which will contribute to their imperilment; therefore, any take of beluga whales has an adverse impact on their availability for subsistence use and must be fully mitigated. They also indicate the IHA should require consultation with Native Alaskan communities to ensure adequate mitigation for subsistence harvest for harbor seals and Steller sea lions and that NMFS must not allow unmitigable adverse impacts on subsistence use of marine mammal stocks.

Response: NMFS agrees with CBD that the authorized taking of marine mammals may not have an unmitigable adverse impact on subsistence uses and we have ensured this is the case. In this case, NMFS has imposed a number of mitigation measures designed to limit the introduction of noise in the aquatic environment through use of noise attenuation devices (*e.g.,* confined bubble curtain) and temporal restrictions (*i.e.,* no vibratory pile driving 144-in piles during August) and, if marine mammals are present, reducing exposure to noise through pile driving shutdown and delay procedures.

Further, the POA notified 14 tribes to the availability of the notice of proposed IHAs for public comment. No subsistence users submitted public comments to NMFS on the proposed IHAs. No tribes have indicated to NMFS concern about the proposed IHAs adversely impacting their subsistence use. NMFS is prescribing much more stringent mitigation and monitoring measures than proposed by the POA, which will reduce the potential impacts to marine mammals. We have found this taking would have a negligible impact on the population, meaning we do not anticipate there to be adverse impacts on the annual rates of recruitment or survival. Therefore, the taking would not impede recovery of CIBW for potential future subsistence use.

Overall, there is little subsistence use of marine mammals near the project area and no tribes have alerted NMFS to any concern over the proposed IHAs. The explanation and support for our findings is described further in the *Unmitigable Adverse Impact Determination* section of this notice.

Comment 22: CBD believes the draft Environmental Assessment fails to comply with the requirements of the National Environmental Policy Act. They stipulate the Draft EA fails to consider a reasonable range of alternatives, lacks a meaningful environmental and cumulative impacts analysis and that NMFS must prepare an EIS.

Response: In accordance with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) Regulations, NMFS is required to consider a reasonable range of alternatives to a Proposed Action, as well as a No Action Alternative. Reasonable alternatives are viable options for meeting the purpose and need for the proposed action. The evaluation of alternatives under NEPA assists NMFS with understanding, and as appropriate, minimizing impacts through an assessment of alternative ways to achieve the purpose and need for our Proposed Action. Reasonable alternatives are carried forward for detailed evaluation under NEPA while alternatives considered but determined not to meet the purpose and need are not carried forward. For the purposes of this EA, an alternative will only meet the purpose and need if it satisfies the requirements of Section 101(a)(5)(D) of the MMPA.

In accordance with NOAA's implementing procedures, the Companion Manual (CM) for NAO 216–6A, Section 6.B.i, NMFS is defining the No Action alternative as not authorizing the requested incidental take of marine mammals under Section 101(a)(5)(D) of the MMPA. This is consistent with our statutory obligation under the MMPA to either: (1) Deny the requested authorization or (2) grant the requested authorization and prescribe mitigation, monitoring, and reporting requirements. The Preferred Alternative (*i.e.,* issuance of the IHAs) includes mandatory mitigation, monitoring, and reporting requirements for POA to achieve the MMPA standard of effecting the least practicable adverse impact on each species or stock of marine mammal and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance. Since NMFS is required to prescribe mitigation to effect the least practicable adverse impact on marine mammals, mitigation that reduces noise impacts on marine mammals is inherently included in Alternative 2 (the proposed action) and is included as part of the analysis of alternative(s) in the Environmental Consequences chapter in the EA. NMFS described both the No Action Alternative and Preferred Alternative in the EA. We have also included an ''Alternatives Considered but Eliminated from Further Consideration'' section in the final EA that considered whether other alternatives could meet the purpose and need while supporting this applicant's proposal to construct a new PCT. There is no requirement under NEPA to consider more than two alternatives, or to consider alternatives that are substantially similar to other alternatives or which have substantially similar consequences. NMFS' range of alternatives is based on the proposed action and the purpose and need, which are linked to NMFS' authorities under the MMPA. For the purposes of analysis under NEPA in the EA, an alternative will only meet the purpose and need if it satisfies the requirements under section 101(a)(5)(D) of the MMPA. Therefore, NMFS determined that, based on our authorities and criteria under the MMPA, which included criteria regarding mitigation measures, appropriate considerations were applied to identify which alternatives to carry forward for analysis.

NMFS disagrees with CBD that our environmental impacts section is not sufficient. We described both the general effects to marine mammals from exposure to noise (*e.g.,* pile driving) and scientific literature identifying responses of CIBWs to pile driving at the POA. We have updated both our analysis in this notice and the final EA with the best available science regarding the newly released technical report describing the status of the CIBW stock (Sheldon and Wade, 2019). In the final EA, we also reviewed potential direct, indirect, and cumulative impacts to protected species and their environment, associated with NMFS' proposed action and alternatives. While the draft EA did not identify specific human activities, such as the Hilcorp seismic survey that CBD noted, we did include a section on the effects of oil and gas development in Cook Inlet that includes seismic work; therefore, this survey was not discounted. In the final EA, we included specifics regarding the work in Cook Inlet for which we currently have ITA requests. Since the Draft EA was released, we have also learned of other activity the POA is planning on implementing as well as proposed plans by Alaska DOT in upper Cook Inlet. We have included those activities in the Cumulative Effects section of the final EA.

CBD is correct that Federal agencies generally prepare an EIS for a major Federal action significantly affecting the quality of the human environment. While CBD acknowledges that significance is determined by considering the context and intensity of the action, and that intensity is evaluated by considering the ten factors listed in 40 CFR 1508.27(b), CBD argues, that if any one of these factors is met, then the agency must prepare an EIS. CBD further argues that, ''the impacts on an endangered species like the environmentally and culturally significant Cook Inlet beluga and its designated critical habitat alone is enough to trigger the need to prepare an EIS.'' NMFS disagrees. The mere presence of one or more factors listed in 40 CFR 1508.27(b) does not necessarily trigger the requirement to prepare an EIS. These factors are specific to evaluating the intensity of potential impacts of an action. NMFS can prepare an EA so long as the record supports the conclusion that potential impacts are not ''significant'' for the purposes of NEPA. Based on the information presented in the application and NMFS' Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (Companion Manual (CM) for NAO 216–6A) (NOAA 2017), Sections 3 and 7, NMFS' determination to prepare an EA is appropriate and in compliance with NEPA and 40 CFR 1501.3 and 40 CFR 1508.9.

Comment 23: CBD states that NMFS must comply with the ESA but asserts that NMFS should not issue take authorization under the ESA because such taking would jeopardize the continued existence of CIBWs and adversely modify their critical habitat.

Response: In our notice of proposed IHAs, NMFS indicated that we have requested section 7 consultation under the ESA. CBD indicates they believe the proposed taking would jeopardize the recovery and survival of CIBWs but did not further explain how they reached this conclusion. NMFS has fully complied with the ESA. NMFS Alaska Region issued a BiOp concluding that issuance of take, by harassment, of CIBW, humpback whales (Mexico Distinct Population Segment (DPS)) and Western DPS (wDPS) of Steller sea lions would not jeopardize the continued existence of those stocks and the takings would not adversely modify critical habitat. The full analysis supporting these conclusions can be found in the Biological Opinion.

Comment 24: In their letter, CBD stated they did not believe NMFS should authorize take of CIBWs and other marine mammals but, if NMFS did take action to do so, we must impose stringent mitigation measures to ensure the least practicable adverse impact on protected species.

Response: NMFS has made the required findings to issue the IHAs, pursuant to the MMPA, and has issued the IHAs. We have also prescribed mitigation measures that effect the least practicable adverse impact on marine mammals, in accordance with the MMPA (see Mitigation section).

Description of Marine Mammals in the Area of Specified Activities

A detailed description of the species likely to be affected by POA's project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (84 FR 72154; December 30, 2019). Please refer to the proposed IHA **Federal Register** notice for these descriptions. Since that notice, there are updates to the abundance and trends on one species: CIBWs. We provide a summary table of marine mammals that may potentially be present in the project area here (Table 3) and a summary of the changes to CIBWs. 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). Additional information on beluga whales may be found in NMFS' 2016 *Recovery Plan for the Cook Inlet Beluga Whale (Delphinapterus leucas*), available online at *https://www.fisheries.noaa.gov/resource/document/recovery-plan-cook-inlet-beluga-whale-delphinapterus-leucas.*

Table 3 lists all species with expected potential for occurrence in upper Cook Inlet and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2019). 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.

TABLE 3—MARINE MAMMAL SPECIES POTENTIALLY OCCURRING IN UPPER COOK INLET, ALASKA

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals)						
Humpback whale	*Megaptera novaeangliae*	Western North Pacific	E/D; Y	1,107 (0.3, 865, 2006)	3	2.6
		Central North Pacific	E/D; Y	10,103 (0.3, 7890, 2006)	83	24
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Beluga whale	*Delphinapterus leucas*	Cook Inlet	E/D; Y	279 (-, 250, 2018) [4]	0.54	0
Killer whale	*Orcinus orca*	Alaska Resident	-/-; N	2,347 (N/A, 2,347, 2012)	24	1
		Alaska Transient	-/-; N	587 (N/A, 587, 2012)	5.9	1
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena*	Gulf of Alaska	-/-; Y	31,046 (0.214, N/A, 1998).	Undet	72
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumetopias jubatus*	Western	E/D; Y	54,267 (N/A, 54,267, 2017).	326	247
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Cook Inlet/Shelikof	-/-; N	28,411 (26,907, N/A, 2018).	807	807

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable because it has not been calculated.

[3] These values, found in NMFS' 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] Sheldon and Wade (2019). 95 percent probability range is 250–317 whales.

Update to CIBW Population Estimate

Until 2020, the best estimate of the CIBW stock was 327 with a minimum estimate of 311 whales (Muto et al., 2019). In 2020, NMFS released an updated population estimate using a new method to estimate group size from the aerial surveys in the analysis of abundance and trends for CIBWs (Boyd et al., 2019). This new method replaced the method developed by Hobbs et al. (2000, 2015) and has several important differences, as these differences contribute to the disparity between the

Hobbs method and the Boyd method. These differences are fully explained in Sheldon and Wade (2019). In summary, the new method leads to some smaller and some larger group size estimates compared to the older Hobbs et al. (2000, 2015) method, when applied to all groups recorded during the period 2004–2016. Using the older method, the rate of population decline is not as great primarily because the 2016 estimate is higher, and there is no 2018 estimate using this older method. Annual abundance was calculated as the median of all the daily abundance estimates, using all days with an acceptable survey. Using the old method, from 2006 to 2016, the rate of decline was estimated to be -0.5 percent per year, (with a 70 percent probability the population is declining) (Shelden et al. 2017). Using the new method, NMFS found from 2008–2018, the estimated trend in the CIBW population is a decline of -2.3 percent per year. The abundance estimates indicate there is a 99.7 percent probability of a decline, and a 93.0 percent probability of a decline that is more than 1 percent per year.

The best estimate of 2018 abundance for the CIBW population from the aerial survey data is 279 (95 percent probability interval 250 to 317). This is based on the estimate of smoothed abundance for 2018, as described in Sheldon and Wade (2019). A comparison of the population estimates over time is presented in Figure 3.

While Sheldon and Wade (2019) provides explanations for the differences between model results, including inadequacies and biases, the authors do not postulate on the reason for population decline in general (which was evident using both models); however, recent literature suggests prey reductions may be a critical contributing factor (Norman et al., 2019). This is not unexpected as reduced prey availability has been directly linked to increased mortality and reduced health and survival of other marine mammals populations such as the Southern Resident killer whale (*e.g.,* Ward et al., 2009, Trites and Rosen, 2017) and California sea lion (*e.g.,* McClatchie et al., 2016).

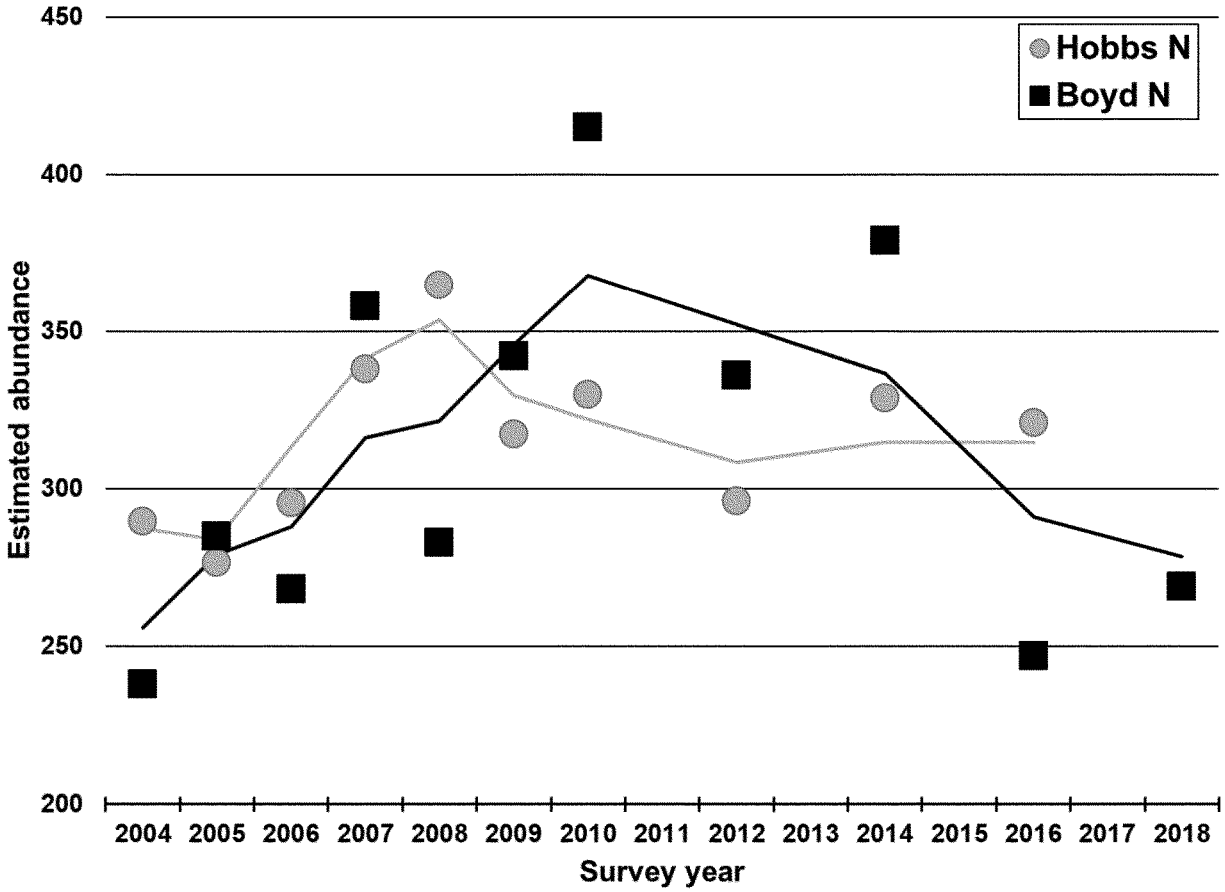

Figure 3. Annual estimates of abundance for both group size estimation methods. The moving average of each set of estimates is also plotted. Taken from Sheldon and Wade (2019).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The **Federal Register** notice for the proposed IHAs (84 FR 72154; December 30, 2019) included a discussion of the potential effects of the specified activities on marine mammals and their habitat, therefore that information is not repeated in detail here; please refer to that **Federal Register** notice for that information. No new data is available that suggests the potential responses and impacts to marine mammals would differ from those discussed in the notice of proposed IHAs.

Estimated Take

This section provides an estimate of the number of incidental takes authorized through each of the IHAs, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination for the two separate IHAs.

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 primarily be by Level B harassment, as pile driving has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for mysticetes, high frequency species, and phocids because predicted auditory injury zones are larger than for mid-frequency species and otariids. Auditory injury is unlikely to occur for mid-frequency species and otariids. The mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. In general, NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. However, ambient noise levels within Knik Arm are above the 120-dB threshold, and therefore, for purposes of this analysis, NMFS considers received levels above those of the measured ambient noise (122.2 dB) to constitute Level B harassment of marine mammals incidental to continuous noise, including vibratory pile driving.

Results from the most recent acoustic monitoring conducted at the port are presented in Austin et al (2016) and Denes et al (2016) wherein noise levels were measured in absence of pile driving from May 27 through May 30, 2016 at two locations: Ambient-Dock and Ambient- Offshore. NMFS considers the median sound levels to be most appropriate when considering background noise levels for purposes of evaluating the potential impacts of the POA's PCT Project on marine mammals. By using median value, which is the 50th percentile of the measurements, for ambient noise level, one will be able to eliminate the few transient loud identifiable events that do not represent the true ambient condition of the area. This is relevant because during two of the four days (50 percent) when background measurement data were being collected, the U.S. Army Corps of Engineers was dredging Terminal 3 (located just north of the Ambient-Offshore hydrophone) for 24 hours per day with two 1-hour breaks for crew change. On the last two days of data collection, no dredging was occurring. Therefore, the median provides a better representation of background noise levels when the PCT project would be occurring. With regard to spatial considerations of the measurements, the Ambient-Offshore location is most applicable to this discussion as it is consistent with accepted methodology for measuring background noise levels. The median ambient noise level collected over four days at the end of May at the Ambient-Offshore hydrophone was 122.2 dB. We note the Ambient-Dock location was quieter, with a median of 117 dB; however, that hydrophone was placed very close to the dock and not where we would expect Level B harassment to occur given mitigation measures (*e.g.,* shut downs). If additional data collected in the future warrant revisiting this issue, NMFS may adjust the 122.2 dB rms Level B harassment threshold.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The POA's proposed activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in Table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	$L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	$L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	$L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	$L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	$L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	$L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	$L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	$L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	$L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (i.e., varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activities that will feed into identifying the areas ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The estimated sound source levels and transmission loss coefficient used in our analysis are based on direct measurements during installation of unattenuated 48-in piles during the POA's 2016 TPP and measurements collected during marine construction projects conducted by the U.S. Navy. All source levels used in our analysis are presented in Table 5. We note that both sound source verification tests (in situ measurements at 10 m to refine source levels) as well as measurements taken at the estimated Level B harassment isopleths and in the far field (+1 km) will be collected at the onset of pile driving to verify these estimates.

TABLE 5—ESTIMATED SOUND SOURCE LEVELS WITH AND WITHOUT A BUBBLE CURTAIN

Method and pile size	Sound level at 10 m						Data source
Vibratory	Unattenuated [1]			Bubble curtain			
	db rms			7 dB reduction, dB rms			
144-in	178			171			Caltrans 2015.
48-in	168			161			Austin et al 2016.
36-in	166			159			Navy 2015.
24-in	161			154			Navy 2015.
Impact	Unattenuated [1]			Bubble curtain			
	dB rms	dB SEL	dB peak	dB rms	dB SEL	dB peak	
144-in	209	198	220	202	191	213.	Caltrans 2015
48-in	200	187	215	193	180	208	Austin et al 2016.
36-in	194	184	211	187	177	204	Navy 2015.
24-in	193	181	210	186	174	203	Navy 2015.

[1] We note the only piles that may be driven or removed without a bubble curtain are 24-in battered piles. We included unattenuated SLs here for 36-in, 48-in, and 144-in piles to demonstrate how the 7dB reduction for bubble curtains was applied.

During the TPP, JASCO computed transmission loss (TL) coefficients, derived from fits of the received sound level data versus range. TL coefficients varied between piles with values ranging from 13 to 19.2 for impact pile driving and from 12.6 to 17.9 for vibratory pile driving when using sound attenuation devices. Results for the unattenuated hydraulic impact hammer yielded the highest TL coefficient, 19.2, indicating that sounds from the hydraulic impact hammer decayed most rapidly with range compared to the other hammers. The TL coefficient for the unattenuated diesel impact hammer averaged 17.5. Sounds from the unattenuated vibratory hammer had the lowest TL coefficient, with values of 16.1 and 16.9.

Based on these data, the POA proposed different transmission loss rates depending on if SEL (used for Level A harassment) or rms (used for Level B harassment) values were being evaluated. SPLrms is a pressure metric and SEL an energy metric. The difference in TL coefficient is a reflection of how SPLrms or SEL is dissipated in the marine environment. During underwater sound propagation, pressure amplitude tends to suffer more loss due to multipath propagation and reverberation, while acoustic energy does not dissipate as rapidly. Accordingly, the POA proposed using TL rate of 16.85 for assessing potential for Level A harassment from impact pile driving but a TL rate of 18.35, based on Austin et al. (2016), when assessing potential for Level B harassment from impact pile driving. For vibratory pile

driving, SPLrms is used for both Level A harassment and Level B harassment analysis and, based on Austin et al. (2016) the POA applied a TL rate of 16.5. NMFS found these transmission loss rates acceptable and carried them forward in our analysis. Again, on site acoustic monitoring in both the near and far field (to capture any sediment-borne noise) at the onset of pile driving will verify estimates made in our analysis.

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources (such as pile driving), NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS.

The User Spreadsheet also includes a default, single frequency weighting factor adjustment (WFA) to account for frequency hearing groups. During the 2016 TPP, the POA collected direct measurements of sound generated during installation of 48-in piles. The spectra associated with impact and vibratory driving 48-in unattenuated piles was also derived. Therefore, we accepted POA's applied spectra approach for 48-in piles but relied on the User Spreadsheet default WFA for all other pile sizes.

Inputs used in the User Spreadsheet for 24-in, 36-in and 144-in pilesare reported in Table 6.

TABLE 6—NMFS USER SPREADSHEET INPUTS

	24-in (unattenuated)	24-in (bubble curtain)	36-in (bubble curtain)	48-in (bubble curtain)	144-in (bubble curtain)
User Spreadsheet Input: Impact Pile Driving (TL = 16.85)					
Spreadsheet Tab Used.	(E.1) Impact pile driving	(E.1) Impact pile driving.	(E.1) Impact pile driving.	(E.1) Impact pile driving.	(E.1) Impact pile driving.
Source Level (Single Strike/shot SEL).	181	174	177	180	191
Weighting Factor Adjustment (kHz).	2	2	2	measured spectra	2
Number of strikes pile.	50 (re-strikes)	50 (re-strikes)	3,000	2,300 or 3,000	5,000
Piles per day	1–4	1–4	1–3	1–3	0.3 or 0.7
User Spreadsheet Input: Vibratory Pile Driving (TL = 16.5)					
	24-in (unattenuated)	24-in (bubble curtain)	36-in (bubble curtain)	48-in (bubble curtain)	144-in (bubble curtain)
Spreadsheet Tab Used.	(A) Non-Impul, Stat, Cont.	(A) Non-Impul, Stat, Cont..	(A) Non-Impul, Stat, Cont..	(A) Non-Impul, Stat, Cont..	(A) Non-Impul, Stat, Cont.
Source Level (SPL RMS).	161	154	159	161	171
Weighting Factor Adjustment (kHz).	2.5	2.5	2.5	measured spectra	2.5
Time to drive single pile (minutes) [1].	75	75	75	30	45
Piles per day	1–4	1–4	1–4	1 [2]	1

[1] In some cases, only 30 minutes may be required to drive a pile using a vibratory hammer; however, here we default to the greatest amount of time indicated per pile.

[2] The POA indicated a vibratory hammer would only be used if an obstruction is encountered; therefore, the most probable scenario is, at most, only one 48-in pile per day would require use of a vibratory hammer.

To calculate the Level B harassment isopleths, NMFS considered SPLrms source levels and the corresponding TL coefficients of 18.35 and 16.5 for impact and vibratory pile driving, respectively. The resulting Level A harassment and Level B harassment isopleths are presented in Table 7.

TABLE 7—DISTANCES TO LEVEL A HARASSMENT, BY HEARING GROUP, AND LEVEL B HARASSMENT THRESHOLDS PER PILE TYPE AND INSTALLATION METHOD

Pile size	Hammer type	Attenuation	Piles installed/ day	Level A harassment (m)					Level B harassment (m)
				LF	MF	HF	PW	OW	
48-in (2,300 strikes per pile).	Impact	Bubble Curtain	1	655	34	766	376	36	[1] 824
			2	989	51	1,156	567	55	
			3	1,258	65	1,470	721	70	

TABLE 7—DISTANCES TO LEVEL A HARASSMENT, BY HEARING GROUP, AND LEVEL B HARASSMENT THRESHOLDS PER PILE TYPE AND INSTALLATION METHOD—Continued

Pile size	Hammer type	Attenuation	Piles installed/ day	Level A harassment (m)					Level B harassment (m)
				LF	MF	HF	PW	OW	
48-in (3,000 strikes per pile).	Impact	Bubble Curtain	1	767	39	897	440	43	824
			2	1,158	59	1,353	664	64	
			3	1,473	76	1,721	844	82	
48-in	Vibratory	Bubble Curtain	1	5	1	7	3	0	2,247
36-in	Vibratory	Bubble Curtain	3	12	1	17	8	1	1,699
			4	14	2	20	9	1	
	Impact	Bubble Curtain	1	509	26	595	292	28	296
			2	768	39	898	440	43	
			3	978	50	1,142	560	54	
24-in	Vibratory	Bubble Curtain	3	3	0	5	2	0	846
			4	7	1	10	4	0	
		Unattenuated (6 battered piles in Phase 2).	3	16	2	22	10	1	2,247
			4	19	2	27	12	1	
	Impact (50 re-strikes per pile) [2].	Bubble Curtain	1	30	2	35	17	2	261
			4	68	4	79	39	4	
		Unattenuated (6 battered piles in Phase 2).	1	78	4	91	44	4	629
			4	176	9	206	101	10	
144-in	Impact	Bubble Curtain	0.3	2,286	117	2,672	1,311	127	1,945
			0.7	3,781	194	4,418	2,167	210	1,945
	Vibratory		1	24	3	34	15	1	9,069

[1] The Level B harassment isopleth of 824 m is an average of modeled distances based on *in situ* data presented in Austin et al. (2016; Table 12).
[2] For impact hammering of 24-in temporary piles, we include information only for one or four piles, to provide the general range of very small zones. The number of piles may vary from one to four piles per day.

Marine Mammal Occurrence and Take Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals and present take calculations.

For all species of cetaceans other than beluga whales, density data is not available for upper Cook Inlet. Therefore, the POA relied on marine mammal monitoring data collected during past POA projects. These data cover the construction season (April through November) across multiple years. Estimated exposure from pile installation for all marine mammals except beluga whales is calculated by the following equation: Exposure estimate = N * # days of pile installation, where: N = highest daily abundance estimate for each species in project area across all years of data.

Harbor Seals

Marine mammal monitoring data collected during previous POA projects were used to estimate daily sighting rates for harbor seals in the project area (see Table 4–1 in POA's application). The highest individual sighting rate recorded for a previous year was used to quantify take of harbor seals for pile installation associated with the PCT. The number of sightings of harbor seals during 2016 TPP construction monitoring was 28 sightings recorded over 83.5 hours of monitoring from May 3 through June 21, 2016. Based on these observations, the sighting rate during the 2016 TPP construction monitoring period was one harbor seal every 3 hours, or approximately four harbor seals per 12-hour work day. Given the likely increase in harbor seal abundance over the years, the POA and NMFS doubled this number to estimate take (*i.e.,* up to 8 seals per day could be taken by harassment). However, the Commission commented that because previous monitoring data indicated a maximum of nine seals were observed on a particular day during previous monitoring, we should use 9 seals (not 8) for days when Level B harassment zones are within 2 km and double this number (18 seals per day) when Level B harassment zones extend to 4 kms since all seals were observed within 2 kms, as they are difficult to observe beyond this distance. While this is conceptually a reasonable alternative, the take numbers resulting from use of 8 seals per day far exceed what the years of monitoring data indicate as reasonable estimates of potential harassment. Over the course of 8 years of data (no monitoring was conducted in 2012, 2013, and 2014 as no pile driving was conducted at the POA during these years), the maximum number of seals observed in a year (2009) was 57 seals (while other years ranged from 0–34 seals total). The monitoring conducted during 2009 was extensive (3,222 hours over 214 days from March through December). The average number of seals observed per year across all years of monitoring was 17 seals. Therefore, it is reasonable to assume our originally proposed take estimates are more than sufficient to account for potential harassment from the PCT project, as the take estimates for Phase 1 and Phase 2 are more than 17 and 10 times the maximum number of seals observed in any given prior year, respectively. This 10 to 17 fold increase adequately accounts for seals present at greater than 2 kms. Therefore, we maintain our original take estimate approach.

Pile installation and removal is anticipated to take approximately 127 days for Phase 1 and 75 days for Phase 2. Therefore, we estimate no more than 1,016 instances of harbor seal take during Phase 1 (8 harbor seals per day * 127 days) and 600 instances of harbor seal take (8 harbor seals per day * 75 days) during Phase 2.

The mouth of Ship Creek, where harbor seals tend to concentrate is located approximately 700 m from the southern end of the PCT, and is therefore located outside the harbor seal Level A harassment zone for the majority of pile sizes for both impact and vibratory pile installation. However, there is potential for Level A harassment near Ship Creek during installation of three 48-in piles per day and installation of 144-in piles. We estimate

30 percent of the estimated take could be in the form of Level A harassment, as approximately 30 percent of the work may result in Level A harassment isopleths extending to Ship Creek. Therefore, the POA has requested, and NMFS has authorized 305 Level A harassment and 711 Level B harassment takes in Phase 1 and 180 Level A harassment and 420 Level B harassment takes in Phase 2.

Steller Sea Lions

Steller sea lions are anticipated to be encountered in low numbers, if at all, within the project area. Three sightings of what was likely a single individual occurred in the project area in 2009 and two sightings occurred in 2016. Based on observations in 2016, we anticipate an exposure rate of 2 individuals every 19 days during PCT pile installation and removal. Based on this rate, we are authorizing 13 sea lion takes during Phase 1 (127 days * [2 sea lions every 19 days]) and 8 Steller sea lion takes during Phase 2 (75 days for Phase 2 * [2 sea lions every 19 days]). During installation of 144-in piles (Phase 2), the Level A harassment isopleth extends beyond 100 m. Although Steller sea lions are readily detectable at these distances, we are not requiring the POA to shut down if a Steller sea lion is observed. Steller sea lions are rarely present in Knik Arm; however, they can linger in the area for multiple days. During Phase 1, the Level A harassment isopleth is less than the 100 m shutdown zone for all scenarios; therefore, the potential for Level A harassment take is discountable. During installation of the 144-in piles in Phase 2, there is a low potential for Level A harassment and an animal may remain for a couple of days; therefore, we allocate two takes in Phase 2 to Level A harassment.

Harbor Porpoise

Previous monitoring data at the POA were used to evaluate daily sighting rates for harbor porpoises in the project area. During most years of monitoring, no harbor porpoises were observed. The highest individual sighting rate for any recorded year during pile installation and removal associated with the PCT was an average of 0.09 harbor porpoises per day during 2009 construction monitoring, but this value may not account for increased sightings in Upper Cook Inlet (Shelden et al. 2014). Therefore, the POA assumed that one harbor porpoise could be observed every 2 days of pile driving. Based on this assumption, the POA has requested, and NMFS has authorized, 64 takes during Phase 1 (127 days * [1 harbor porpoise every 2 days]) and 38 takes during Phase 2 (75 days for Phase 2 * [1 harbor porpoise every 2 days]). This estimate also covers the possibility that larger groups (2–3 individuals) of harbor porpoise could occur occasionally.

Harbor porpoises are relatively small cetaceans that move at high velocities, which can make their detection and identification at great distances difficult. Using the NMFS User Spreadsheet, impact driving 36-in, 48-in and 144-in piles results in Level A harassment isopleths larger than the Level B harassment isopleth. Vibratory driving and removal result in much smaller Level A harassment zones than Level B harassment zones and many temporary piles (the bulk of the work) would be installed and removed with a vibratory hammer. Further, the Level A harassment isopleths consider long durations and harbor porpoise are likely moving through the area, if present, not lingering. Therefore, we authorized approximately one-third of the total expected take in the form of Level A harassment. For Phase 1, we authorized 21 takes by Level A harassment and 43 takes by Level B harassment. For Phase 2, we authorized 13 Level A harassment and 25 Level B harassment takes.

Killer Whales

Few, if any, killer whales are expected to approach the project area. No killer whales were sighted during previous monitoring programs for the Knik Arm Crossing and POA construction projects, including the 2016 TPP. The infrequent sightings of killer whales that are reported in upper Cook Inlet tend to occur when their primary prey (anadromous fish for resident killer whales and beluga whales for transient killer whales) are also in the area (Shelden et al. 2003). Previous sightings of transient killer whales have documented pod sizes in upper Cook Inlet between one and six individuals (Shelden et al. 2003). The potential for exposure of killer whales within the Level B harassment isopleths is anticipated to be extremely low. Level B harassment take is conservatively estimated at no more than 12 individuals during Phase 1 and Phase 2 to account for two large (n=12) groups or several smaller groups. No Level A harassment take for killer whales is anticipated or authorized due to the small Level A harassment zones and implementation of a 100 m shutdown which is larger than Level A harassment isopleths.

Humpback Whales

Sightings of humpback whales in the project area are rare, and the potential risk of exposure of a humpback whale to sounds exceeding the Level B harassment threshold is low. Few, if any, humpback whales are expected to approach the project area. However, there were two sightings in 2017 of what was likely a single individual at the Ship Creek Boat Launch (ABR 2017) which is located south of the project area. Based on these data, the POA conservatively estimates one humpback whale could be harassed every 16 days of pile driving. Therefore, the POA requested 8 humpback whale takes during Phase 1 (127 days for Phase 1 * [1 humpback whale every 16 days]) and 5 takes (75 days for Phase 2 * [1 humpback whale every 16 days]) for Phase 2. This could include sighting a cow-calf pair on multiple days or multiple sightings of single humpback whales. The POA did not request Level A harassment take of humpback whales; however, based on the large distances to the Level A harassment thresholds relative to Level B harassment isopleths and the fact humpback whale sightings in Upper Cook Inlet are rare, NMFS authorized two Level A harassment takes per year to account for a single individual or a cow/calf pair. Therefore, NMFS has authorized two Level A harassment takes and six Level B harassment takes during Phase 1 and two Level A harassment takes and three Level B harassment takes for Phase 2.

Beluga Whales

For beluga whales, we looked at several sources of information on marine mammal occurrence in upper Cook Inlet to determine how best to estimate the potential for exposure to pile driving noise from the PCT Project. In their application, the POA took a two-step approach to estimating Level B harassment take. The POA first estimated the numbers of beluga whales potentially exposed to noise levels above the Level B harassment threshold for pile installation and removal using the following formula: Beluga Exposure Estimate = N * Area * number of days of pile installation/removal, where: N = maximum predicted # of beluga whales/km^2 in Knik Arm (0.291 whales/km^2) based on data from Goetz et al. (2012a) and Area = Area ensonified above Level B harassment threshold (km^2). We note the actual beluga whale densities within the Level B harassment isopleths predicted for the PCT project ranged from 0.042 to 0.236 beluga whales/km^2. However, the POA applied the highest beluga whale density in upper Knik Arm. The higher densities north of the POA are expected as beluga whales tend to concentrate in Eagle Bay to forage whereas in the lower Arm, where the

POA is located, habitat use is more commonly associated with traveling. The POA's simple calculation results in 103 takes in Phase 1 and 125 takes in Phase 2. The second step in POA's take estimate approach was to apply a 50 percent correction factor to their density-based calculation. The POA provided several reasons why this reduction factor was appropriate, including, but not limited to: The POA's commitment to using a bubble curtain means that noise levels along the western side of Knik Arm will remain below the regulatory thresholds; providing a travel corridor for beluga whales to access upper Knik Arm; for the majority of PCT construction and pile installation and removal, only approximately half of the width of Knik Arm, along the eastern shore, would be ensonified; beluga whales observed in Knik Arm during the autumn were most frequently sighted on the western side of the arm (Funk et al. 2005); and beluga whales are present in Knik Arm year-round, but sightings are much lower in winter through early summer.

We reviewed the POA's density-based take calculation approach and their reasons for applying a 50 percent correction factor. We determined use of the Goetz density data for this specific project does not represent the best available scientific information in this circumstance because the density data is based on June aerial surveys while the PCT project is occurring from April through November, the data is over seven years old, and the multiple years of monitoring data collected by the POA is not incorporated into this approach. Regarding the rationale for applying a 50 percent correction factor, we found the use of a bubble curtain and the fact the majority of pile driving would ensonify half or less than half of the width of Knik Arm is already captured by the ensonified area which is embedded into the take calculation. The POA is not pile driving during winter when beluga whale abundance is lowest and although early summer tends to see lower beluga abundance, the density used in the take calculation is from June surveys.

To better capture beluga whale distribution and abundance, we undertook a multi-step analysis consisting of an evaluation of long-term, seasonal sighting data, mitigation and monitoring measures, the amount of documented exposure from previous POA projects compared to authorized take, and considered group size. First, in lieu of density data, NMFS applied sighting rate data presented in Kendell and Cornick (2015) to estimate hourly sighting rates per month (April through November). We then identified hours of pile driving per month. The POA indicated there will be extended durations when no pile driving is happening (*e.g.,* later in the season when decking and other out-of-water work is occurring); however, the schedule could not be more refined than assuming an equal work distribution across the construction season. The POA did indicate the first two weeks of April and the last two weeks in November would be most likely utilized for equipment mobilization and demobilization; therefore, pile driving effort during those months were limited to two weeks. The data and calculated exposure estimates are presented below in Table 8. These calculations assume no mitigation (*i.e.,* uncorrected take estimates) and that all animals observed would enter a given Level B harassment zone during pile driving. In total, we would expect approximately 94 exposures in Phase 1 and 60 exposures in Phase 2.

TABLE 8—UNCORRECTED BELUGA WHALE EXPOSURE ESTIMATES FOR PHASE 1 AND PHASE 2

Month	Monitoring data [1]			Estimated instances of take			
	Effort hours	Number of whales observed	Average whale/hr	Pile driving hours phase 1 [2]	CIBW exposures phase 1	Pile driving hours phase 2 [2]	CIBW exposures phase 2
April	12	2	0.17	25.64	4.27	16.37	2.73
May	156	40	0.26	51.29	13.15	32.71	8.39
June	280	8	0.03	51.29	1.47	32.71	0.94
July	360	2	0.01	51.29	0.28	32.71	0.18
August	426	269	0.63	51.29	32.38	32.71	20.65
Sept	447	169	0.38	51.29	19.37	32.71	12.35
October	433	22	0.05	51.29	2.61	32.71	1.66
Nov	215	175	0.82	25.64	20.91	16.37	13.35
Total	2,317	685	0.30	359.02	94.44	229.00	60.25

[1] From Kendell and Cornick 2015.
[2] Assumes equal work distribution/month except in April and November when the POA has indicated they would be conducting only 2 weeks of pile driving due to time needed for mobilization and demobilization.

NMFS then considered the prescribed mitigation as well as distribution of beluga whales in Knik Arm. In the POA's application, they proposed a 100-m shutdown zone for all marine mammals. However, as described in more detail below, NMFS has prescribed additional mitigation designed to reduce Level B harassment take as well as avoid Level A harassment take. We recognize that in certain situations, pile driving may not be able to be shut down prior to whales entering the Level B harassment zone due to safety concerns. During previous monitoring, sometimes beluga whales were initially observed when they surfaced within the harassment zone. For example, on November 4, 2009, 15 whales were initially sighted approximately 950 meters north of the project site near the shore, and then they surfaced in the Level B harassment zone during vibratory pile driving (ICRC 2009b). Construction activities were immediately shut down, but the 15 whales were nevertheless exposed within the Level B harassment zone. On other occasions, beluga whales were initially sighted outside of the harassment zone and shutdown was called, but the beluga whales swam into the harassment zone before activities could be halted, and exposure within the harassment zone occurred. For example, on September 14, 2009, a construction observer sighted a beluga whale just outside the harassment zone, moving quickly towards the 1,300 m Level B harassment zone during vibratory pile driving. The animal entered the harassment zone before construction activity could be shut down (ICRC 2009c). However, we note that for the PCT, there will be four PSO

stations, with the southern-most station near Point Woronzof and the northern-most station at the north end of POA property (immediately south of Cairn Point). No less than 11 PSOs will be on watch at any given time during days pile driving is occurring. In addition, we expect the Level B harassment zones for a majority of work to be smaller than previous zones given the use of the confined bubble curtain system with the casing pile. For these reasons, we believe the ability to detect whales and shut down prior to them entering the Level B harassment zones will be enhanced from previous years.

To more accurately estimate potential exposures than simply using the uncorrected numbers, which does not account for any mitigation, we looked at previous monitoring results at the POA in relation to authorized take numbers. Between 2008 and 2012, NMFS authorized 34 beluga whale takes per year to POA, with the same Level B harassment shutdown mitigation measure that are included in the IHAs (we note that in these IHAs, we have also included additional mitigation designed to reduce the potential for take). The percent of the authorized takes that may have occurred as a result of documented exposures within harassment zones during this time period ranged from 12 to 59 percent with an average of 36 percent (Table 9). The previous method of estimating take was based on density; however, the results between using densities versus sighting rate are somewhat comparable (*e.g.,* 94 exposures in Phase 1 using sighting rates versus 103 exposures using the highest density in Knik Arm). Further, there was extensive scientific monitoring and POA construction monitoring occurring during these time periods; therefore, we believe there is little potential that animals were taken but not observed. Therefore we believe this first step in our analysis is reasonable.

TABLE 9—AUTHORIZED AND REPORTED BELUGA WHALE TAKES DURING POA ACTIVITIES FROM 2009–2012

ITA effective dates	Reported takes	Authorized take	Percent of authorized takes occurred
15 July 2008–14 July 2009	12	34	35
15 July 2009–14 July 2010	20	34	59
15 July 2010–14 July 2011	13	34	38
15 July 2011–14 July 2012	4	34	12

Second, we applied the highest percentage of previous takes (59 percent) to ensure potential impacts to beluga whales are adequately evaluated. Therefore, we assume that approximately 59 percent of the takes calculated for Phase 1 (n=94) and Phase 2 (n=64) will actually be realized. This approach is further supported by the mitigation measures, which are strict shutdown requirements for CIBWs, with a goal of avoiding Level B harassment take altogether.

Finally, we then considered group size from the long-term scientific monitoring effort and POA opportunistic data to determine if these numbers represented realistic scenarios. Figure 4 presents data from the scientific monitoring program. The scientific monitoring data set documented 390 beluga whale sightings.

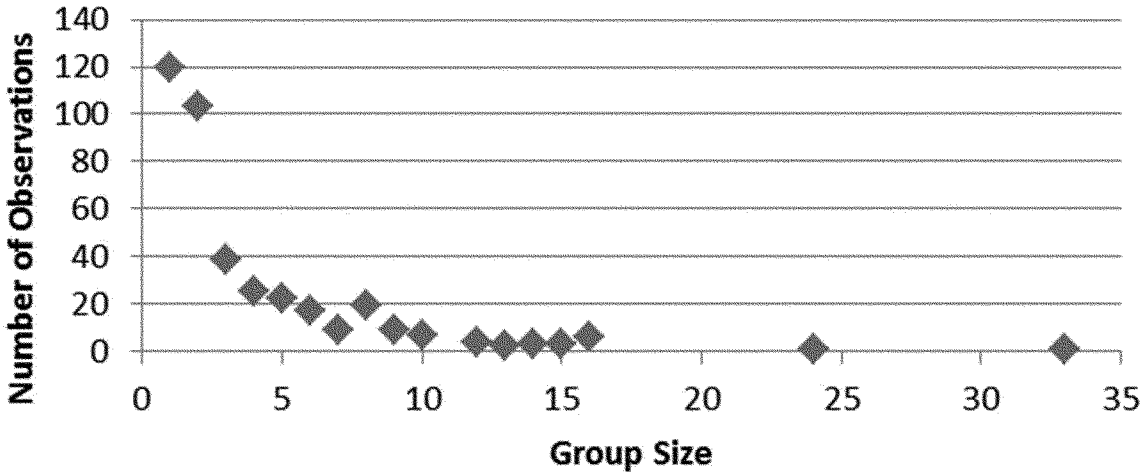

Figure 4. CIBW Sighting Data from POA Scientific Monitoring.

Group size exhibits a mode of 1 and a median of 2, indicating that over half of the beluga groups observed over the 5-year span of the monitoring program were of individual beluga whales or groups of 2. The 95th percentile of group size from the APU scientific monitoring data set is 11.1 beluga whales. This means that, of the 390 documented beluga whale groups in this data set, 95 percent consisted of fewer than 11.1 whales; 5 percent of the groups consisted of more than 11.1 whales. We conclude the amount of take authorized following the approach above allows for the potential for both several small and some large groups to be exposed to noise above NMFS

harassment thresholds. When considering the extensive monitoring (four PSO locations) and mitigation never before required (*e.g.,* pre-clearance of greater than the Level B harassment zone), the amount of take authorized is justified.

For reasons described above, NMFS believes this approach adequately analyzes the risk of beluga whale exposure to Level B harassment from the PCT Project. We conclude there is the potential for 55 exposures in Phase 1 and 35 exposures in Phase 2 (Table 10).

TABLE 10—BELUGA WHALE LEVEL B HARASSMENT EXPOSURES

PCT construction phase	Calculated exposure	Authorized take [1]
Phase 1—2020	94	55
Phase 2—2021	60	35

[1] Authorized take is identified as 59 percent of the calculated exposures using sighting rates.

In summary, the total amount of Level A harassment and Level B harassment authorized for each marine mammal stock is presented in Table 11.

TABLE 11—AUTHORIZED AMOUNT OF TAKE, BY STOCK AND HARASSMENT TYPE

Species	Stock	Phase 1 (2020)			Phase 2 (2021)		
		Level A	Level B	Percent of stock	Level A	Level B	Percent of stock
Humpback whale	Central or Western N Pacific	2	6	0.7	2	3	0.7
Beluga whale	Cook Inlet	0	55	19.7	0	35	12.5
Killer whale	Transient/Alaska Resident	0	12	2	0	12	2
Harbor porpoise	Gulf of Alaska	21	43	0.2	13	25	0.2
Steller sea lion	Western	0	13	<0.1	2	6	<0.1
Harbor seal	Cook Inlet/Shelikof	305	711	3.6	180	420	2.1

Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such 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), the likelihood of effective implementation (probability implemented as planned), and;

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The POA presented mitigation measures in section 11 of their application that NMFS found did not effect the least practicable adverse impact on marine mammals, namely CIBWs. Therefore, NMFS worked with the POA to greatly improve on mitigation measures that both reduce noise into the aquatic environment and reduce the potential for CIBWs to be adversely impacted from any unavoidable noise exposure.

A key mitigation measure NMFS considered for this project is reducing noise levels propagating into the environment. The POA will use a confined bubble curtain on all piles in Phase 1 when water depth is deep enough to deploy the bubble curtain. At this time, NMFS is not requiring an confined bubble curtain for Phase 2 because the contractor has not been chosen by POA at this time, the effectiveness of the confined bubble curtain will be proven during Phase 1 and currently, there is no casing pile large enough to encapsulate 144-in piles. However, at minimum, an unconfined bubble curtain will be required for all plumb piles in Phase 2.

In addition to noise attenuation devices, NMFS considered practicable work restrictions. For installation of 144-in piles included in Phase 2 (2021), NMFS has determined that given the extensive Level B harassment zone generated from this activity, vibratory driving these large piles during peak beluga whale season poses an amount of risk and uncertainty to the degree that it should be minimized. This August peak is confirmed through acoustic monitoring (Castellote et al. 2020) where the authors indicate beluga whales appeared concentrated in the upper inlet year-round, but particularly feeding in river mouths from April–December, shifting their geographical foraging preferences from the Susitna River region towards Knik Arm in mid-August, and dispersing towards the mid inlet throughout the winter. Therefore, vibratory driving 144-in piles will not

occur during August. Further, to minimize the potential for overlapping sound fields from multiple stressors, the POA will not simultaneously operate two vibratory hammers for either pile installation or removal. This measure is designed to reduce simultaneous in-water noise exposure. Because impact hammers will not likely be dropping at the same time, and to expedite construction of the project to minimize pile driving during peak beluga whale abundance periods, NMFS is not proposing to restrict the operation of two impact hammers at the same time.

NMFS also considered other means by which to remove piles since the majority of piles installed for this project are temporary. NMFS inquired about the potential to direct pull piles or cut them off at the mudline; thereby, reducing in-water noise levels. The POA responded that the depth at which temporary piles would be installed and substrate type precludes directly pulling the piles. Cutting piles at the mudline also presents navigational (*e.g.,* anchoring) and safety concerns. Therefore, temporary piles will be removed with a vibratory hammer; however, all will be done so in the confines of a bubble curtain.

In their IHA application, the POA proposed a 100-m shutdown zone for all marine mammals or, where the Level A harassment zone was deemed to be greater than 100 m, a shutdown zone equivalent to the Level A harassment zone. NMFS found this measure did not effect the least practicable adverse impact on all marine mammals for several reasons.

First, except for 48-in piles, the Level A harassment zones in the application were based on estimated spectra, a methodology that NMFS does not believe appropriate. Therefore, NMFS calculated Level A harassment zones for all piles (except 48-in piles) using the single frequency, default weighting factor adjustment provided in the NMFS User Spreadsheet. As shown in Table 7, Level A harassment zones for low-frequency and high frequency cetaceans and pinnipeds are relatively large when considering multiple piles installed per day and installation of the 144-in piles. Sighting rates at these distances, specifically for harbor seals and porpoise, are likely ineffective to avoid take. Therefore, the POA's proposal to shutdown at the Level A harassment zone is unlikely to be effective for smaller species (*i.e.,* harbor seal and harbor porpoise). Therefore, while the POA has the liberty to shutdown at greater than 100 m; this is likely a more reasonable distance to observe these small, erratic species, making the mitigation measure more effective. For these reasons, the IHAs include a 100-m shutdown zone for all marine mammals (except CIBWs) and has issued Level A take, where appropriate.

For beluga whales, NMFS determined the proposed shutdown zone of 100 m or the Level A harassment zone (if greater than 100 m) was not consistent with the conservation intentions of the POA nor what NMFS would consider as effecting the least practicable adverse impact based on the proposed project description and acoustic analysis. NMFS and the POA entered into discussions to address these issues and have determined that measures from previous IHAs should be carried over (*e.g.,* shutdown at the Level B harassment zone) but additional measures would ensure valuable protection and conservation of CIBWs. Therefore, NMFS has included mitigation measures exceeding those proposed by the POA in their application:

- Prior to the onset of pile driving, should a CIBW be observed approaching the mouth of Knik Arm, pile driving will be delayed. This in-bound pre-clearance line extends from Point Woronzof to approximately 2.5 kms west of Point McKenzie. Pile driving may commence once the whale(s) moves at least 100 m past the Level B harassment zone and on a path away from the zone. A similar pre-pile driving clearance zone will be established to the north of the POA (from Cairn Point to the opposite bank), allowing whales to leave Knik Arm undisturbed. Similar to the in-bound whale clearance zone, pile driving may not commence until a whale(s) moves at least 100 m past the Level B harassment zone and on a path away from the zone. If non-beluga whale species are observed within or likely to enter the Level B harassment zone prior to pile driving, the POA may commence pile driving but only if those animals are outside the 100 m shutdown zone.
- If pile driving has commenced and a CIBW is observed within or likely to enter the Level B harassment zone, pile driving will shut down and not re-commence until the whale is out of and on a path away from the Level B harassment zone or until no beluga whale has been observed in the Level B harassment zone for 30 minutes.
- If vibratory hammering is required on a 144-in pile, it may not be possible to monitor the entire Level B harassment zone, as this zone may extend beyond the pre-clearance zone. In this case, the pre-clearance zone remains applicable.
- If, during pile driving 24-, 36-, and 48-in piles, PSOs can no longer effectively monitor all waters within the CIBW Level B harassment due to environmental conditions (*e.g.,* fog, rain, wind), pile driving may continue only until the current segment of pile is driven; no additional sections of pile or additional piles may be driven until conditions improve such that the Level B harassment zone can be effectively monitored. If the Level B harassment zone cannot be monitored for more than 15 minutes, the entire Level B harassment zone must be cleared again for 30 minutes prior to pile driving.

In addition to these measures which greatly reduce the potential for harassment to CIBWs and establish shutdown zones that realistically reflect non-beluga whale detectability, NMFS is including the following additional mitigation measures:

- PSOs shall begin observing for marine mammals 30 minutes before pile driving begins for the day and must continue for 30 minutes when pile driving ceases at any time. If pile driving has ceased for more than 30 minutes within a day, another 30-minute pre-pile driving observation period is required before pile driving may commence.
- If a marine mammal is entering or is observed within an established shutdown zone, pile driving must be halted or delayed. Pile driving may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes (non-CIBW) or 30 minutes (CIBW) have passed without subsequent detections. NMFS may adjust the shutdown zones pending review and approval of an acoustic monitoring report.
- POA must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.
- For in-water construction other than pile driving, the POA must cease operations or reduce vessel speed to the minimum level required to maintain steerage and safe working conditions if a marine mammal approaches within 10 m of the equipment or vessel.
- POA is required to conduct briefings for construction supervisors and crews, the monitoring team, and POA staff prior to the start of all pile driving activity, and when new personnel join the work, in order to

explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

• 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 (Table 7), pile driving and removal activities must shut down immediately using delay and shut-down procedures. Activities must not resume until the animal has been confirmed to have left the area or the 15 (non-CIBW) or 30 (CIBW) minute observation period has elapsed.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the 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 stock for subsistence uses.

Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).

• Mitigation and monitoring effectiveness.

During the 2016 TPP, observers for that project provided a number of recommendations to improve marine mammal monitoring for POA projects. These recommendations included:

• A minimum of three PSOs at an observation station is necessary to prevent fatigue and increase accuracy of detecting marine mammals, especially for large-radius zones. When using three PSOs, one PSO is observing, one PSO is recording data (and observing when there are no data to record), and the third PSO is resting. A fourth PSO allows the scanning of a 90-degree arc, instead of a 180-degree arc, increasing scan intensity and the likelihood of detecting marine mammals. Thirty to 60 minute rotations work well with this schedule.

• Communications between the pile driving/construction contractor and the PSOs should take place between one dedicated point of contact, or Lead PSO, for each shift.

• Each observation station should employ a pair of 25-power binoculars as they were superior to the 7- and 10-power binoculars at detecting and identifying marine mammals at greater distances.

• Electronic data collection methods should be considered. Tablet applications and other technological advances make it possible to collect data quickly and accurately. A theodolite can be plugged into the device and marine mammal locations can be calculated on the spot, minimizing uncertainty. Data can be downloaded throughout the day to a database, eliminating the need for data entry by hand, and allowing quicker data assessment.

• Hard copy maps with pre-established grid-cells and harassment zones specific to the pile location being driven were invaluable. These maps allowed for immediate, accurate and consistent identification of marine mammal locations relative to the harassment zones, regardless of observation station.

The POA's IHA application addresses the majority of these recommendations in its Marine Mammal Monitoring Plan (Appendix A in POA's application) and NMFS has included additional measures here. NMFS is requiring four monitoring stations, and requiring at least three PSOs (two on-watch and one to record data) to be positioned at the northern and southern stations while two PSOs will be on-watch at the PCT (*i.e.,* pile driving) station. Each station will be equipped with several pieces of equipment (see section 2.4 in Appendix A of POA's application), including 25x binoculars and a range finders, as recommended above. One station will have a theodolite. PSOs may observe for no more than 4 hours at time and no more than 12 hours per day. The POA will submit all PSO CVs to NMFS prior to a PSO working on this project. In addition, if POA is conducting non-PCT-related in-water work that includes PSOs, the PCT PSOs must be in real-time contact with those PSOs, and both sets of PSOs must share all information regarding marine mammal sightings with each other.

To improve beluga whale detection, NMFS has worked with the POA to include PSO stations in different locations than the three stations originally proposed by the POA, which were all on POA property. In addition, since publication of the notice of proposed IHAs, the POA has included a fourth monitoring station. One PSO station will be located at the PCT pile driving site. One station will be at Port Woronzof or a similar location, rather than on the POA property, to maximize beluga whale detection outside of Knik Arm and the mouth of Knik Arm. PSOs at this location will have unencumbered views of the entrance to Knik Arm and can provide information on beluga whale group dynamics (*e.g.,* group size, demographics, etc) and behavior of animals approaching Knik Arm in the absence of and during pile driving. We also considered moving a station from the POA property to Port MacKenzie for an improved view of beluga whales moving from north to south within Knik Arm. However, Port MacKenzie is not an available option due to logistical reasons; therefore, the northern station will be located on POA property. A fourth PSO station will be located at Ship Creek.

For both Phase 1 and Phase 2, NMFS is requiring the POA to submit interim weekly and monthly monitoring reports (that include data sheets) during the

PCT construction season. These reports must include a summary of marine mammal species and behavioral observations, pile driving shutdowns or delays, and pile driving work completed. A final end-of season report will be submitted to NMFS within 90 days following pile driving. The report must include: Dates and times (begin and end) of all marine mammal monitoring; a description of daily construction activities, weather parameters and water conditions during each monitoring period; number of marine mammals observed, by species, distances and bearings of each marine mammal observed to the pile being driven or removed, age and sex class, if possible; number of individuals of each species (differentiated by month as appropriate) detected within the monitoring zone, and estimates of number of marine mammals taken, by species (a correction factor may be applied); description of mitigation implemented, and description of attempts to distinguish between the number of individual animals taken and the number of incidences of take. In addition, any acoustic data and analysis collected throughout the year will also be made available to NMFS in the form of an interim report within 10 days of data collection for 24 to 48-in piles and 72 hours for 144-in piles. The POA will also submit draft and final reports within 60 days of the conclusion of acoustic monitoring each season. Reported metrics will include, but are not limited to, monitoring methods, mean, median, and peak sound source levels (dB re: 1μPa): cumulative sound exposure level (SELcum), peak sound pressure level (SPLpeak), root mean square sound pressure level (SPLrms), and single-strike sound exposure level (SELs-s), spectra, and amount of pile strikes or vibratory hammer duration. In addition, during PCT hydroacoustic monitoring, allin-water work occurring in the area (*e.g.,* dredging, other in-water work at the POA, vessel transit) must be documented (*e.g.,* type of activity, location relative to recordings, date/time) and reported in the acoustic monitoring report.

NMFS has also included reporting requirements for unanticipated situations. In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as serious injury, or mortality, POA must immediately cease the specified activities and report the incident to NMFS. In the event POA discovers an injured or dead marine mammal, and the lead observer 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), POA must immediately report the incident to the Office of Protected Resources, NMFS, and the Alaska Region Stranding Coordinator, NMFS. In addition, in the event that POA discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the specified activities (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), POA must report the incident to the Office of Protected Resources, NMFS, and the Alaska Region Stranding Coordinator, NMFS, within 24 hours of the discovery.

Negligible Impact Analyses and Determinations

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels). Below we present our analysis for each IHA.

To avoid repetition, the discussion below applies to all the species listed in Table 11 for which we authorized take, other than CIBWs, for each IHA (*i.e.,* the POA's planned activities for Phase 1 and Phase 2 activities), as the anticipated effects of both Phase 1 and Phase 2 activities on marine mammals are expected to be relatively similar in nature. For CIBWs, there are meaningful differences in anticipated individual responses to activities, impact of expected take on CIBWs, or impacts on habitat; therefore, we provide a supplemental analysis for CIBWs, independent of the other species for which we authorize take.

NMFS has identified key factors which may be employed to assess the level of analysis necessary to conclude whether potential impacts associated with a specified activity should be considered negligible. These include (but are not limited to) the type and magnitude of taking, the amount and importance of the available habitat for the species or stock that is affected, the duration of the anticipated effect to the species or stock, and the status of the species or stock. The following factors support negligible impact determinations for the affected stocks of humpback whales, killer whales, harbor porpoise, harbor seals, and Steller sea lions. Some of these also apply to CIBWs; however, a more detailed analysis for CIBWs is provided below.

- No takes by mortality or serious injury are anticipated or authorized;
- The number of total takes (by Level A and Level B harassment) are less than 3 percent of the best available abundance estimates for all stocks;
- Take would not occur in places and/or times where take would be more likely to accrue to impacts on reproduction or survival, such as within ESA-designated or proposed critical habitat, biologically important areas (BIA), or other habitats critical to recruitment or survival (*e.g.,* rookery);
- Take would occur over a short timeframe, being limited to the short duration a marine mammal would likely be present within a Level B harassment zone during pile driving;
- Any impacts to marine mammal habitat from pile driving are temporary and minimal; and
- Take would only occur within upper Cook Inlet—a limited, confined area of any given stock's home range.

For CIBWs, we further discuss our negligible impact findings in the context of potential impacts to this endangered stock. As described in the *Recovery Plan for the Cook Inlet Beluga Whale* (NMFS, 2016), NMFS determined the following physical or biological features are essential to the conservation of this species: (1) Intertidal and subtidal waters of Cook Inlet with depths less than 30 feet mean lower low water (9.1 m) and within 5 mi (8 km) of high and

medium flow anadromous fish streams; (2) Primary prey species consisting of four species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole, (3) Waters free of toxins or other agents of a type and amount harmful to CI beluga whales, (4) Unrestricted passage within or between the critical habitat areas, and (5) Waters with in-water noise below levels resulting in the abandonment of critical habitat areas by CI beluga whales. The PCT would not impact essential features 1–3 listed above. All construction would be done in a manner implementing best management practices to preserve water quality and no work would occur around creek mouths or river systems leading to prey abundance reductions. In addition, no physical structures would restrict passage; however, impacts to the acoustic habitat are of concern. Previous marine mammal monitoring data at the POA demonstrate beluga whales indeed pass by the POA during pile driving. As described above, there was no significant difference in beluga sighting rate with and in the absence of pile driving (Kendell and Cornick, 2015). However, beluga whales do swim faster and in tighter formation in the presence of pile driving (Kendell and Cornick, 2015).

During review of the POA's application, NMFS was concerned that exposure to pile driving at the PCT could result in beluga whales avoiding Knik Arm and thereby not accessing the productive foraging grounds north of POA such as Eagle River flats based on the proposed project and mitigation measures—thus, impacting essential feature number 5 above. Although the data previously presented demonstrate whales are not abandoning the area (*i.e.,* no significant difference in sighting rate with and without pile driving), we considered the results of a recent expert elicitation (EE) at a 2016 workshop, which predicted the impacts of noise on CIBW survival and reproduction given lost foraging opportunities, to inform our assessment of impacts on this stock. The 2016 EE workshop used conceptual models of an interim population consequences of disturbance (PCoD) for marine mammals (NRC 2005; New et al. 2014, Tollit et al., 2016) to help in understanding how noise-related stressors might affect vital rates (survival, birth rate and growth) for CIBW (King et al. 2015). NMFS (2015, section IX.D—CI Beluga Hearing, Vocalization, and Noise Supplement) suggests that the main direct effects of noise on CIBW are likely to be through masking of vocalizations used for communication and prey location, and habitat degradation. The 2016 workshop on beluga whales was specifically designed to provide regulators with a tool to help understand whether chronic and acute anthropogenic noise from various sources and projects are likely to be limiting recovery of the CIBW population. The full report can be found at *http://www.smruconsulting.com/publications/* and we provide a summary of the expert elicitation portion of the workshop here.

For each of the noise effect mechanisms chosen for expert elicitation, the experts provided a set of parameters and values that determined the forms of a relationship between the number of days of disturbance a female CIBW experiences in a particular period and the effect of that disturbance on her energy reserves. Examples included the number of days of disturbance during the period April, May and June that would be predicted to reduce the energy reserves of a pregnant CIBW to such a level that she is certain to terminate the pregnancy or abandon the calf soon after birth, the number of days of disturbance in the period April-September required to reduce the energy reserves of a lactating CIBW to a level where she is certain to abandon her calf, and the number of days of disturbance where a female fails to gain sufficient energy by the end of summer to maintain themselves and their calves during the subsequent winter. Overall, median values ranged from 16 to 69 days of disturbance depending on the question. However, for this elicitation, a ''day of disturbance'' was defined as any day on which an animal loses the ability to forage for at least one tidal cycle (*i.e.,* it forgoes 50–100% of its energy intake on that day). Therefore, disturbance in this context is not equivalent to Level B harassment but would represent increased severity compared with Level B harassment as defined in the MMPA. The mitigation measures NMFS has prescribed for the PCT project are designed to avoid the potential that any animal would lose the ability to forage for one or more tidal cycles. While Level B harassment (behavioral disturbance) is authorized, our mitigation measures would limit the severity of the effects of that Level B harassment to behavioral changes such as increased swim speeds, tighter group formations, and cessation of vocalizations, not the loss of foraging capabilities. Regardless, this elicitation recognized that pregnant or lactating females and calves are inherently more at risk than other animals, such as males. NMFS first considered proposing the POA shutdown based on more vulnerable life stages (*e.g.,* calf presence) but ultimately determined all beluga whales warranted pile driving shutdown to be protective of potential vulnerable life stages, such as pregnancy, that could not be determined from observations, and to avoid more severe behavioral reaction.

Monitoring data from the POA suggest pile driving does not discourage beluga whales from entering Knik Arm and travelling to critical foraging grounds such as those around Eagle Bay. As previously described, sighting rates were not different in the presence or absence of pile driving. This is not surprising as food is a strong motivation for marine mammals. As described in Forney et al. (2017), animals typically favor particular areas because of their importance for survival (*e.g.* feeding or breeding), and leaving may have significant costs to fitness (reduced foraging success, increased predation risk, increased exposure to other anthropogenic threats). Consequently, animals may be highly motivated to maintain foraging behavior in historical foraging areas despite negative impacts (*e.g.,* Rolland et al. 2012). Previous monitoring data indicates beluga whales are responding to pile driving noise but not through abandonment of critical habitat, including primary foraging areas north of the port. Instead, they travel faster past the POA, more quietly, and in tighter groups (which may be linked to the decreased communication patterns). This traveling behavior past the POA has also been verified by acoustic monitoring. Castellote et al. (2020) found low echolocation detection rates in lower Knik Arm indicating belugas moved through that area relatively quickly when entering or exiting the Arm. We anticipate these behaviors to continue, and do not believe exposure to elevated noise levels during transit past the POA has adverse effects on reproduction or survival as the whales continue to access critical foraging grounds north of the POA, and tight associations help to mitigate the potential for any contraction of communication space for a group. Finally, as described previously, both telemetry (tagging) and acoustic data suggest beluga whales likely stay in upper Knik Arm for several days or weeks before exiting Knik Arm. Specifically, a beluga instrumented with a satellite link time/depth recorder entered Knik Arm on August 18th and remained in Eagle Bay until September 12th (Ferrero et al. 2000). Further, a recent detailed re-analysis of the satellite telemetry data confirms how

several tagged whales exhibited this same movement pattern: whales entered Knik Arm and remained there for several days before exiting through lower Knik Arm (Shelden et al. 2018). This longer-term use of upper Knik Arm would avoid repetitive exposures from pile driving noise.

NMFS has prescribed mitigation measures beyond those proposed by the POA in the IHA application, specifically, not commencing pile driving if beluga whales are observed within Knik Arm or within 1 km of the mouth of Knik Arm, shutting down pile driving should a beluga whale approach or enter the Level B harassment zone, stationing PSOs at Point Woronzof and Ship Creek, and not vibratory pile driving 144-in piles during August (peak beluga season). These measures are designed to ensure beluga whales will not abandon critical habitat and exposure to pile driving noise will not result in adverse impacts on the reproduction or survival of any individuals. The location of PSOs at Point Woronzof allows for detection of beluga whales at much farther distances than previous years and behavioral observations prior to whales entering Knik Arm. Although NMFS does not anticipate beluga whales would abandon entering Knik Arm in the presence of pile driving with the required mitigation measures, these PSOs will be integral to identifying if belugas are potentially altering pathways they would otherwise take in the absence of pile driving. Because the POA is submitting weekly and monthly reports, NMFS will be able to regularly evaluate if the impacts of the project are having a greater than anticipated impact on beluga whales. If we find the project is having a greater than negligible impact on marine mammals, the IHA may be modified or revoked. Finally, take by mortality, serious injury, or Level A harassment of CIBWs is not anticipated or authorized.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from the activities analyzed under each of these two separate IHAs are not expected to adversely affect CIBWs through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or authorized;
- Area of exposure would be limited to travel corridors. Data demonstrates Level B harassment manifests as increased swim speeds past the POA and tight group formations and not through habitat abandonment;
- No critical foraging grounds (*e.g.* Eagle Bay, Eagle River, Susitna Delta) would be impacted by pile driving; and
- While animals could be harassed more than once, exposures are not likely to exceed more than a few per year for any given individual and are not expected to occur on sequential days; thereby, decreasing the likelihood of physiological impacts caused by chronic stress or masking.

We also considered our negligible impact analysis with respect to NMFS' technical report released in January 2020 regarding the abundance and status of CIBWs (Sheldon and Wade, 2019). As described in the marine mammal section, new analysis indicates the CIBW stock is smaller and declining faster than previously recognized. While this is concerning, NMFS continues to believe the taking authorized (allowed for in the cases where shutdowns cannot occur in time to avoid Level B harassment take) will have a negligible impact. The monitoring measures (four stations each equipped with two PSOs simultaneously on watch at each station) are extensive, such that we find it unlikely whales would go undetected. The mitigation measures reduce noise entering the water column (a benefit for all marine mammals) through the use of a confined bubble curtain and noise levels would be verified upon the onset of pile driving to verify estimated harassment zones. Further, the exposure risk to CIBWs is greatly minimized through the incorporation of in-bound and out-bound whale pre-pile driving clearance zones. Finally, should pile driving be occurring at the same time a whale is detected, pile driving would shut down prior to its entering the Level B harassment zone. All these measures, as well as other required measures such as soft-starts, greatly reduce the risk of animals not accessing important foraging areas north of the POA, which could result in impacts to annual rates of recruitment or survival. For these reasons, the new status of CIBWs does not ultimately change our findings with respect to the specified activities.

Phase 1 IHA—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 required monitoring and mitigation measures, we find that the total marine mammal take from the POA's construction activities in Phase 1 will have a negligible impact on the affected marine mammal species or stocks.

Phase 2 IHA—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 required monitoring and mitigation measures, we find that the total marine mammal take from the POA's construction activities in Phase 2 will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Sections 101(a)(5)(A) and (D) 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.

For all non-CIBW stocks, for both the Phase 1 and Phase 2 IHAs, the amount of taking is less than one-third of the best available population abundance estimate (in fact it is less than 4 percent for all stocks considered here). Further, the amount of take authorized likely represents smaller numbers of individual harbor seals and Steller sea lions. Harbor seals tend to concentrate near Ship Creek and have small home ranges; therefore, the amount of take authorized likely represents repeat exposures to the same animals. Previous Steller sea lion sightings identified that if a Steller sea lion is within Knik Arm, it is likely lingering to forage on salmon or eulachon runs and may be present for several days.

We provide additional information with respect to CIBW. They are known to enter Knik Arm and then exit after several days of remaining within Knik Arm. There is potential an individual is taken on both ingress and egress; however, due to the mitigation measures (essentially takes are for animals where pile driving cannot be shut down before exposure), the circumstances would have to be such that pile driving is occurring while the whale is both entering and exiting Knik Arm and that the animal is missed or taken due to logistical constraints of shutting down pile driving immediately in both cases.

Phase 1 IHA—Based on the analysis contained herein of the likely effects of the specified activity in Phase 1 on marine mammals and their habitat, and taking into consideration the

implementation of the mitigation and monitoring measures, we find that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Phase 2 IHA—Based on the analysis contained herein of the likely effects of the specified activity in Phase 2 on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, we find that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

No subsistence use of CIBWs occurs and subsistence harvest of other marine mammals in upper Cook Inlet is limited to harbor seals. Steller sea lions are rare in upper Cook Inlet; therefore, subsistence use of this species is not common. However, Steller sea lions are taken for subsistence use in lower Cook Inlet. In 2013 and 2014, the ADF&G conducted studies to document the harvest and use of wild resources by residents of four tribal communities in Cook Inlet: Tyonek, Nanwalek, Port Graham, and Seldovia (Jones and Kostick 2016). Tyonek is the community in closest proximity to Knik Arm while the other communities are located lower in Cook Inlet. The only marine mammal species taken by the Tyonek community was harbor seals (from the McArthur River Flats north to the Beluga River (Jones et al. 2015)- south of Knik Arm) while communities lower in the inlet relied on harbor seals, Steller sea lions and sea otters (we note the sea otter is under the jurisdiction of the USFWS; therefore, it is not a part of our analysis).

The potential impacts from harassment on stocks that are harvested in Cook Inlet would be limited to minor behavioral changes (*e.g.,* increased swim speeds, changes in dive time, temporary avoidance near the POA, etc.) within the vicinity of the POA. Some PTS may occur; however, the shift is likely to be slight due to the implementation of mitigation measures (*e.g.,* shutdown zones) and the shift would be limited to lower pile driving frequencies which are on the lower end of phocid and otariid hearing ranges. In summary, any impacts to harbor seals would be limited to those seals within Knik Arm (outside of any hunting area) and the very few takes of Steller sea lions in Knik Arm would be far removed in time and space from any hunting in lower Cook Inlet.

Finally, we have not received any communication from Alaska Natives that this project raises concern regarding their subsistence use. The POA alerted 14 tribal organizations and communities to the notice of proposed IHAs. No tribes commented on or expressed concern over subsistence use during the public comment period for the proposed IHAs.

For all these reasons, relevant to both the Phase 1 and Phase 2 IHAs, 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.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the Alaska Region Protected Resources Division (AKR), whenever we propose to authorize take for endangered or threatened species.

On November 18, 2019, NMFS requested consultation on the issuance of two successive IHAs to the POA authorizing the take of humpback whales (Mexico DPS, Western North Pacific DPS), wDPS Steller sea lions, and CIBWs. On March 23, 2020, NMFS AKR released a Biological Opinion concluding the proposed action would not jeopardize the continued existence of the aforementioned species and would not destroy or adversely modify critical habitat.

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.

NMFS prepared a draft EA to consider the environmental impacts associated with the issuance of two IHAs which was made available to the public during the public comment period on the proposed IHAs. NMFS' final EA considered comments submitted during the public comment period and found that authorizing take of marine mammals by issuing the IHAs would not result in significant direct, indirect, or cumulative impacts to the human environment. Accordingly, NMFS determined that issuance of the IHAs to the POA would not significantly impact the quality of the human environment and signed a Finding of No Significant Impact (FONSI). NMFS' Final EA and FONSI are available online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Authorization

As a result of these determinations, NMFS has issued the two requested IHAs to the POA for the PCT Project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A copy of the final IHAs can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Dated: April 1, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

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Part IV

Department of Labor

Wage and Hour Division

29 CFR Part 826

Paid Leave Under the Families First Coronavirus Response Act; Temporary Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 826

RIN 1235–AA35

Paid Leave Under the Families First Coronavirus Response Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Temporary rule.

SUMMARY: The Secretary of Labor (''Secretary'') is promulgating temporary regulations to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave to assist working families facing public health emergencies arising out of Coronavirus Disease 2019 (COVID–19) global pandemic. The leave is created by a time-limited statutory authority established under the Families First Coronavirus Response Act, Public Law 116–127 (FFCRA), and is set to expire on December 31, 2020. The FFCRA and this temporary rule do not affect the FMLA after December 31, 2020.

DATES: This rule is effective from April 2, 2020, through December 31, 2020. This rule became operational on April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number).

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I. Executive Summary

On March 18, 2020, President Trump signed into law the FFCRA, which creates two new emergency paid leave requirements in response to the COVID–19 global pandemic. Division E of the FFCRA, ''The Emergency Paid Sick Leave Act'' (EPSLA), entitles certain employees to take up to two weeks of paid sick leave. Division C of the FFCRA, ''The Emergency Family and Medical Leave Expansion Act'' (EFMLEA), which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* (FMLA), permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID–19. On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (CARES Act), which amends certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

In general, the FFCRA requires covered employers to provide eligible employees up to two weeks of paid sick leave at full pay, up to a specified cap, when the employee is unable to work because the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19, has been advised by a health care provider to self-quarantine due to concerns related to COVID–19, or is experiencing COVID–19 symptoms and seeking a medical diagnosis. The FFCRA also provides up to two weeks of paid sick leave at partial pay, up to a specified cap, when an employee is unable to work because of a need to care for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID–19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons; or because the employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services. The FFCRA also requires covered employers to provide up to twelve weeks of expanded family and medical leave, up to ten weeks of which must be paid at partial pay, up to a specified cap, when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons.

The FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allocable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA. For information on the tax credits, *see https://www.irs.gov/forms-pubs/about-form-7200 see also https://www.irs.gov/pub/irs-drop/n-20-21.pdf.* For more information on the COVID–19 related small business loans, *see https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources.*

The CARES Act amended the FFCRA by providing certain technical corrections, as well as clarifying the caps for payment of leave; expanded family and medical leave to certain employees who were laid off or terminated after March 1, 2020, but are reemployed by the same employer prior to December 31, 2020; and provided authority to the Director of the Office of Management and Budget (OMB) to exclude certain Federal employees from paid sick leave and expanded family and medical leave.

The FFCRA grants authority to the Secretary to issue regulations for certain purposes. In particular, sections 3102(b), as amended by section 3611(7) of the CARES Act, and 5111(3) of the FFCRA grant the Secretary authority to issue regulations ''as necessary, to carry

out the purposes of this Act, including to ensure consistency'' between the EPSLA and the EFMLEA. The Department is issuing this temporary rule to carry out the purposes of the FFCRA. These new paid sick leave and expanded family and medical leave requirements became operational on April 1, 2020, effective on April 2, 2020, and will expire on December 31, 2020.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs (OIRA) designated this rule as a ''major rule'', as defined by 5 U.S.C. 804(2).

II. Background

A. Emergency Paid Sick Leave Act (EPSLA)

The EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons having to do with COVID–19 where the employee (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID–19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; (3) is experiencing symptoms of COVID–19 and is seeking a medical diagnosis; (4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2); (5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID–19 related reasons; or (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Private employers with fewer than 500 employees, as well as public agencies with one or more employees, must comply with the EPSLA, although the Secretary has authority to exempt by rulemaking certain employers with fewer than 50 employees from providing paid sick leave to an employee who is unable to work because the employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID–19 related reasons when compliance with this requirement would ''jeopardize the viability of the business as a going concern.'' FFCRA sections 5100(2)(B)(i)–(ii), 5111(2). The EPSLA applies to employees of covered employers regardless of how long an employee has worked for an employer, except that employers may exclude employees who are health care providers or emergency responders from taking paid sick leave; similarly, the Secretary has the authority to exclude by rulemaking ''certain health care providers and emergency responders'' from the requirements of the EPSLA. FFCRA sections 5102(a), 5102(e)(1), 5111(1). The CARES Act also added certain exemptions that may apply to Federal employers and employees, which are discussed below.

The EPSLA entitles full-time covered employees to up to 80 hours of paid sick leave, and generally entitles part-time employees to up to the number of hours that they work on average over a two-week period, although special rules may apply to part-time employees with varying schedules. For an employee who takes paid sick leave because he or she is subject to a quarantine or isolation order, has been advised to self-quarantine by a health care provider, or is experiencing symptoms of COVID–19 and is seeking a medical diagnosis, the EPSLA provides for paid sick leave at the greater of the employee's regular rate of pay under section 7(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (FLSA) (29 U.S.C. 207(e)), or the applicable minimum wage (federal, state, or local), up to $511 per day and $5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason under the EPSLA is entitled to be paid two-thirds of that amount, up to $200 per day and $2,000 in the aggregate. An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave, nor may an employer require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using paid sick leave.

The EPSLA also provides that employers who fail to provide paid sick leave as required are considered to have failed to pay minimum wages in violation of section 6 of the FLSA, and that such employers are subject to enforcement proceedings described in sections 16 and 17 of the FLSA. 29 U.S.C. 206, 216, 217. In addition, the EPSLA prohibits employers from discharging, disciplining, or in any other manner discriminating against an employee who takes paid sick leave under the EPSLA, files any complaint under or relating to the EPSLA, institutes any proceeding under or relating to the EPSLA, or testifies in any such proceeding. *See* FFCRA section 5104, as amended by CARES Act section 3611(8). Employers who violate this prohibition are considered to have violated section 15(a)(3) of the FLSA, and are subject to the penalties described in sections 216 and 217 of the FLSA. 29 U.S.C. 215(a)(3), 216, 217. The EPSLA also authorizes the Secretary to investigate and gather data to ensure compliance with the EPSLA in the same manner as authorized by sections 9 and 11 of the FLSA, and the CARES Act section 3611(9) (adding FFCRA section 5105(c)); 29 U.S.C. 209, 211.

The EPSLA requires employers to post a notice of employees' rights under the EPSLA. It permits, but does not require, employers who are signatories to multiemployer collective bargaining agreements to fulfill their obligations under the EPSLA by making contributions to a multiemployer fund, plan, or program, subject to certain requirements. Nothing in the EPSLA diminishes the rights or benefits that an employee is entitled to under any other Federal, State, or local law; collective bargaining agreement; or existing employer policy. Moreover, the EPSLA does not require financial or other reimbursement by an employer to an employee for unused paid sick leave upon the employee's separation from employment.

B. Emergency Family and Medical Leave Expansion Act (EFMLEA)

The EFMLEA requires employers to provide expanded paid family and medical leave to eligible employees who are unable to work because the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, defined as an emergency with respect to COVID–19, declared by a Federal, State, or local authority.

The EFMLEA applies to different sets of employers and employees from the other provisions of the FMLA. Private employers with fewer than 500 employees must comply with the EFMLEA, although the Secretary has the authority to exempt by rulemaking employers with fewer than 50 employees from EFMLEA's requirements when compliance with the EFMLEA would ''jeopardize the viability of the business as a going concern.'' FFCRA section 3102(b) (adding FMLA section 110(a)(1)(B), (3)(B)). Generally, public agencies as defined at § 826.10(a) must comply with the EFMLEA. As it relates to the Federal government, however, only those Federal employees covered by Title I of the FMLA are potentially eligible under the EFMLEA. 29 U.S.C. 2611(2)(B)(i). The EFMLEA applies to employees of covered employers if such employees have been employed by the employer for at least 30 calendar days. This includes employees who were laid off or

otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer. CARES Act section 3605 (amending FMLA section 110(a)(1)(A)). As with the EPSLA, employers may, however, exclude employees who are health care providers or emergency responders from taking expanded family and medical leave, and similarly, the Secretary has the authority to exclude by rulemaking ''certain health care providers and emergency responders'' from the requirements of the EFMLEA.

An employee is entitled to take up to twelve weeks of leave for the purpose described in the EFMLEA. 29 U.S.C. 2611(a)(1). The first two weeks (usually ten workdays) of this leave are unpaid, though an employee may substitute paid sick leave under the EPSLA or paid leave under the employer's preexisting policies for these two weeks of unpaid leave. Unlike FMLA leave taken for other reasons, the following period of up to ten weeks of expanded family and medical leave must be paid. Specifically, after the first two weeks of leave, expanded family and medical leave under the FFCRA must be paid at two-thirds the employee's regular rate of pay. For each day of leave, the employee receives compensation based on the number of hours he or she would otherwise be normally scheduled to work, although special rules may apply to employees with varying schedules. An eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off. The total EFMLEA payment per employee for this ten-week period is capped at $200 per day and $10,000 in the aggregate, for a total of no more than $12,000 when combined with two weeks of paid leave taken under the EPSLA.

The EFMLEA provides that if the need for expanded family and medical leave is foreseeable, employees shall provide employers with notice of the leave as soon as practicable. The EFMLEA defines conditions under which employees who take leave are entitled to be restored to their positions, while exempting employers with fewer than twenty-five employees from this requirement under certain circumstances. The FMLA's general prohibitions on interference with rights and discrimination, 29 U.S.C. 2615, as well as the FMLA's enforcement provisions, 29 U.S.C. 2617, apply for purposes of the EFMLEA, except that an employee's right to file a lawsuit directly against an employer does not extend to employers who were not previously covered by the FMLA.

The EFMLEA permits, but does not require, employers who are signatories to multiemployer collective bargaining agreements to fulfill their obligations under the EFMLEA by making contributions to a multiemployer fund, plan, or program, subject to certain requirements.

III. Discussion

The paid leave requirements of the EPSLA and the EFMLEA are described and interpreted by the Secretary in regulations to appear in new Part 826 of Title 29 of the Code of Federal Regulations, and addressed below.

A. General

Section 826.10 contains definitions of terms used in the EPSLA and the EFMLEA as well as in this rule. As a general matter, the FMLA definitions apply to the EFMLEA unless specific definitions were included in the EFMLEA. The majority of the terms found in the EPSLA and the EFMLEA are based on terms that are defined in other statutes and/or their implementing regulations, such as the FLSA. For example, the EPSLA expressly adopts the definition of ''person'' from the FLSA and the definition of ''son or daughter'' from the FMLA.

The EFMLEA defines ''qualifying need related to a public health emergency'' as a need for leave ''to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.'' FFCRA section 3102(b) (adding FMLA section 110(a)(1)(A)). This definition could be read to narrow the FMLA definition of ''son or daughter'' for purposes of expanded family and medical leave, as the FMLA expressly includes children 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). The EFMLEA does not contain a definition of ''son or daughter,'' however, and therefore the FMLA definition of that term applies to expanded family and medical leave. The EPSLA also adopts the FMLA definition of ''son or daughter.'' As addressed more fully below in the discussion of § 826.20, the Department believes it would create needless confusion and complication to have different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for his or her son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons. The Department is therefore treating the definitions as the same (*i.e.,* to include children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability), pursuant to its statutory authority to issue regulations to ensure consistency between the EPSLA and the EFMLEA.

Only one other definition in the FFCRA—''telework''—bears further discussion here. Section 826.10 defines the word broadly to effectuate the statute's underlying purposes and also outlines when an employee is able to telework. The definition also clarifies that telework is no less work than if it were performed at an employer's worksite. As a result, employees who are teleworking for COVID–19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the FLSA. *See* 29 CFR 785.11–13; 785.48; *see also* 29 U.S.C. 206, 207; 29 CFR part 778. However, an employer is not required to compensate employees for unreported hours worked while teleworking for COVID–19 related reasons, unless the employer knew or should have known about such telework. *See, e.g., Allen* v. *City of Chicago,* 865 F.3d 936 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1302, 200 L. Ed. 2d 474 (2018). While the Department's regulations and interpretations of the FLSA generally apply to employees who are teleworking for COVID–19 related reasons, the Department has concluded that § 790.6 and its continuous workday guidance are inconsistent with the objectives of the FFCRA and CARES Act only with respect to such employees.

The FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID–19 related reasons. But section 790.6 and the Department's continuous workday guidance generally provide that all time between performance of the first and last principal activities is compensable work time. *See* 29 CFR 790.6(a). Applying this guidance to employers with employees who are teleworking for COVID–19 related reasons would disincentivize and undermine the very flexibility in teleworking arrangements that are

critical to the FFCRA framework Congress created within the broader national response to COVID–19. As a result, the Department has determined that an employer allowing such flexibility during the COVID–19 pandemic shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID–19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID–19 related reasons on the following schedule: 7–9 a.m., 12:30–3 p.m., and 7–9 p.m. on weekdays. This allows an employee, for example, to help teach children whose school is closed or assist the employee's parents who are temporarily living with the family, reserving work times when there are fewer distractions. Of course, the employer must compensate the employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between the employee's first principal activity at 7 a.m. and last at 9 p.m. Section 790.6 and the Department's guidance regarding the continuous workday continue to apply to all employees who are not teleworking for COVID–19 related reasons.

B. Paid Leave Entitlements

Section 826.20 of Title 29 of the Code of Federal Regulations describes the circumstances under which a covered employer must provide paid sick leave and/or expanded family and medical leave to an eligible employee.

Section 826.20(a) explains that an employee may take paid sick leave if the employee is unable to work because of any one of six qualifying reasons related to COVID–19. The first reason for paid sick leave applies where an employee is unable to work because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order. Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is whether the employee would be able to work or telework ''but for'' being required to comply with a quarantine or isolation order.

An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID–19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.[1] That said, he may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.

Additionally, § 826.20(a)(2) explains that an employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work. For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

The second reason for paid sick leave applies where an employee is unable to work because he or she has been advised by a health care provider, as defined in 29 CFR 825.102, to self-quarantine for a COVID–19 reason. Section 826.20(a)(3) explains that the advice to self-quarantine must be based on the health care provider's belief that the employee has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19. And, self-quarantining must prevent the employee from working. An employee who is self-quarantining is able to telework, and therefore may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID–19 symptoms, that prevent the employee from performing that work. For instance, if the lawyer in the above example would be able to work while self-quarantining at home, she may not take paid sick leave due to a need to self-quarantine.

The third reason for paid sick leave applies where an employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis. Section 826.20(a)(4) explains that symptoms that could trigger this are: Fever, dry cough, shortness of breath, or other COVID–19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID–19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID–19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis. An employee who is waiting for the results of a test is able to telework, and therefore may not take paid sick leave, if: (a) His or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is waiting; and (c) there are no extenuating circumstances, such as serious COVID–19 symptoms, that may prevent the employee from performing that work. An employee may continue to take leave while experiencing any of the symptoms specified at § 826.20(a)(4), however; or may continue to take leave after testing positive for COVID–19, regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine. In addition, an employee who is unable to telework may continue to take paid sick leave under this reason while awaiting

[1] This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.

a test result, regardless of the severity of the COVID–19 symptoms that he or she might be experiencing. In the case of an employee who exhibits COVID–19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the second reason, provided he or she meets all the requirements spelled out above.

The fourth reason for paid sick leave applies where an employee is unable to work because he or she needs to care for an individual who is either: (a) Subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID–19. This qualifying reason applies only if but for a need to care for an individual, the employee would be able to perform work for his or her employer. Accordingly, an employee caring for an individual may not take paid sick leave if the employer does not have work for him or her. Furthermore, if the employee must have a genuine need to care for the individual. Accordingly, § 826.20(a)(5) explains that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined. Additionally, the individual being cared for must: (a) Be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19.

The fifth reason for paid sick leave applies when the employee is unable to work because the employee needs to care for his or her son or daughter if: (a) The child's school or place of care has closed; or (b) the child care provider is unavailable, due to COVID–19 related reasons. Again, the employee must be able to perform work for his or her employer but for the need to care for his or her son or daughter, which means an employee may not take paid sick leave if the employer does not have work for him or her. Moreover, an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.

The sixth reason for paid sick leave applies if the employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Section 826.20(b) explains that an employee may take expanded family and medical leave if the employee is unable to work due to a need for leave to care for his or her son or daughter if the child's school or place of care is closed, or the child care provider of such son or daughter is unavailable, for reasons related to COVID–19. The EFMLEA provides that this reason for leave is for closures or unavailability ''due to a public health emergency,'' which the statute defines as ''an emergency with respect to COVID–19 declared by a Federal, State, or local authority.'' FFCRA section 3102(b) (adding FMLA section 110(a)(2)(A), (B)). In keeping with the Department's statutory authority to issue regulations to ensure consistency between the EPSLA and the EFMLEA, the regulatory text uses ''for reasons related to COVID–19'' to match the regulatory text related to the same reason for taking paid sick leave. In other words, the leave authorized by the EFMLEA is the same as the fifth reason discussed above authorized by the EPSLA, *i.e.,* leave required when an employee is unable to work because of a need to care for his or her son or daughter if the school or place of care of the son or daughter is closed, or the child care provider of the son or daughter is unavailable, due to COVID–19 related reasons.

The Department recognizes that section 3102 of the EFMLEA defines ''qualifying need related to a public health emergency'' as a need for leave ''to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.'' FFCRA section 3102(b) (adding FMLA section 110(a)(2)(A), (B)). This definition can be read to narrow the FMLA definition of son or daughter, which includes children under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). Section 5110(4) of the EPSLA states that the FMLA definition of son or daughter applies when, among other things, the employee is unable to work because the employee is caring for a son or daughter of the employee if: (a) The school or place of care of the son or daughter has been closed; or (b) the child care provider of such son or daughter is unavailable, due to COVID–19 related reasons.

The Department considered interpreting the leave provision of the EFMLEA to apply only when an employee is unable to work because of a need to care for a child under age 18 years of age, and not to apply when a child is 18 years of age or older and incapable of self-care because of a mental or physical disability. The Department also recognizes there could be other interpretations of the ''under 18 years of age'' phrase within the EFMLEA. However, the Department has decided not to employ these alternative interpretations because it sees significant disadvantages to having different rules under the EFMLEA and the EPSLA for when an employee may take leave to care for his or her son or daughter. Having different rules would introduce unnecessary complexity and incongruity into the leave provisions and could improperly deny leave to employees with a need to care for a child age 18 or older who is incapable of caring for himself or herself because of a mental or physical disability. The Department is therefore treating the definitions as the same pursuant to its authority under section 5111 of the EPSLA and section 110(a) of the FMLA, as amended by the EFMLEA, and the CARES Act, and will issue regulations to ensure consistency between the EPSLA and the EFMLEA.

The Department intends that providing maximum flexibility to employers and employees during the public health emergency should not impact the underlying relationships between an employer and an employee. More specifically, nothing in this Act should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either paid sick leave or expanded family and medical leave should not be construed as undermining the employee's salary basis for purposes of 29 U.S.C. 213 and 29 CFR part 541.

Section 826.21 explains how much paid sick leave an employee is entitled to under the EPSLA. Under section 5102(b)(2) of the EPSLA, a full-time employee is entitled to 80 hours of paid sick leave, and a part-time employee is entitled to the ''number of hours that such employee works, on average, over a 2-week period.'' Section 5110(5)(C)(i) further provides that if the part-time employee's ''schedule varies from week to week . . . the average number of

hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time'' shall be used in place of the ''number of hours that such employee works, on average, over a 2-week period'' under section 5102(b)(2)(B) to determine the number of paid sick leave hours.

The Department does not believe the EPSLA intended to replace the average number of hours worked ''over a 2-week period'' with the average number of hours scheduled ''per day'' as the number of paid sick leave hours because such replacement would create a contradiction within the statute and lead to an absurd outcome. Setting hours of paid sick leave ''equal to the average number of hours that the employee was scheduled per day,'' as section 5110(5)(C)(i) requires, would violate the requirement under section 5102(b)(2)(B) that ''hours of paid sick time to which an employee is entitled shall be . . . equal to the number of hours that such employee works, on average, over a 2-week period'' for the obvious reason that a day is different from a two-week period. And the number of hours an employee typically works in a day is an order of magnitude lower than the number of hours that an employee typically works in a two-week period. Thus, an employee who works a varied schedule would be entitled to an order of magnitude fewer hours of paid sick leave than if the employee had worked a regular schedule. In light of the FFCRA, the Department can think of no reason why Congress would penalize part-time employees who work varied as opposed to regular schedules.

Rather, the Department believes Congress intended to use the daily average to compute the two-week average. Because there are fourteen calendar days over a two-week period, the Department believes Congress intended for the EPSLA to provide part-time employees whose weekly schedule varies with paid sick leave equal to fourteen times the ''number of hours that the employee was scheduled per [calendar] day,'' averaged over the above-mentioned six-month period. An employer may also use twice the number of hours that an employee was scheduled to work per workweek, averaged over the six-month period.

The EPSLA does not define what it means to be a ''full-time'' or ''part-time'' employee. Because paid sick leave is designed to provide leave ''over a 2-week period,'' and the EPSLA provides up to 80 hours of such leave to full-time employees, the Department believes a full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each workweek. As a result, the Department defines a full-time employee as an employee who is normally scheduled to work at least 40 hours each workweek in § 826.21(a)(2). Further, § 826.21(a)(3) provides that an employee who does not have a normal weekly schedule may also be a full-time employee if he or she is scheduled to work, on average, at least 40 hours each workweek. For consistency purposes, this weekly average should be computed over the same six-month period as the ''Varying Schedule Hours Calculation'' for certain part-time employees under section 5110(5)(C)(i) of the FFCRA. Thus, § 826.21(a)(3) provides that the average hours per workweek for an employee who does not have a normal weekly schedule should be calculated over the six-months prior to the date on which leave is requested to determine if he or she is a full-time employee. If the employee has been employed for less than six months, the average hours per workweek is computed over the entire period of employment.

Under § 826.21(b), a part-time employee is an employee who is normally scheduled to work fewer than 40 hours each workweek or—if the employee lacks a normal weekly schedule—who is scheduled to work, on average, fewer than 40 hours each workweek. Under § 826.21(b)(1), a part-time employee who works a normal schedule is entitled to paid sick leave equal to the number of hours he or she is normally scheduled to work over a two-workweek period. As discussed above, the Department believes that a part-time employee whose weekly work schedule varies should be entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type. This computation is possible only if the employee has been employed for at least six months. Thus, § 826.21(b)(2) provides variable-schedule part-time employees with such an amount of paid sick leave.

Section 5110(5)(C)(ii) of the EPSLA further provides that, if a part-time employee with a varying weekly schedule has been employed for fewer than six months, ''the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work'' should be used ''in place of'' the average number of hours worked ''over a 2-week period'' under section 5102(b)(2)(B) to determine the amount of paid sick leave to which an employee is entitled. Again, the Department does not believe that in the EPSLA Congress intended for ''the reasonable expectation . . . of the average number of hours per day'' to be used ''in place of'' the average number of hours worked ''over a 2-week period.'' Rather, Congress intended to use the expected daily average number of hours to estimate the two-week average. The Department further believes such ''reasonable expectation'' is best evidenced by an agreement between the employer and employee at the time of hiring.

Thus, § 826.21(b)(3) states that a part-time employee with a varying schedule who has been employed for fewer than six months is entitled to fourteen times the expected number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. This is equal to twice the average number of hours that the employee would be expected to work each workweek. The agreement could have used any time period—*e.g.,* each workweek, month, or year—to express the average number of hours the employee was expected to work, so long as that daily average could be extrapolated. In the absence of such an agreement, the Department believes that the actual average number of hours the employee was scheduled to work each workday demonstrates ''the reasonable expectation . . . of the average number of hours per day that the employee would normally be scheduled to work.'' FFCRA section 5110(5)(C)(ii). Accordingly, § 826.21(b)(3) further states that, in the absence of an agreement regarding the expected number of hours worked each day, a part-time employee with a varying schedule who has been employed for fewer than six months ''is entitled to up to the number of hours of paid sick leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.'' An employer may also use twice the number of hours that an employee was scheduled to work per workweek, on average, over the six-month period.

Section 826.22 explains the amount of pay due to employees who take paid sick leave. If the employee takes paid sick leave because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order; has been advised by a health care provider to self-quarantine for COVID-related reasons;

or is experiencing COVID–19 symptoms and seeking a medical diagnosis, the employer must pay the employee his or her regular rate of pay (subject to the qualifications described below) for each hour of paid sick leave taken. If an employee takes paid sick leave because of any other COVID–19 qualifying reason, the employer must pay the employee two-thirds of the employee's regular rate of pay (subject to the qualifications described below).

If the employee's regular rate of pay is lower than the Federal, State, or local minimum wage (if applicable to the employee), the employee should instead be paid the highest of such amounts. That means an employee taking paid sick leave because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order; has been advised by a health care provider to self-quarantine for COVID-related reasons; or is experiencing COVID–19 symptoms and seeking a medical diagnosis must be paid the highest applicable minimum wage (federal, state, or local). And, an employee taking paid sick leave for any other COVID–19 qualifying reason must be paid at least two-thirds of the highest applicable minimum wage.

The amount an employer is required to pay is capped at $511 per day of paid sick leave taken and $5,110 in total per covered employee for all paid sick leave pay. Furthermore, where an employee is taking paid sick leave at two-thirds pay, the amount of pay is subject to a lower cap of $200 per day of leave and $2,000 in total per covered employee for all paid sick leave that is paid at two-thirds pay.

Section 826.23 explains that expanded family and medical leave is a type of FMLA leave that is available for certain eligible employees between April 1, 2020, and December 31, 2020. As such, § 826.23(a) explains that an eligible employee is entitled to up to twelve workweeks of expanded family and medical leave, as provided under section 102 of the FMLA, during that period. *See* 29 U.S.C. 2612; *see also* 29 CFR 825.200. Section 826.23(b) further clarifies that any time taken by an eligible employee as expanded family and medical leave counts towards the twelve workweeks of FMLA leave to which the employee is entitled under section 102 of the FMLA and 29 CFR 825.200. Because the FFCRA amends the FMLA, and in particular references Section 102(d)(2)(B) of the FMLA, § 826.23 explains that an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies would be available to the employee to care for a child, such as vacation or personal leave or paid time off concurrently with the expanded family and medical leave under the EFMLEA. Although Section 102(d)(2)(B) is read broader in the traditional FMLA context to include sick and medical leave, the Department notes that the FMLA is in part a medical leave, whereas the leave provided under the FFCRA is solely for care for a family (*i.e.,* a child whose school or place of care is closed or whose child care provider is unavailable). The Department believes that this flexibility carries out the purposes of the FFCRA by allowing employees to receive full pay during the period for which they have preexisting accrued vacation or personal leave or paid time off, and allowing employers to require employees to take such leave and minimize employee absences.

Section 826.24 explains the amount an employer must pay an employee for each day of expanded family and medical leave under the EFMLEA taken to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. The payment requirement under the EFMLEA is triggered after two weeks that an employee uses leave for this reason. For each day of expanded family and medical leave after the initial two-week period, the employer must pay an employee taking such leave two-thirds of the employee's regular rate times the number of hours the employee would normally be scheduled to work that day, up to a maximum of $200 per day or $10,000 in total for the additional ten workweeks.

Some employees do not have a regular work schedule. If the employee's ''schedule varies week to week to such an extent that an employer is unable to determine with certainty [that] number of hours,'' section 110(b)(2)(C)(i) of the FMLA, as amended by the EFMLEA, requires the employer to compute pay per day of expanded family and medical leave based on ''the average number of hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.'' This six-month average of daily hours is possible only if the employee has been employed for at least six months. The Department does not believe Congress intended for the EFMLEA to use this six-month average only where an employee's ''schedule varies week to week,'' but also where the schedule varies day to day. This is because, even if an employee is scheduled for the same number of hours each workweek, day-to-day variations within each workweek could prevent an employer from determining the number of hours an employee would have been scheduled to work on a particular workday.[2] Thus, § 826.24(b) provides that the six-month average set forth in section 110(b)(2)(C) of the FMLA, as amended by the EFMLEA, is to be used to compute pay for each day of expanded family and medical leave taken where an employee's work schedule varies, without a week-to-week requirement, and has been employed for at least six months.

For an employee with a varying schedule of hours who has been employed for fewer than six months, section 110(b)(2)(C)(i) of the FMLA, as amended by the EFMLEA, provides that ''the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work'' should be used to compute the amount of pay for each day of expanded family and medical leave he or she takes after the initial unpaid period. The Department believes such ''reasonable expectation'' is best evidenced by an agreement between the employer and employee at the time of hiring. Thus, § 826.21(b)(2)(ii) explains the number of hours per day used to compute pay for an employee with a varying schedule who has been employed for less than six months is equal to the number of hours that the employee and the employer agreed at the time of hiring that the employee would be expected to work, on average, each workday. The agreement could have expressed the average number of hours over any time period—*e.g.,* each week, month, or year—so long as that daily average could be extrapolated. In the absence of such an agreement, the Department believes that the actual average number of hours the employee was scheduled to work each workday evinces ''the reasonable expectation . . . of the average number of hours per day that the employee would normally be scheduled to work.'' Accordingly, § 826.21(b)(2)(ii) further states that, in the absence of an agreement regarding the expected number of hours worked each day, the employer should use ''the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type'' to compute the amount of pay for an employee with a varying schedule who

[2] For instance, an employee may always work 40 hours each workweek, but on some weeks the employee works five eight-hour shifts and on other weeks he or she works four ten-hour shifts.

has been employed for fewer than six months.

The Department recognizes that the two-week initial unpaid period of expanded family and medical leave under § 826.60 is different from the ten-day unpaid period set forth in section 110(b)(1)(A) of the FMLA, as amended by the EFMLEA. This deviation is necessary to ensure that expanded family and medical leave provided under the EFMLEA and paid sick leave provided under the EPSLA work together—as Congress intended—to permit an employee to have a continuous income stream while taking FFCRA paid leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason.

The EFMLEA provides that, during the unpaid period of expanded family and medical leave, an employee may receive pay by using other paid leave to which he or she may be entitled, including paid sick leave provided by the EPSLA. Paid sick leave may be used for the same reason as expanded family and medical leave, *i.e.,* to care for a child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. And the amount of pay per hour of paid sick leave is guaranteed to be at least as much as the amount of pay per hour for paid expanded family and medical leave, *i.e.,* two-thirds of the employee's regular rate, up to $200 per day. Furthermore, the entitlement to paid sick leave of an employee with a regular work schedule, *i.e.,* eight hours each day for five days for a total of 40 hours each workweek—is the same as the ten-day period of unpaid expanded family and medical leave. Such an employee is entitled to 80 hours of paid sick leave, which provides pay at two-thirds of the employee's regular rate, as defined in § 826.25, for ten workdays. If the employee were concurrently taking expanded family and medical leave, he or she would be able to take paid expanded family and medical leave at two-thirds the regular rate as soon as the 80 hours of paid sick leave runs out. Thus, paid sick leave and expanded family and medical leave are designed to work in tandem to provide continuous income for an employee to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID–19 related reason. Put another way, the reason for an unpaid initial period of expanded family and medical leave is because an eligible employee already may concurrently use paid sick leave for the same reason and get paid at the same rate. The unpaid period is therefore intended to ensure that the employee has sufficient leave for a constant stream of income at two-thirds the regular rate, up to $200 per day, while taking care of his or her child, but not more paid leave than necessary for that purpose.

As explained above, a ten-day period of unpaid expanded family and medical leave satisfies these purposes for an employee who works a regular 40-hour week. But the twin purposes of providing sufficient, yet not excessive, paid leave are not satisfied with respect to employees who work unconventional hours. For instance, consider an employee who works twelve hours each day for three days each workweek, or a total of 36 hours each workweek. This employee would be entitled to 72 hours of paid sick leave under the EPSLA to care for his or her child, which lasts for two workweeks. The employee, however, would not be able to take paid expanded family and medical leave at the end of two workweeks time because he would have taken only six workdays of such leave, and the ten-day period of unpaid leave would still be in effect. In order to have a continuous income stream until the ten-day unpaid period of expanded family and medical leave expired, the employee would need an additional 48 hours of paid sick leave.

As another example, consider a second employee who works six hours each day for six days each workweek, also for a total of 36 hours each workweek. The second employee would likewise be entitled to 72 hours of paid sick leave under the EPSLA to care for his or her child, which lasts for two workweeks or twelve workdays. The period of unpaid expanded family and medical leave would expire after ten workdays—two workdays before the second employee runs out of paid sick leave. The second employee may transition from paid sick leave to expanded family and medical leave after ten workdays, leaving two days of paid sick leave unused. In other words, the second employee would have two more days of paid leave than necessary to have a continuous income stream at two-thirds the regular rate while caring for his or her child.

In short, there is inconsistency between the provisions for expanded family and medical leave under the EFMLEA and paid sick leave under the EPSLA with respect to the first employee because he or she would be 48 hours short of being able to have continuous income. And there is inconsistency between the two Acts with respect to the second employee because he or she would have more hours of leave than needed for that purpose. Accordingly, pursuant to the Secretary's authority to issue regulations ''to ensure consistency'' between the two types of paid leave under the FFCRA, § 826.24 states that the unpaid period for expanded family and medical leave lasts for two weeks rather than ten days.[3]

In subsection (d), we made clear that despite the cap on pay, an employee may elect to use, or an employer may require that an employee take leave under the employer's policies that would be available to the employee to care for a child, such as vacation or personal leave or paid time off, concurrently with expanded family and medical leave, and the employer must pay the employee a full day's pay for that day.

Section 826.25 explains how to calculate the regular rate that is used to determine the amount an employer must pay an eligible employee who takes paid sick leave or expanded family and medical leave (after the initial two-week unpaid period). An employee's regular rate is computed for each workweek as defined under section 7(e) of the FLSA, as ''all [non-overtime] remuneration for employment'' paid to the employee except for eight statutory exclusions, divided by the number of hours worked in that workweek. *See* 29 U.S.C. 207(e); *see also Bay Ridge Operating Co.* v. *Aaron,* 334 U.S. 446, 458 (1948) (stating that the ''regular rate must be computed by dividing the total number of hours worked into the total [non-overtime] compensation received'').

The Department's regulations at 29 CFR parts 531 and 778 explain how to calculate the regular rate in different circumstances. For example, the Department uses the computation of an employee's regular rate with respect to tips in § 531.60. Moreover, the Department clarifies how to compute an employee's regular rate under different compensation arrangements, including commissions and piece rates, at §§ 778.110–.122, and explains what types of compensation are excludable from the regular rate, at §§ 778.200–.225. The regular rate used to determine the amount of pay due an employee who takes paid sick leave or expanded family and medical leave must be computed using the same methods as those described in 29 CFR parts 531 and 778.

[3] As a practical matter, the unpaid period for employees who work regular Monday-through-Friday schedules would still be ten days because that is the number of days they would work in two weeks.

The regular rate must also be computed on a workweek to workweek basis. *See, e.g.,* § 778.104 (''Each workweek stands alone''). Neither the EPSLA nor the EFMLEA, however, explains which workweek should be used to compute the regular rate that is the basis for determining the amount of pay for leave taken. The Department does not believe it would be appropriate to use the workweek in which an employee takes leave because an employee's hours worked, and therefore regular rate, in such a workweek is unlikely to be representative. Indeed, if the employee takes leave for the entire workweek, the regular rate would equal zero.

Instead, the Department believes the regular rate used to determine the amount of pay under the EPSLA and the EFMLEA should be representative of the employee's regular rate from week to week. Section 826.25 therefore requires an employer to use an average of the employee's regular rate over multiple workweeks.[4] Such an average should be weighted by the number of hours worked each workweek. For example, consider an employee who receives $400 of non-excludable compensation in one week for working 40 hours and $200 of non-excludable compensation in the next week for working ten hours. The regular rate in the first week is $10 per hour ($400 ÷ 40 hours), and the regular rate for the second week is $20 per hour ($200 ÷ 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ÷ 50 hours).

To be representative, the period over which the regular rate is averaged should be substantially greater than the two workweeks used in the above example. The Department believes it would be appropriate to compute the average regular rate over the same period used by the EPSLA and the EFMLEA to compute the employee's average number of hours worked per day, *i.e.,* a six-month period ending on the date on which the employee first takes paid sick leave or expanded family and medical leave. The Department has selected this six-month period because it is sufficiently representative under both the EPSLA and the EFMLEA. And it minimizes regulatory burden by allowing employers to use the same payroll and schedule records to compute both an employee's average number of hours worked per day and average regular rate. Of course, computing an average regular rate used to determine the amount of pay should be computed over a six-month period is not possible if the employee at issue has not been employed for at least six months. In such a case, the average regular rate should be computed over the entire term of the employment.

C. Employee Eligibility for Leave Under the EPSLA and the EFMLEA

Section 826.30 sets out the criteria for an employee's eligibility to receive paid sick leave under the EPSLA and/or expanded family and medical leave under the EFMLEA, which have similar, but not identical, eligibility requirements for leave. This section also addresses when employers may elect to exclude certain otherwise-eligible employees from coverage under these Acts.

Sections 826.30(a) and (b) provide that all employees employed by a covered employer are eligible to take paid sick leave under the EPSLA regardless of their duration of employment, and all employees who have been employed by a covered employer for at least thirty calendar days are eligible to take expanded family and medical leave under the EFMLEA, subject to the exceptions described in §§ 826.30(c)–(d) and .40(b).

Section 826.30(b)(1)(i) further explains that an employee is considered to have been employed for at least thirty calendar days for purposes of EFMLEA eligibility if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin. For example, for an employee to be eligible to take leave under the EFMLEA on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020. Section 826.30(b)(1)(ii) provides that an employee who is laid off or otherwise terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least thirty calendar days, provided the employer rehires or otherwise reemploys the employee on or before December 31, 2020, and the employee had been on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. ''For example, an employee who was originally hired by an employer on January 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the EFMLEA and the EPSLA, if the same employer rehired the employee on October 1, 2020.''

The EFMLEA and the EPSLA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Acts. Section 826.30(c) reiterates this option and defines which employees are ''health care providers'' or ''emergency responders'' whom employers may exclude from eligibility for the EPSLA and the EFMLEA's leave requirements. An employer's exercise of this option does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Further, an employer's exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies. Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from taking paid leave under the EPSLA or the EFMLEA, such leave is subject to all other requirements of those laws and this Part, and should be treated in the same manner for purposes of the tax credit created by the FFCRA. To minimize the spread of COVID–19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA.

The Department recognizes that health care providers whom an employer may exempt pursuant to sections 3105 and 5102(a) of the FFCRA is broader than the definition of health care provider under 29 CFR 825.102. Section 5110(4) of the FFCRA adopts the FMLA definition of ''health care providers,'' which includes licensed doctors of medicine or osteopathy and ''any other person determined by the Secretary to be capable of providing health care services.'' 29 U.S.C. 2611(6). The Department defined ''health care provider'' narrowly in § 825.102 to mean medical professionals who are capable of diagnosing serious health conditions in light of the FMLA's requirement for such health care

[4] The Department notes that § 778.104 states that the FLSA ''does not permit averaging of hours over 2 or more weeks'' for the purpose of computing the regular rate. But this prohibition against averaging applies when the regular rate is used for its purpose under the FLSA to compute overtime pay due. It does not apply when, as here, the regular rate is used as a metric for an employee's average hourly non-overtime wages.

providers to issue certifications regarding the nature and probable duration of serious health conditions. *See* 29 U.S.C. 2613; *see also* 58 FR 31800 (''Because health care providers will need to indicate their diagnosis in health care certificates, such a broad definition was considered inappropriate.'').

The term ''health care provider'' as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID–19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID–19 public health emergency. Accordingly, the Department is adopting a definition of ''health care provider'' that is broader than the diagnosing medical professionals under § 825.102 for the limited purpose of identifying employees whom an employer may exclude under sections 3105 and 5102(a) of the FFCRA. The definition of health care provider under § 825.102 continues to apply for other purposes of the FFCRA, such as, for instance, identifying health care providers who may advise an employee to self-quarantine for COVID–19 related reasons under section 5102(a)(2).

The authority for employers to exempt emergency responders is reflective of a balance struck by the FFCRA. On the one hand, the FFCRA provides for paid sick leave and expanded family and medical leave so employees will not be forced to choose between their paychecks and the individual and public health measures necessary to combat COVID–19. On the other hand, providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society, including the functions of emergency responders. The FFRCA should be read to complement—and not detract from—the work being done on the front lines to treat COVID–19 patients, prevent the spread of COVID–19, and simultaneously keep Americans safe and with access to essential services. Therefore, the Department interprets ''emergency responder'' broadly.

The specific parameters of the Department's definition of ''emergency responder'' derive from consultation of various statutory and regulatory definitions and from the consideration of input provided to the Department by various stakeholders and public officials. The Department endeavored to include those categories of employees who (1) interact with and aid individuals with physical or mental health issues, including those who are or may be suffering from COVID–19; (2) ensure the welfare and safety of our communities and of our Nation; (3) have specialized training relevant to emergency response; and (4) provide essential services relevant to the American people's health and wellbeing. While the Department endeavored to identify these categories of workers, it was cognizant that no list could be fully inclusive or account for the differing needs of specific communities. Therefore, the definition allows for the highest official of a state or territory to identify other categories of emergency responders, as necessary.

Section 826.30(d) explains that the CARES Act grants authority to the Director of OMB to exclude, for good cause, certain federal government employers from eligibility to take paid sick leave or expanded family and medical leave. As to the EFMLEA, the Director of OMB may exclude certain categories of United States Executive Branch employees from expanded family and medical leave. As to the EPSLA, the Director of OMB may exclude certain categories of federal government employees if they are covered by Title II of the FMLA, occupy a position in the civil service (as defined in 5 U.S.C. 2101(1)), and/or are employees of a United States Executive Agency (as defined in 5 U.S.C. 105), which includes employees of the U.S. Postal Service and the U.S. Postal and Regulatory Commission.

D. Employer Coverage Under the EPSLA and the EFMLEA

Section 826.40 addresses which employers are covered by the EPSLA and the EFMLEA, that is, which employers must provide paid leave to employees as described in those Acts.

Section 826.40(a) explains which private employers must provide paid sick leave and expanded family and medical leave to their employees. Specifically, it explains that, subject to the exemption described in § 826.40(b), all private employers that employ fewer than 500 employees at the time an employee would take leave must comply with the EPSLA and the EFMLEA.

This determination is dependent on the number of employees at the time an employee would take leave. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID–19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

Section 826.40(a) also addresses how to determine who counts as an employee for this purpose, including discussing categories of workers who do (and do not) count toward the 500-employee threshold. In making this determination, the employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States. For example, if an employer employs 1,000 employees in North America, but only 250 are employed in a U.S. State, the District of Columbia, or a territory or possession of the United States, that employer will be considered to have 250 employees and is thus subject to the FFCRA.

Section 826.40(a) further explains that joint or integrated employers must combine employees in determining the number of employees they employ for this purpose. The FLSA's test for joint employer status applies in determining who is a joint employer for purposes of coverage, and the FMLA's test for integrated employer status applies in determining who is an integrated employer, under both the EPSLA and the EFMLEA.

Section 826.40(a) does not distinguish between for-profit and non-profit entities; employers of both types must comply with the FFCRA if they otherwise meet the requirements for coverage.

Section 826.40(b) describes the small employer exemption pursuant to the

Secretary's regulatory authority to exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern. The American Institute of Certified Public Accountants (AICPA) allows companies to use the ''ongoing concern assumption'' to defer some of its prepaid expenses until future accounting periods because the entity can continue in business for the foreseeable future without the intention nor the necessity to liquidate, cease trading, or seek protection from creditors pursuant to laws or regulations. In other words, the business is considered to remain a viable business for the foreseeable future. There is no formula provided by the AICPA to determine the viability of a business as a going concern, but rather the standard considers conditions or events in the aggregate.

The Department believes it is necessary to set forth objective criteria for when a small business with fewer than 50 employees can deny an employee paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID–19 related reasons. To that end, section 826.40(b)(1) explains that a small employer is exempt from the requirement to provide such leave when: (1) Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. For reasons (1), (2), and (3), the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Section 826.40(b)(2) explains that if a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth in § 826.40(b)(1) to justify such denial. The employer should not send such material or documentation to the Department, but rather should retain such records for its own files.

In exercising its authority to exempt certain employers with fewer than 50 employees, the Department balanced two potentially competing objectives of the FFCRA. On the one hand, the leave afforded by the FFCRA was designed to be widely available to employees to assist them navigating the social and economic impacts of COVID–19 as well as public and private efforts to contain and slow the spread of the virus. On the other hand, the Department recognizes that FFCRA leave entitlements have little value if they cause an employer to go out of business and, in so doing, deny employees not only leave but also jobs. In § 826.40(b), the Department attempted to extend the leave benefits as broadly as practicable, but not in circumstances that would significantly increase the likelihood that small businesses would be forced to close. The Department rejected alternative arrangements that excessively favored either the extension of leave or exclusion of small businesses or which imposed compliance requirements that were overly burdensome, particularly in economic conditions resulting from COVID–19.

Section 826.40(c) explains which public employers must comply with the EPSLA and the EFMLEA. It uses the term ''Public Agency,'' which as explained in the definitions section, has the same meaning as in section 203(x) of the FLSA. Specifically, public agency means the Government of the United States; the government of a State or political subdivision of a State; or an agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. All covered public agencies must comply with both the EPSLA and the EFMLEA regardless of the number of employees they employ, although such employers may exclude employees who are health care providers or emergency responders as described in § 826.30(c).

Section 826.40(c) provides further information about which parts of the Federal government must comply with these Acts. Because the EFMLEA only amends Title I of the FMLA, only employers of employees covered by Title I of the FMLA are subject to the requirements of the EFMLEA. Employers of federal employees covered by Title II of the FMLA are not subject to requirements of the EFMLEA.

Section 826.40(c) provides certain clarifications as to the EPSLA's and the EFMLEA's applicability to public employers. It explains that all public agencies must provide their eligible employees with paid sick leave, subject to the exceptions set forth in § 826.30(c)–(d). In general, public agencies must also provide their eligible employees with expanded family and medical leave, subject to the exceptions and limitations set forth in § 826.30(b)–(d). However, as § 826.40(c) clarifies, only certain employees of the United States or agencies of the United States (''federal employees'') are potentially eligible to take expanded family and medical leave. Those who are potentially eligible are the federal employees covered by Title I of the FMLA. Those who are not potentially eligible for expanded family and medical leave are the federal employees whose FMLA coverage is found elsewhere, including in Title II of the FMLA (codified in Title 5 of the U.S. Code). Section 826.40(c)(i)–(viii) sets forth specific examples of federal employees covered by Title I of the FMLA and therefore potentially eligible for expanded family and medical leave.

E. Intermittent Leave

Section 826.50 outlines the circumstances and conditions under which paid sick leave or expanded family and medical leave may be taken intermittently under the FFCRA. In this section, the Department has imported and applied to the FFCRA certain concepts of intermittent leave from its FMLA regulations. However, it has also modified these concepts and added additional limitations on the use of intermittent leave in circumstances where the Department believes it is incompatible with Congress' objectives to slow the spread of COVID–19.

One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently. Subsection (a) does not require an employer and

employee to reduce to writing or similarly memorialize their agreement. But, in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both. Additionally, where an employer and employee agree that the latter may take paid sick leave or expanded family and medical leave intermittently, they also must agree on the increments of time in which leave may be taken, as explained in subsections (b)(1) and (c).

Section 826.50(c) provides that if an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. This section intentionally affords teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business. Moreover, as teleworking employees present no risk of spreading COVID–19 to work colleagues, intermittent leave for any qualifying reason furthers the statute's objective to contain the virus.

In contrast, employees who continue to report to an employer's worksite may only take paid sick leave or expanded family and medical leave intermittently and in any increment—subject to the employer and employee's agreement—in circumstances where there is a minimal risk that the employee will spread COVID–19 to other employees at an employer's worksite. Therefore, subsection (b)(1) allows an employer and employee who reports to an employer's worksite to agree that the employee may take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID–19. In this context, the absence of confirmed or suspected COVID–19 in the employee's household reduces the risk that the employee will spread COVID–19 by reporting to the employer's worksite while taking intermittent paid leave. This is not true, however, when the employee takes paid sick leave for other qualifying reasons.

Subsection (b)(2) prohibits employees who report to an employer's worksite from taking paid sick leave intermittently, notwithstanding any agreement between the employer and employee to the contrary, if the leave is taken because the employee: (1) Is subject to a Federal, State, or local quarantine or isolation order related to COVID–19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; (3) is experiencing symptoms of COVID–19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID–19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. As the Department explains in subsection (b)(2), where paid leave is taken for these reasons, ''the employee is, may be, or is reasonably likely to become, sick with COVID–19, or is exposed to someone who is, may be, or is reasonably likely to become, sick with COVID–19.'' In these situations, the employee may not take intermittent leave due to the unacceptably high risk that the employee might spread COVID–19 to other employees when reporting to the employer's worksite. Once such an employee begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until the employee either uses the full amount of paid sick leave or no longer has a qualifying reason for taking paid sick leave. The Department believes that such a requirement furthers Congress' objective to slow the spread of COVID–19.

Finally, subsection (d) clarifies that where an employer and employee have agreed that FFCRA leave may be taken intermittently, only the amount of leave actually taken may be counted toward the employee's leave entitlements. This is consistent with the requirements for intermittent leave use under the FMLA and ensures that employees are able to use the full leave entitlement.

F. Leave To Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection Between the EPSLA and the EFMLEA

Both the EPSLA and the EFMLEA permit an employee to take paid leave when needed to care for his or her son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID–19 related reasons. Section 826.60 sets forth how the requirements of the EFMLEA and the EPSLA interact when an employee qualifies for both types of leave.

Generally, when an employee qualifies for leave under both Acts, an employee may first use the two weeks of paid leave provided by the EPSLA. This use runs concurrent with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is paid under the EFMLEA.

Section 826.60 further explains that where an employee has already taken some FMLA leave in the current twelve-month leave year as defined by 29 CFR 825.200(b), the maximum twelve weeks of EFMLEA leave is reduced by the amount of the FMLA leave entitlement taken in that year. If an employee has exhausted his or her twelve workweeks of FMLA or EFMLEA leave, he or she may still take EPSLA leave for a COVID–19 qualifying reason.

Section 826.60(b) addresses an employee's prior use of emergency paid sick leave, which does not prevent the employee from taking expanded family and medical leave. For example, if the employee takes two weeks of paid sick leave for a qualifying reason under EPSLA section 5102(a)(1)–(4) and (6), the employee has exhausted the paid sick leave available to the employee under the EPSLA and may not take additional paid sick leave for any qualifying reason. If the employee then needs to take leave under the EFMLEA, the employee may do so, but the first ten days of expanded family and medical leave may be unpaid. The employee may, however, choose to substitute earned or accrued paid leave, as provided by the employer's established policies.

G. Leave To Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection Between the EFMLEA and the FMLA

Section 826.70 addresses the interaction between the new entitlement to take FMLA leave to care for an employee's child due to school or place of care closure or child care unavailability under the EFMLEA and an employee's entitlement to take FMLA leave for other reasons, such as bonding with a newborn or newly placed child, for the employee's own serious health condition, or to care for a covered family member with a serious health condition. The EFMLEA amended the FMLA to add a sixth reason to take the twelve-week FMLA entitlement: To care for an employee's son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons.

Eligibility requirements for employees to take expanded family and medical leave under the EFMLEA differ from standard FMLA leave. Not all employees who are eligible to take expanded family and medical leave will be eligible to take FMLA leave for other reasons. Employees only need to have been employed for 30 calendar days in order to be eligible for expanded family and medical leave to care for their child due to school or place of care closure or child care unavailability under the EFMLEA. In contrast, to be eligible to take FMLA leave for other reasons, employees generally need to have worked for the employer for at least twelve months, have 1,250 hours of service in the twelve-month period prior to the leave, and work at a location where the employer has at least 50 employees within 75 miles.

Employer coverage also differs under the EFMLEA and the FMLA. Most significantly, the EFMLEA applies to all employers with fewer than 500 employees, while the FMLA generally does not apply to employers with fewer than 50 employees. Further, employers of health care providers and emergency responders may exclude such employees from the EFMLEA's leave requirements, but not the FMLA's.

An employee's ability to take EFMLEA leave depends on his or her use of FMLA leave during the 12-month FMLA leave year pursuant to 29 CFR 825.200(b) for a reason unrelated to COVID–19. If an employee has already taken such leave, the employee may not be able to take the full twelve weeks of expanded family and medical leave under the EFMLEA. For example, if the employer uses the calendar year as the twelve-month FMLA leave year and an employee took three weeks of leave in January 2020 for the employee's own serious health condition, the employee would only have nine weeks of expanded family and medical leave available. Additionally, employees are limited to a total of twelve weeks of expanded family and medical leave under the EFMLEA, even if the applicable time period (April 1 to December 31, 2020) spans two twelve-month leave periods under the FMLA. Finally, for employees who are eligible to take leave under the FMLA and the EFMLEA, and who take leave to care for a service member with a serious injury or illness, the total amount of leave available to the employee will be calculated as set forth in 29 CFR 825.127(e).

As explained in the above discussion of § 826.60, the first two weeks of expanded family and medical leave may be unpaid and the employee may substitute paid sick leave under the EPSLA or employer-provided earned and accrued paid leave during this period. After the first two weeks of leave, expanded family and medical leave is paid at two-thirds the employee's regular rate of pay, up to $200 per day. *See* § 826.24. Because this period of expanded family and medical leave is paid, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where Federal or state law permits, to have accrued paid leave supplement the two-thirds pay under the EFMLEA so that the employee receives the full amount of their normal pay. Federal agencies generally lack authority to provide for such a supplement.

H. Employer Notice

Section 826.80 addresses the FFCRA requirement that employers post and keep posted a notice of the law's requirements. As required by the FFCRA, the Department made a model notice available on March 25, 2020, and employers may, free of charge, download the poster (WHD1422 REV 03/20) from the WHD website at *https://www.dol.gov/whd.* In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by email, or post the required notice electronically on an employee information website to satisfy the FFCRA requirement. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through email, or online. An employer may post or distribute the required information provided in the model notice in a different format, as long as the content is accurate and readable. Although the FFCRA does not require employers to provide a translated notice to employees, the Department has issued a Spanish language version of the poster. For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation. *See* 29 U.S.C. 2619; 29 CFR 825.300.

The Department is aware that employers newly affected by the EFMLEA requirements of the FFCRA will not have established policies and practices for administering FMLA leave. In consideration of these employers, the number of employees who will be eligible to use the FMLA for the first time for a limited period of time, and interruptions to normal business operations from emergency conditions, the Department did not adopt in the FFCRA employer notice regulations or employer ''specific notice'' obligations that are required in the FMLA regulations. The FFCRA regulations do not require employers to respond to employees who request or use EFMLEA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances. However, an employer that has established practices for providing individual employees with specific notices compliant with the FMLA regulatory guidance at 29 CFR 825.300 may prefer to apply their existing practices to EFMLEA leave users.

I. Employee Notice of Need for Leave

Section 826.90 addresses an employee's notice to his or her employer regarding the need to take leave. Section 826.90(a) explains that for paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons, an employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave. Sections 826.90(b) and (c) explain that it will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer

to determine whether the requested leave is covered by the FFCRA. The employer may not require the notice to include documentation beyond what is allowed by § 826.100.

Section 826.90(d) states that it is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

J. Documentation of Need for Leave

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. As provided in § 826.100, such documentation must include a signed statement containing the following information: (1) The employee's name; (2) the date(s) for which leave is requested; (3) the COVID–19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID–19 qualifying reason.

An employee must provide additional documentation depending on the COVID–19 qualifying reason for leave. An employee requesting paid sick leave under § 826.20(a)(1)(i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. An employee requesting paid sick leave under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID–19 related reasons. An employee requesting paid sick leave under § 826.20(a)(1)(iv) to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave under § 826.20(a)(1)(v) or expanded family and medical leave to care for his or her child must provide the following information: (1) The name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID–19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

For leave taken under the FMLA for an employee's own serious health condition related to COVID–19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID–19, the normal FMLA certification requirements still apply. *See* 29 CFR 825.306.

K. Health Care Coverage

Section 826.110 explains that an employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave. *See* 29 U.S.C. 2614(c); *see also* 29 U.S.C. 1182 and 26 CFR 54.9802–1(e)(2)(i); 29 CFR 2590.702(e)(2)(i) and 45 CFR 146.121(e)(2)(i) (providing that an employer cannot establish a rule for group health plan eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work, unless the employer treats employees who are absent from work on sick leave as being actively at work). This rule defines ''group health plan'' using the definition under the FMLA. *See* 29 CFR 825.102. Maintenance of individual health insurance policies purchased by an employee from an insurance provider, as described in 29 CFR 825.209(a), is the responsibility of the employee.

Section 826.110(b)–(g) explains what an employer must do to continue group health plan coverage on the same terms as if the employee did not take paid sick leave or expanded family and medical leave. These requirements are similar to the regulatory requirements for employers when employees take FMLA leave for other reasons. In particular, while an employee is taking paid sick leave or expanded family and medical leave, the employer must maintain the same group health plan benefits provided to an employee and his or her family members covered under the plan prior to taking leave—including medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, and other benefit coverage. This requirement also applies to benefits provided through a supplement to a group health plan, whether or not the supplement is provided through a flexible spending account or other component of a cafeteria plan.

Likewise, if an employer provides a new health plan (including a new benefit package option) or benefits or changes health benefits or plans while an employee is taking paid sick leave or expanded family and medical leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. The employer must give the employee notice of any opportunity to change plans or benefits, and if the employee requests the changed coverage it must be provided by the employer.

Employees in a group health plan who take paid sick leave or expanded family and medical leave remain responsible for paying the same portion of the plan premium that the employee paid prior to taking leave. If premiums are adjusted, the employee is required to pay the new employee premium contribution on the same terms as other employees. The employee's share of premiums must be paid by the method normally used during any paid leave; in many cases, this will be through a payroll deduction. For unpaid leave, or where the pay provided by the EFMLEA or the EPSLA is insufficient to cover the employee's premiums, the rule directs employers to 29 CFR 825.210(c), which specifies how employers can obtain payment. If an employee chooses not to retain group health plan coverage while taking paid sick leave or expanded family and medical leave, the employee is entitled upon returning from leave to be reinstated on the same terms as prior to taking the leave, including family member coverage.

L. Multiemployer Plans

An employer that is a signatory to a multiemployer collective bargaining agreement may satisfy its obligations under the EFMLEA and the EPSLA by making contributions to a multiemployer fund, plan, or other program consistent with its bargaining obligations and its collective bargaining agreement. The contributions must be based on the amount of paid sick leave and expanded family and medical leave to which the employee is entitled under the applicable provisions of the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. The fund, plan, or other program must allow employees to obtain their pay for the leave to which they are entitled under the FFRCA.

Alternatively, an employer that is part of a multiemployer collective bargaining agreement may choose to satisfy its obligations under the FFCRA by means other than through contribution to a plan, fund, or program, provided they are consistent with its bargaining obligations and collective bargaining agreement.

M. Return to Work

Section 826.130 describes an employee's right to return to work after taking paid leave under the EPSLA or the EFMLEA. In most instances, an employee is entitled to be restored to

the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave. *See* the FMLA job restoration provisions at 29 CFR 825.214 and the FMLA equivalent position provisions at 29 CFR 825.215.

However, the new statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. This provision tracks the existing provision under the FMLA in 29 CFR 825.216. The employer has the same burden of proof to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

The EFMLEA amendments to the FMLA specify that the FMLA's restoration provision in 29 U.S.C. 2614(a)(1) does not apply to an employer who has fewer than twenty-five employees if all four of the following conditions are met:

(a) The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable;

(b) The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (*i.e.,* due to COVID–19 related reasons) during the period of the employee's leave;

(c) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and

(d) If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID–19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.

In addition, as these provisions amend the FMLA, the existing limitation to job restoration for ''key'' employees is applicable to leave taken under the EFMLEA. The FMLA's key employee regulations are in 29 CFR 825.217.

N. Recordkeeping

Section 826.140 explains that an employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless of whether leave was granted or denied. If an Employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years. If an employer denies an employee's request for leave pursuant to the small business exemption under § 826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years. Section 826.140 also explains what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at *https://www.irs.gov/forms-pubs/about-form-7200* and *https://www.irs.gov/pub/irs-drop/n-20-21.pdf.*

O. Prohibited Acts and Enforcement

Sections 826.150 and 826.151 describe certain acts that are prohibited under the EPSLA and the EFMLEA, as well as enforcement mechanisms.

Section 826.150(a) explains that, under the EPSLA, employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took paid sick leave, initiated a proceeding under or related to paid sick leave, or testified or is about to testify in such a proceeding.

Section 826.150(b) explains that an employer who violates the paid sick leave requirements is considered to have failed to pay the minimum wage required by section 6 of the FLSA, and an employer who violates the prohibition on discharge, discipline, or discrimination described in section 826.150(a) is considered to have violated section 15(a)(3) of the FLSA. *See* 29 U.S.C. 206, 215(a)(3). With respect to such violations, the relevant enforcement provisions of sections 16 and 17 of the FLSA apply. *See* 29 U.S.C. 216, 217.

For instance, an employee may maintain, on behalf of the employee and any other similarly-situated employees, an action in any federal or state court of competent jurisdiction to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees. Moreover, the Secretary may bring an action against an employer to recover an amount equal to the Federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer. Finally, in the case of a repeated or willful violation, the employer shall also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.

Section 826.151(a) explains that, for purposes of the EFMLEA, employers are subject to the prohibitions that apply with respect to all FMLA leave, which are set forth at 29 U.S.C. 2615. Specifically, employers are prohibited from interfering with, restraining, or denying an employee's exercise of or attempt to exercise any right under the FMLA, including the EFMLEA; discriminating against an employee for opposing any practice made unlawful by the FMLA, including the EFMLEA; or interfering with proceedings initiated under the FMLA, including the EFMLEA.

Section 826.151(b) explains that, for purposes of the EFMLEA, employers are subject to the enforcement provisions set forth in section 107 of the FMLA, with one exception: an employee may not bring a private action against an employer under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA. *See* 29 U.S.C. 2617; 29 CFR 825.400. In other words, an employee can only bring an action against an employer under the EFMLEA if the employer has had 50 or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year, as required by section 101(4)(A)(i) of the FMLA.

Section 826.152 provides that employees may file complaints alleging violations of the EPSLA and/or the EFMLEA with WHD.

Section 826.153 sets out the Secretary's investigative authority under the EPSLA and the EFMLEA. Under the EPSLA, the Secretary may investigate and gather data in the same manner as authorized by sections 9 and 11 of the FLSA. *See* 29 U.S.C. 209, 211. Under the EFMLEA, the Secretary may investigate and gather data in the same manner as authorized by sections 106(a) and (d) of the FMLA. *See* 29 U.S.C. 2616(a), (d). The provisions authorize, among other things, the Secretary to enter a workplace and have access to, inspect, and copy documents, and/or require witness attendance and testimony, relating to any matter under investigation, from any person or entity being investigated or proceeded against,

at any stage of any proceeding or investigation, at any place in the United States. They also permit the Secretary to compel the production of relevant documents or testimony by subpoena as permitted by these provisions of law, including that in the event of any failure or refusal to comply with such a subpoena, the Secretary may obtain from any district court in the United States an order to compel production and/or testimony. Failure to obey such an order may be enforced through contempt proceedings.

P. Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements

Section 826.160 discusses the effect of taking paid sick leave and expanded family and medical leave on other rights, benefits, employer practices, and collective bargaining agreements. The statutory provisions underlying this section appear in the EPSLA.

Section 826.160(a)(1) explains that an employee's entitlement to, or actual use of, paid sick leave is not grounds for diminishment, reduction, or elimination of any other right or benefit to which the employee is entitled under any other federal, state, or local law, under any collective bargaining agreement, or under any employer policy that existed prior to April 1, 2020. *See* 29 U.S.C. 2651(b), 2652. Paid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before the EPSLA became operational on April 1, 2020, and effective on April 2, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave.

Section 826.160(a)(2) explains that an employer may not deny an employee paid sick leave or expanded family and medical leave on the grounds that the employee has already taken another type of leave or taken leave from another source, including leave taken for reasons related to COVID–19. Regardless of how much other leave an employee has taken up to the date he or she requests paid sick leave or expanded family and medical leave, the employer must permit the employee to immediately take any and all paid sick leave or expanded family and medical leave to which he or she is entitled and eligible under the EPSLA and the EFMLEA. However, the preceding analysis does not apply to or affect the FMLA's twelve workweeks within a twelve-month period cap.

The Department interprets ''existing employer policy'' in section 5107(1)(C) of the FFCRA to include a COVID–19 related offering of paid leave that the employer voluntarily issued prior to April 1, 2020, and under which employees were offered more paid leave than under the employer's standard or current policy. The Department acknowledges that some employers voluntarily offered and provided such leave to help their employees in this time of emergency. Nonetheless, the FFCRA still requires those employers to provide the entirety of the paid sick leave and expanded family and medical leave to which its employees are eligible, regardless of whether an employee took the additional paid leave the employer voluntarily offered. Doing so is necessary to ensure all eligible employees receive the full extent of paid sick leave and expanded family and medical leave to which they are entitled under the EPSLA and the EFMLEA. However, an employer may prospectively terminate such a voluntary additional paid leave offering as of April 1, 2020, or thereafter, provided that the employer had not already amended its leave policy to reflect the voluntary offering. This means the employer must pay employees for leave already taken under such an offering before it is terminated, but the employer need not continue the offering in light of the FFCRA taking effect.

Finally, the Department clarifies that employees do not have any right or entitlement to use paid sick leave or expanded family and medical leave retroactively, meaning they have no right or entitlement to be paid through paid sick leave or expanded family and medical leave for any unpaid or partially paid leave taken before April 1, 2020.

Section 826.160(b) explains the sequencing of paid sick leave with other types of leave. Pursuant to section 5102 of the FFRCA, an employee may choose to use paid sick leave prior to using any other type of paid leave to which he or she is entitled under any other Federal, State, or local law; collective bargaining agreement; or employer policy that existed prior to April 1, 2020. As this decision is at the employee's discretion, § 826.160(b)(2) clarifies that no employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking paid sick leave. Of course, an employer may not require or influence an employee to use unpaid leave prior to taking paid sick leave; doing so would be akin to denying or attempting to deny the employee the paid sick leave to which he or she is entitled.

Section 826.160(c) explains the sequencing of expanded family and medical leave with other types of leave. No employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking expanded family and medical leave. However, an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off, concurrently. If expanded family and medical leave is used concurrently with another source of paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken, even if that amount is greater than $200 per day or $10,000 in the aggregate. But the employer's eligibility for tax credits is still limited to the cap of $200 per day or $10,000 in the aggregate.

Section 826.160(d)–(e) explains that an employer has no obligation to provide, and an employee has no right or entitlement to receive, financial compensation or other reimbursement for unused paid sick leave or unused expanded family and medical leave in the event the employee's employment ends after April 1, 2020, but before the FFCRA's expiration on December 31, 2020. Moreover, the Department interprets sections 5107(2) and 5109 of the FFCRA to mean that no employer has an obligation to provide, and no employee or former employee has a right or entitlement to receive, financial compensation or other reimbursement for unused paid sick leave or unused expanded family and medical leave upon or after the FFCRA's expiration on December 31, 2020.

Section 826.160(f) explains that any one individual employee is limited to a maximum of two weeks (80 hours) paid sick leave as described in § 826.160. Thus, the absolute upper limit of 80 hours of paid sick leave to which one could potentially be eligible is per person and not per job. Should an employee change positions during the period of time in which the paid sick leave is in effect, he or she is not entitled to a new round of paid sick leave. Once an employee takes the maximum 80 hours of paid sick leave, he or she is not entitled to any paid sick leave from a subsequent employer. If an employee changes positions before taking 80 hours of paid sick leave, then his or her new employer (if covered by FFCRA) must provide paid sick leave

until the employee has taken 80 hours of paid sick leave total regardless of the employer providing it.

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The FFCRA authorizes the Department to issue regulations under the EPSLA and the EFMLEA pursuant to the good cause exception of the APA. FFCRA sections 3102(b) (adding FMLA section 110(a)(3)), 5111.

The Department is bypassing advance notice and comment because of the exigency created by sections 3106 and 5108 of the FFCRA, which go into effect on April 1, 2020, and expire on December 31, 2020. The COVID–19 pandemic has escalated at a rapid pace and scale, leaving American families with difficult choices in balancing work, child care, and the need to seek medical attention for illness caused by the virus. To avoid economic harm to American families facing these conditions, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the Department from successfully exercising the authority created by sections 3106 and 5108. Moreover, such delay would be counter to one of the FFCRA's main purposes in establishing paid leave: enabling employees to leave the workplace now to help prevent the spread of COVID–19.

2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The FFCRA authorizes the Department to issue regulations that are effective immediately under the EPSLA and the EFMLEA pursuant to the good cause exception of the APA. FFCRA sections 3102(b) (adding FMLA section 110(a)(3)), 5111; CARES Act section 3611(1)–(2). For the reasons stated above, the Department has concluded it has good cause to make this temporary rule effective immediately and until the underlying statute sunsets on December 31, 2020.

B. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

1. Introduction

Under E.O. 12866, OIRA determines whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. As described below, this temporary rule is economically significant. The Department has prepared a Regulatory Impact Analysis (RIA) in connection with this rule, as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule. OIRA has designated this rule as a ''major rule'', as defined by 5 U.S.C. 804(2).

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

2. Overview of the Rule

The rule implements the EPSLA and the EFMLEA, as modified by the CARES Act. The EPSLA requires that certain employers provide two workweeks (up to 80 hours) of paid sick leave to eligible employees who need to take leave from work for specified reasons. The EFMLEA requires that certain employers provide up to twelve weeks of expanded family and medical leave to eligible employees who need to take leave from work because the employee is caring for his or her son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID–19 related reasons. Payments from employers to employees for such paid leave, as well as allocable costs related to the maintenance of health benefits during the period of the required leave, is to be reimbursed by the Department of the Treasury via tax credits, up to statutory limits, as provided under the FFCRA.

3. Economic Impacts

The Department estimated the number of affected employers and quantified the costs associated with this temporary rule. The paid sick leave and the expanded family and medical leave provisions of the FFCRA both apply to employers with fewer than 500 employees. The 2017 Statistics of U.S. Businesses (SUSB) reports that there are 5,976,761 private firms in the U.S. with fewer than 500 employees.[5] This temporary rule says that small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school or place of care closings or child care unavailability if the leave payments would jeopardize the viability of their business as a going concern. The 2017 SUSB reports that there are 5,755,307 private firms with fewer than 50 employees, representing 96 percent of all impacted firms (firms with fewer than 500 employees). The employers who are not able to qualify for the exemption discussed above are those with fewer than 500 employees but greater than or equal to 50 employees. Using the SUSB data mentioned above, the Department estimates that there are 221,454 firms that meet this criteria.

Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, their employers may have some

[5] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2017 SUSB Annual Data Tables by Establishment Industry.

employees who do not meet this definition, so these employers may still be impacted by the provisions of the FFCRA.

The Department estimates that employees who work for employers with fewer than 500 employees could potentially benefit from this rule. According to the 2017 SUSB data, the 5,976,761 firms that meet this criteria employ 60,556,081 workers. Not all eligible employees will require use of the paid sick leave or expanded family and medical leave provisions of the FFCRA. The Department lacks data to determine how many employees will use this leave, which type of leave they will use and for what reason, and the wages of those who will use the leave.

Certain health care providers and emergency responders may be excluded from this group of impacted employees. The rule defines health care provider to include anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution. According to the SUSB data mentioned above, employers with fewer than 500 employees in the health care and social assistance industry employ 9.0 million workers.[6] This estimate is likely to be the upper bound of potentially exempt health care industry workers, because it could include workers that may not be employed at an institution covered by the exemption. This estimate may not, however, include employees who provide services to the health care industry. The SUSB data does not include further industry breakouts, and so the Department is unable to determine the exact number of workers employed at these organizations with fewer than 500 employees.

The rule defines emergency responders as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID–19. The rule provides a list of occupations that includes but is not limited to military or National Guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, and public works personnel. Because this list consists of occupations spread across various industries, the Department is unable to use the SUSB data to determine the magnitude of potential affected emergency responders. According to the May 2018 BLS Occupational Employment and Wages estimates, these occupations have a combined employment of 4.4 million.[7] This may be an over count or an under count of the potentially exempt emergency responders. The estimate may be an over count because it includes employees who work for employers of all sizes, not just those with fewer than 500 employees. The estimate may be an under count because it does not include military or national guard, as they are not counted in the OES estimates.

i. Costs

This temporary rule implementing the paid sick leave and expanded family and medical leave provisions of the FFCRA will result in four different categories of costs to employers: Rule familiarization costs, documentation costs, costs of posting a notice, and other managerial and operating costs. The temporary rule will also result in increased costs to the Department to administer the rule and handle complaints and claims related to the provisions of the Acts.

a. Rule Familiarization Costs

The Department estimates that all employers with fewer than 500 employees will need to review the rule to determine their responsibilities. For those 5,755,307 employers with fewer than 50 employees, they will need to review the rule to determine what the rules are for all businesses, what the small employer exemptions are, and how to either comply or show that the requirements of the rule would jeopardize the viability of their business. The Department estimates that these small employers will likely spend one hour to understand their responsibilities under the rule. For the 221,454 employers with fewer than 500 employees, but greater than or equal to 50 employees, they will likely need to spend one hour to read the rule and determine their responsibilities to provide paid sick leave and expanded family and medical leave. The Department estimates that this will be a one-time rule familiarization cost, as the provisions of the Act sunset on December 31, 2020.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers is $30.29 per hour.[8] In addition, the Department also assumes that benefits are paid at a rate of 46 percent[9] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully-loaded hourly wage of $49.37.[10] The Department estimates that the total rule familiarization cost to employers with fewer than 50 employees, who spend one hour reviewing the rule, will be $284,139,507 (5,755,307 firms × 1 hour × $49.37). The Department estimates that the total rule familiarization cost to employers with greater than or equal to 50 but fewer than 500 employees will be $10,933,184 (221,454 firms × 1 hour × $49.37). Total rule familiarization costs for all impacted firms will therefore be $295,072,691.

b. Costs of Documentation

Employers with fewer than 50 employees are able to be exempt from providing paid sick leave for child care purposes and expanded family and medical leave under the FFCRA if they are able to show that complying with the requirements would jeopardize the viability of their business as a going concern. These employers will need to demonstrate this burden, and to show that they are exempt. These small employers must document the facts and circumstances to demonstrate this burden if they have employees who are requesting paid sick leave or expanded family and medical leave. Although the employers are not required to send such material or documentation to the Department, they are required to retain such records for their own files. Some employers will not qualify for the exemption. The Department lacks specific data to estimate the number of small employers who will use the exemption, but the Department assumes

[6] Statistics of U.S. Businesses 2017, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2017 SUSB Annual Data Tables by Establishment Industry.

[7] Occupational Employment and Wages, May 2018, *https://www.bls.gov/oes/2018/may/oes131141.htm.* The Department used SOC codes 29–1060 (Physicians and Surgeons), 29–1141 (Registered Nurses), 29–1171 (Nurse Practitioners), 29–2041 (Emergency Medical Technicians and Paramedics), 33–2000 (Fire Fighting and Prevention Workers), and 33–3000 (Law Enforcement Workers), to represent the occupations listed in the rule.

[8] Occupational Employment and Wages, May 2018, *https://www.bls.gov/oes/2018/may/oes131141.htm.*

[9] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

[10] $30.29 + $30.29(0.46) + $30.29(0.17) = $49.37.

that until the end of the year, potentially up to 10 percent of these 5,755,307 employers (575,531) will likely document that the requirements of the Act will jeopardize the viability of their businesses. The Department estimates that each of these employers will spend one hour for creating and documenting these records. Costs of documentation for these small employers will therefore be $28,413,965 (575,531 firms × 1 hour × $49.37).

Employers are required to retain all records or documentation provided by the employee prior to taking paid sick leave or expanded family and medical leave. When employees take expanded family and medical leave, employees must provide their employers with appropriate documentation in support of such leave. Employers must retain this documentation, as it may be required for tax credits and other purposes under the FFCRA. For the 221,454 employers with between 50 and 500 employees, the Department estimates that they will spend an additional one hour, on average, on documentation associated with this rule. For the 5,755,307 employers with fewer than 50 employees, the Department assumes that they will spend 30 minutes, on average, on documentation associated with this rule. The time spent by small employers will be lower because they have fewer employees, and some of them will be able to use the small business exemption from the requirement to provide leave due to school or childcare closings. The Department believes an average of one hour or 30 minutes is appropriate for the year, because some employers will not have any employees that will request leave, so will therefore not need any documentation, while other employers will have multiple employees requesting this leave. Documentation costs for these employers will therefore be $153,002,937 (5,755,307 × 0.5 hours × $49.37) + (221,454 × 1 hour × $49.37).

Total documentation costs for employers of all sizes are therefore estimated to be $181,416,902 ($28,413,965 + $153,002,937).

c. Costs of Posting a Notice

Section 5103(a) of the FFCRA requires employers to post a notice to inform their employees of the requirements of the EPSLA. The notice must be posted in a conspicuous place on the premises of the employer where notices to employees are customarily posted, or emailed or direct mailed to employees, or posted electronically on an employee information internal or external website. All employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA are required to post this notice. The Department estimates that all 5,976,761 employers with fewer than 500 employees will post this notice, and that 99 percent of employers (5,916,993) will post the information electronically while 1 percent (59,768) will physically post the notice on employee bulletin boards. The Department estimates that it will take 15 minutes (or 0.25 hours) for employers posting the provision electronically to prepare and post the provision, and it will take 75 minutes (or 1.25 hours) for employers posting the notice manually to prepare the notice and post it in a conspicuous place where notices to employees are customarily posted. Employers who post electronically will incur a one-time cost of $73,030,486 (5,916,993 × 0.25 × $49.37) and those who physically post the notice will incur a one-time cost of $3,688,433 (59,768 × 1.25 × $49.37). Therefore, the total cost of posting this notice will be $76,718,919. Employers may also incur a small cost of manually producing the notices, including paper, printer ink, etc., but the Department believes that this cost will be minimal compared to the cost of the time spent preparing and posting the notice.

d. Other Managerial and Operating Costs

In order to comply with the paid sick leave and expanded family and medical leave provisions of the FFCRA, employers may incur additional managerial and operating costs that the Department is unable to quantify. For example, when employees require the use of this paid leave, employers will need to determine if their employees are eligible for the leave, and will need to calculate the amount that an employee should receive, and will need to make the adjustments to an employee's paycheck, and will also need to adjust bookkeeping practices to track the amount of leave used by an employee. Because the Department lacks data on how many employees will require either paid sick leave or expanded family and medical leave through the end of the year, the total managerial and operation costs incurred by employers cannot be quantified. However, for illustrative purposes, for each employee that requires the use of this leave, the Department estimates it will take an employer two hours to complete these additional tasks. If these tasks are performed by a Compensation, Benefits, and Job Analysis Specialist with a fully-loaded hourly wage of $49.37, then the cost to each employer per employee requiring leave is $98.74. The Department estimates that all 5,976,761 firms with fewer than 500 employees could potentially incur this cost, but is unable to determine the extent to which leave will be used by employees given the various eligibility requirements, and therefore cannot estimate the total managerial and operation costs incurred.

There are likely other costs to employers for which the Department is unable to quantify in part because the number of employees who will qualify for leave under the FFCRA and take such leave at each employer is unknown and because the productivity losses caused by employees taking leave likely vary by employer and for each individual employee, but which are discussed qualitatively here. The new paid leave provisions of the Act may result in an increase in the number of employees who take advantage of sick leave and family and medical leave, compared to the number of employees who would use leave absent the new provisions. When an employee takes leave, the overall productivity of the business likely will suffer (although there could be some offsetting productivity improvements if coworkers are less likely to become infected) and, in some instances, the business may face unique operational challenges which could hinder its ability to continue operations for the same duration or at the same capacity as before the employee(s) took leave. These costs are difficult to quantify, but likely will be significant, especially if a large number of employees are eligible for, and take, leave. These costs are not created specifically because of any unique features of this temporary rule, but are directly linked to the statute's leave provisions.

e. Costs to the Department

WHD will also incur costs associated with the paid sick leave and expanded family and medical leave provisions of the FFCRA. Prior to this Act, WHD had not enforced a comprehensive paid sick leave program applicable to a large segment of the U.S. workforce (minus the exemptions). WHD will incur the additional costs of setting up a new enforcement program, administering the program, and processing complaints associated with this new provision. The Department does not have data to assess this cost to the Department.

ii. Cost Summary

As discussed above, the quantified costs associated with the paid sick leave and expanded family and medical leave provisions of the FFCRA and with this temporary rule are rule familiarization

costs, costs of documentation, and the cost of posting a notice. Table 1 summarizes all of these costs in 2018 dollars. The Department estimates that total costs in 2020 are $553 million.

Table 1. Costs

Rule Familiarization Costs	$295,072,691
Documentation Costs	$181,416,902
Cost of Posting a Notice	$76,718,919
Total Costs	**$553,208,512**

iii. Transfers

The transfers associated with this rule are the paid sick leave and expanded family and medical leave that employees will receive as a result of the FFCRA. The paid leave will initially be provided by employers, who will then be reimbursed by the Department of the Treasury through a tax credit, up to statutory limits, which is then ultimately paid for by taxpayers (although there may be some offsetting taxpayer effects due to statutory limits, which is then ultimately paid for by taxpayers' reduced reliance on social assistance programs). Such transfers may be reduced if employees opt to use or employers require that employees use certain pre-existing leave (*i.e.,* personal or vacation leave or paid time off) concurrently with any EFMLEA leave. As discussed above, the total number of employees who are potentially eligible for this leave is as high as 61 million, but the number of employees who will actually use the leave will be a smaller share of this total. The Department does not know to what extent employees will be exposed to COVID–19 themselves, will be subject to a Federal, State, or local quarantine, will be caring for an individual exposed to COVID–19, or will need to stay home to take care of a child out of school or child care (and unable to telework), and therefore does not know how many employees will require use of the paid leave provided in the Act. In order to quantify the potential transfer, the Department would need to determine the number of days of leave that would be taken, and the monetary value of those days of leave. The FFCRA requires employers to pay leave based on an employee's regular rate, so the Department would need to determine the regular rate of each employee who requests leave. This estimate could vary greatly depending on the occupations and industries of employees requesting leave. The share of the regular rate used to calculate the transfer would also depend on the reason for which an employee requires the use of paid leave. The Department would also need to determine the number of days each employee would take leave, the type of leave employees would take, and whether EFMLEA leave would run concurrently with certain previously-provided leave, all of which would vary depending on whether they are taking paid sick leave or expanded family and medical leave. If an employee requires the use of paid sick leave to self-quarantine, they will likely take the entire 80 hours allotted, because the CDC's guidelines recommend a quarantine period of two weeks. Additionally, an employee may take up to ten weeks of paid expanded family and medical leave to care for his or her child whose school or place of care is closed or child care provider is unavailable. For school districts that have closed through the end of the 2020 school year, it is likely that these parents would take the entire twelve week allotment. The Department lacks data to determine which employees will need leave, how many days of leave will ultimately be used, and how much pay employers will be required to provide for such leave. Although the Department is unable to quantify the transfer of paid leave, we expect that it is likely to exceed $100 million in 2020.

iv. Benefits

The benefits of the paid sick leave and expanded family and medical leave provisions of the FFCRA are vast, and although unable to be quantified, are expected to greatly outweigh any costs of these provisions. With the availability of paid leave, sick or potentially exposed workers will be encouraged to stay home, thereby helping to curb the spread of the virus and lessen the strain on hospitals and health care providers. If employees still receive pay while on leave, they will benefit from being able to cover necessary expenses, and to continue to spend money to help support the economy. This will have spillover effects not only on the individuals who receive pay while on leave, but also on their communities and the national economy as a whole, which is facing unique challenges due to the COVID–19 global pandemic.

The expanded family and medical leave provisions of the FFCRA will allow parents to care for their children who are out of school, or whose childcare provider is unavailable due to COVID–19 related reasons. This will allow parents to avoid extra childcare costs that they otherwise may have to incur.

Without this paid sick leave and expanded family and medical leave (that is, without the policy of tying some federal COVID–19 assistance to employment arrangements), there could be long-term costs in addition to the short term impacts listed above. For example, there could be substantial rehiring costs for employers when the public health concern has abated and, simultaneously, transition costs to workers as they restart their careers. A spillover effect of these frictions might be increased reliance on social assistance programs.

v. Regulatory Alternatives

The Department notes that the FFCRA delegates to the Secretary the authority to issue regulations to ''exclude certain health care providers and emergency responders from the definition of eligible employee'' under section 110(a)(1)(A) of the EFMLEA and 5110(1) of the EPSLA; ''to exempt small businesses with fewer than 50 employees from the requirements'' of section 102(a)(1)(F) of EFMLEA and 5102(a)(5) of the EPSLA ''when the imposition of such requirements would jeopardize the viability of the business as a going concern''; and ''as necessary to carry out the purposes of the EPSLA to ensure consistency between it and Division C and Division G of the FFCRA.''

Because the FFCRA itself establishes the basic expanded family and medical leave and paid sick leave requirements that the Department is responsible for implementing, many potential regulatory alternatives would be beyond the scope of the Department's authority in issuing this temporary rule. The

Department considered two regulatory alternatives to determine the correct balance between providing benefits to employees and imposing compliance costs on covered employers. This section presents the two alternatives to the provisions set forth in this temporary rule.

The Department considered one regulatory alternative that would be less restrictive than what is currently being issued and two that would be more restrictive. For the less-restrictive option, the Department considered excluding all small businesses with fewer than 50 employees from the requirements of the FFCRA, assuming that any requirement to provide expanded family and medical leave or paid sick leave for child care to their employees would jeopardize the viability of those small businesses. The Department concluded, however, that requiring small businesses to demonstrate that the viability of their business will be jeopardized if they have to provide paid leave would ensure uniformity among these employers, help the Department administer sections 102(a)(1)(F) of FMLA and 5102(a)(5) of the EPSLA, and would best conform to the FFCRA.

For the first more restrictive alternative, the Department considered requiring small businesses with fewer than 50 employees to maintain formal records in order to demonstrate a need for exemption from the rule's requirements. The Department concluded, however, that this requirement would be unnecessarily onerous for these employers, particularly given that they are not otherwise subject to the FMLA. The Department believes that the requirements issued in this temporary rule will ensure that small employers have the flexibility they need to balance their staffing and business needs during the COVID–19 public health emergency.

For the second more restrictive alternative, the Department considered using a more narrow definition of health care provider and emergency responder for purposes of excluding such employees from the EPSLA's paid sick leave requirements and/or the EFMLEA's expanded family and medical leave requirements. The Department considered only allowing employers to exclude those workers who directly work with COVID–19 patients, but felt that such a limitation would not provide sufficient flexibility to the health care community to make necessary staffing decisions to address the COVID–19 public health emergency. Further, a more narrow definition could leave health care facilities without staff to perform critical services needed to battle COVID–19.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604.

As discussed above, the Department calculated rule familiarization costs, documentation costs, and the cost of posting a notice for all employers with fewer than 500 employees. For employers with fewer than 50 employees, their one-time rule familiarization cost would be $49.37. Their cost for documentation would be $24.69, and the cost of posting a notice would be $12.84. Total cost to these employers would be $111.58. An additional ten percent of employers with fewer than 50 employees will have an additional documentation cost of $49.37 for qualifying for the small employer exemption, bringing their total cost to $160.95. For employers with at least 50 employees but fewer than 500 employees, their one-time rule familiarization cost would be $49.37. Their cost for documentation would be $49.37, and the cost of posting a notice would be $12.84. The average managerial and operational cost to an employer would be $98.74. Total cost to these employers would be $210.32. These estimated costs will be minimal for small business entities, and will be well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses. Based on this determination, the Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) requires agencies to prepare a written statement for rules that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation using the CPI–U) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

(1) Authorizing Legislation

This rule is issued pursuant to the FFCRA.

(2) Assessment of Quantified Costs and Benefits

For purposes of the UMRA, this rule includes a federal mandate that is expected to result in increased expenditures of more than $165 million in the first year. Based on the cost analysis in this temporary rule, the Department determined that the rule will result in Year 1 total costs for rule familiarization, documentation, and posting of notices totaling $553 million (*see* Table 1). There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[11] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $51.5 billion to $102.9 billion (using 2018 GDP). A regulation with smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

(3) Least Burdensome Option Explained

The Department believes that it has chosen the least burdensome option

[11] *See* 2 U.S.C. 1532(a)(4).

given the FFCRA's provisions. Although the Department is requiring small employers with fewer than 50 employees to maintain formal records in order to demonstrate a need for exemption from the rule's requirements they are not required to provide any documents to the Department. The Department believes that the requirements issued in this temporary rule will ensure that small employers have the flexibility they need to balance their staffing and business needs during the COVID–19 pandemic.

E. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order No. 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 13175, Indian Tribal Governments

This rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

G. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The Department is seeking emergency approval related to the collection of information described herein. Persons are not required to respond to the information collection requirements until OMB approves them under the PRA. This temporary rule creates a new information collection specific to paid leave under the FFCRA. The Department has created a new information collection request and submitted the request to OMB for approval under OMB control number 1235–0NEW (Paid Leave under the Families First Coronavirus Response Act) for this action.

Summary: Section 826.140(a) requires covered employer to document and retain information submitted by an employees to support requests for paid sick leave and expanded family and medical leave. Section 826.140(a) further requires any employer that denies a request for leave pursuant to the small business exemption under § 826.40(b) must document and retain the determination by its authorizing officer that it meets the criteria for that exemption. Finally, § 826.140(c) advises, but does not require, employers to create and maintain certain records for the purpose of obtaining a tax credit from the Internal Revenue Service.

Purpose and Use: WHD and employees use employer records to determine whether covered employers have complied with various requirements under the FFCRA. Employers use the records to document compliance with the FFCRA.

Technology: The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

Minimizing Small Entity Burden: Although the FLSA recordkeeping requirements do involve small businesses, including small state and local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection.

Total annual burden estimates, which reflect the new responses for the recordkeeping information collection, are summarized as follows:

Type of Review: Approval of a new collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Paid Leave under the Families First Coronavirus Response Act.

OMB Control Number: 1235–0NEW.

Affected Public: Private Sector: businesses or other for-profits, farms, and not-for-profit institutions: State, Local and Tribal governments; and individuals or households.

Estimated Number of Respondents: 7,903,071.

Estimated Number of Responses: 7,903,071.

Estimated Burden Hours: 801,962 hours.

Estimated Time per Response: Various.

Frequency: Various.

Other Burden Cost: $4,255,500 (operations/maintenance).

List of Subjects in 29 CFR Part 826

Wages.

Signed at Washington, DC, this 1st day of April, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

■ For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations by adding part 826 to read as follows:

PART 826—PAID LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Sec.

826.10 General.
826.20 Paid leave entitlements.
826.21 Amount of Paid Sick Leave.
826.22 Amount of pay for Paid Sick Leave.
826.23 Amount of Expanded Family and Medical Leave.
826.24 Amount of pay for Expanded Family and Medical Leave.
826.25 Calculating the Regular Rate under the FFCRA.
826.30 Employee eligibility for leave.
826.40 Employer coverage.
826.50 Intermittent leave.
826.60 Leave to care for a Child due to School or Place of Care closure or Child Care unavailability—intersection between the EPSLA and the EFMLEA.
826.70 Leave to care for a Child due to School or Place of Care closure or Child Care unavailability—intersection of the EFMLEA and the FMLA.
826.80 Employer notice.
826.90 Employee notice of need for leave.
826.100 Documentation of need for leave.
826.110 Health care coverage.
826.120 Multiemployer plans.
826.130 Return to work.
826.140 Recordkeeping.
826.150 Prohibited acts and enforcement under the EPSLA.
826.151 Prohibited acts and enforcement under the EFMLEA.
826.152 Filing a complaint with the Federal Government.
826.153 Investigative authority of the Secretary.
826.160 Effect on other laws, employer practices, and collective bargaining agreements.

Authority: Pub. L. 116–127 sections 3102(b) and 5111(3); Pub. L. 116–136 section 3611(7).

§ 826.10 General.

(a) *Definitions.* For the purposes of this rule:

Child Care Provider. The term ''Child Care Provider'' means a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law as described in section 9858c(c)(2)(E) of Title 42; and satisfies the State and local

requirements, including those referred to in section 9858c(c)(2)(F) of Title 42. Under the Families First Coronavirus Response Act (FFCRA), the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee's child.

Commerce. The terms ''Commerce'' and ''industry or activity affecting commerce'' mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'', and any ''industry affecting commerce'', as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act of 1947 (29 U.S.C. 142 (1) and (3)).

COVID–19. The term ''COVID–19'' has the meaning given the term in section 506 of the Coronavirus Preparedness Response Supplemental Appropriations Act, 2020.

EFMLEA. The term ''EFMLEA'' means the Emergency Family and Medical Leave Expansion Act, Division C of the FFCRA.

Employee. The term ''Employee'' has the same meaning given that term in section 3(e) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. 203(e)).

Eligible Employee. For the purposes of the EFMLEA, the term ''Eligible Employee'' means an Employee who has been employed for at least 30 calendar days by the Employer.

Employer:

(i) Subject to paragraph (ii) of this definition, ''Employer'':

(A) Means any person engaged in Commerce or in any industry or activity affecting commerce that:

(*1*) In the case of a private entity or individual, employs fewer than 500 Employees; and

(*2*) In the case of a Public Agency or any other entity that is not a private entity or individual, employs one or more Employees;

(B) Includes:

(*1*) Any person acting directly or indirectly in the interest of an employer in relation to an Employee (within the meaning of such phrase in section 3(d) of the FLSA (29 U.S.C. 203(d));

(*2*) Any successor in interest of an employer;

(*3*) Joint employers as defined under the FLSA, part 791 of this chapter, with respect to certain Employees; and

(*4*) Integrated employers as defined under the Family and Medical Leave Act (FMLA), § 825.104(c)(2) of this chapter.

(C) Includes any Public Agency; and

(D) Includes the Government Accountability Office and the Library of Congress.

(ii) For purposes of the EPSLA, ''Employer'' also specifically identifies the following as an employer:

(A) An entity employing a State Employee described in section 304(a) of the Government Employee Rights Act of 1991;

(B) An employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(C) An employing office, as defined in 3 U.S.C. 411(c); and

(D) An Executive Agency as defined in section 5 U.S.C. 105, and including the U.S. Postal Service and the Postal Regulatory Commission.

EPSLA. The term ''EPSLA'' means the Emergency Paid Sick Leave Act, Division E of the FFCRA.

Expanded Family and Medical Leave. The term ''Expanded Family and Medical Leave'' means paid leave under the EFMLEA.

FFCRA. The term ''FFCRA'' means the Families First Coronavirus Response Act, Public Law 116–127.

FLSA Terms. The terms ''employ'', ''person'', and ''State'' have the meanings given such terms in section 3 of the FLSA (29 U.S.C. 203).

Paid Sick Leave. The term ''Paid Sick Leave'' means paid leave under the EPSLA.

Place of Care. The term ''Place of Care'' means a physical location in which care is provided for the Employee's child while the Employee works for the Employer. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

Public Agency. The term ''Public Agency'' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. *See* 29 U.S.C. 203(x); 29 U.S.C. 5110(2)(B)(i)(III). A Public Agency shall be considered to be a person engaged in Commerce or in an industry or activity affecting Commerce. *See* 29 U.S.C. 2611(4)(B); 29 U.S.C. 5110(2)(B)(ii). Whether an entity is a Public Agency, as distinguished from a private Employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official. *See* § 825.108 of this chapter.

Public Health Emergency. The term ''Public Health Emergency'' means an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

School. The term ''School'' means an ''elementary school'' or ''secondary school'' as such terms are defined below, in accordance with section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801). ''Elementary school'' means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under State law. ''Secondary school'' means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

Secretary. The term ''Secretary'' means the Secretary of Labor or his or her designee.

Son or Daughter. The term ''Son or Daughter'' has the meaning given such term in section 101 of the FMLA (29 U.S.C. 2611). Accordingly, the term means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis,* who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.

Subject to a quarantine or isolation order. For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (*e.g.,* of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.

Telework. The term ''Telework'' means work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee's normal workplace. An Employee is able to Telework if: His or her Employer has work for the Employee; the Employer permits the Employee to work from the

Employee's location; and there are no extenuating circumstances (such as serious COVID–19 symptoms) that prevent the Employee from performing that work. Telework may be performed during normal hours or at other times agreed by the Employer and Employee. Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the EPSLA or the EFMLEA. Employees who are teleworking for COVID–19 related reasons must be compensated for all hours actually worked and which the Employer knew or should have known were worked by the Employee. However, the provisions of § 790.6 of this chapter shall not apply to Employees while they are teleworking for COVID–19 related reasons.

(b) *Effective period.* (1) This part became operational on April 1, 2020, and effective on April 2, 2020.

(2) This part expires on December 31, 2020.

§ 826.20 Paid Leave Entitlements.

(a) *Qualifying reasons for Paid Sick Leave.* (1) An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to any of the following reasons:

(i) The Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19;

(ii) The Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(iii) The Employee is experiencing symptoms of COVID–19 and seeking medical diagnosis from a health care provider;

(iv) The Employee is caring for an individual who is subject to an order as described in this paragraph (a)(1)(i) or directed as described in this paragraph (a)(1)(ii);

(v) The Employee is caring for his or her Son or Daughter whose School or Place of Care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, or the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID–19; or

(vi) The Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the Effective Period. This rule became operational on April 1, 2020, and will be effective April 2, 2020, to December 31, 2020.

(2) *Subject to a Quarantine or Isolation Order.* Any Employee Subject to a Quarantine or Isolation Order may take Paid Sick Leave for the reason described in paragraph (a)(1)(i) of this section only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her Employer, either at the Employee's normal workplace or by Telework. An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer does not have work for the Employee as a result of the order or other circumstances.

(3) *Advised by a health care provider to self-quarantine.* For the purposes of this section, the term health care provider has the same meaning as that term is defined in § 825.102 of this chapter. An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(ii) of this section only if:

(i) A health care provider advises the Employee to self-quarantine based on a belief that—

(A) The Employee has COVID–19;

(B) The Employee may have COVID–19; or

(C) The Employee is particularly vulnerable to COVID–19; and

(ii) Following the advice of a health care provider to self-quarantine prevents the Employee from being able to work, either at the Employee's normal workplace or by Telework.

(4) *Seeking medical diagnosis for COVID–19.* An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(iii) of this section if the Employee is experiencing any of the following symptoms:

(i) Fever;

(ii) Dry cough;

(iii) Shortness of breath; or

(iv) Any other COVID–19 symptoms identified by the U.S. Centers for Disease Control and Prevention.

(v) Any Paid Sick Leave taken for the reason described in paragraph (a)(1)(iii) of this subsection is limited to time the Employee is unable to work because the Employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID–19.

(5) *Caring for an individual.* For the purpose of paragraph (a)(1)(iv) of this section, ''individual'' means an Employee's immediate family member, a person who regularly resides in the Employee's home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, ''individual'' does not include persons with whom the Employee has no personal relationship.

(6) An Employee may not take Paid Sick Leave for the reason described in paragraph (a)(1)(iv) of this section unless, but for a need to care for an individual, the Employee would be able to perform work for his or her Employer, either at the Employee's normal workplace or by Telework. An Employee caring for an individual may not take Paid Sick Leave where the Employer does not have work for the Employee.

(7) An Employee may take Paid Sick Leave for the reason described in paragraph (a)(1)(iv) of this section if the Employee is unable to perform work for his or her Employer and if the individual depends on the Employee to care of him or her and is either:

(i) Subject to a Quarantine or Isolation Order as described in paragraph (a)(1)(ii) of this subsection; or

(ii) Has been advised to self-quarantine by a health care provider because of a belief that—

(A) The individual has COVID–19;

(B) The individual may have COVID–19 due to known exposure or symptoms

(C) The individual is particularly vulnerable to COVID–19.

(8) *Caring for a Son or Daughter.* An Employee has a need to take Paid Sick Leave if he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID–19 only if no other suitable person is available to care for the Son or Daughter during the period of such leave.

(9) An Employee may not take Paid Sick Leave to care for his or her Son or Daughter unless, but for a need to care for the Son or Daughter, the Employee would be able to perform work for his or her Employer, either at the Employee's normal workplace or by Telework. An Employee caring for his or her Son or Daughter may not take Paid Sick Leave where the Employer does not have work for the Employee.

(b) *Qualifying reason for Expanded Family and Medical Leave.* An Eligible Employee may take Expanded Family and Medical Leave because he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID–19. Eligible Employee has need to take Expanded Family and Medical Leave for this purpose only if no

suitable person is available to care for his or her Son or Daughter during the period of such leave.

(1) An Eligible Employee may not take Expanded Family and Medical Leave to care for his or her Son or Daughter unless, but for a need to care for an individual, the Eligible Employee would be able to perform work for his or her Employer, either at the Eligible Employee's normal workplace or by Telework. An Eligible Employee caring for his or her Son or Daughter may not take Expanded Family and Medical Leave where the Employer does not have work for the Eligible Employee.

(2) [Reserved]

(c) *Impact on FLSA exemptions.* The taking of Paid Sick Leave or Expanded Family and Medical Leave shall not impact an Employee's status or eligibility for any exemption from the requirements of section 6 or 7, or both, of the FLSA.

§ 826.21 Amount of Paid Sick Leave.

(a) *Full-time Employees.* (1) A full-time Employee is entitled to up to 80 hours of Paid Sick Leave.

(2) An Employee is considered to be a full-time Employee under this section if he or she is normally scheduled to work at least 40 hours each workweek.

(3) An Employee who does not have a normal weekly schedule under § 826.21(a)(2) is considered to be a full-time Employee under this section if the average number of hours per workweek that the Employee was scheduled to work, including hours for which the Employee took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of:

(i) The six-month period ending on the date on which the Employee takes Paid Sick Leave; or

(ii) The entire period of the Employee's employment.

(b) *Part-time Employees.* An Employee who does not satisfy the requirements of § 826.21(a) is considered to be a part-time Employee.

(1) If the part-time Employee has a normal weekly schedule, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to the number of hours that the Employee is normally scheduled to work over two workweeks.

(2) If the part-time Employee lacks a normal weekly schedule under § 826.21(b)(1), the number of hours of Paid Sick Leave to which the Employee is entitled is calculated as follows:

(i) If the part-time Employee has been employed for at least six months, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the average number of hours that the Employee was scheduled to work each calendar day over the six-month period ending on the date on which the Employee takes Paid Sick Leave, including any hours for which the Employee took leave of any type.

(ii) If the part-time Employee has been employed for fewer than six months, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the number of hours the Employee and the Employer agreed to at the time of hiring that the Employee would work, on average, each calendar day. If there is no such agreement, the Employee is entitled to up to the number of hours of Paid Sick Leave equal to fourteen times the average number of hours per calendar day that the Employee was scheduled to work over the entire period of employment, including hours for which the Employee took leave of any type.

§ 826.22 Amount of Pay for Paid Sick Leave.

(a) Subject to § 826.22(c), for each hour of Pick Sick Leave taken by an Employee for qualifying reasons set forth in sections § 826.20(a)(1) through(3), the Employer shall pay the higher of:

(1) The Employee's average regular rate as computed under § 826.25;

(2) The Federal minimum wage to which the Employee is entitled; or

(3) Any State or local minimum wage to which the Employee is entitled.

(b) Subject to § 826.22(c), for each hour of Paid Sick Leave taken by an Employee for qualifying reasons set forth in § 826.20(a)(4) through (6), the Employer shall pay the Employee two-thirds of the amount described in § 826.24(a).

(c) Limitations on payments:

(1) In no event shall an Employer be required to pay more than $511 per day and $5,110 in the aggregate per Employee when an Employee takes Paid Sick Leave for qualifying reasons set forth in sections § 826.20(a)(1) through (3).

(2) In no event shall an Employer be required to pay more than $200 per day and $2,000 in the aggregate per Employee when an Employee takes Paid Sick Leave for qualifying reasons set forth in sections § 826.20(a)(4) through (6).

§ 826.23 Amount of Expanded Family and Medical Leave.

(a) An Eligible Employee is entitled to take up to twelve workweeks of Expanded Family and Medical Leave during the period April 1, 2020 through December 31, 2020.

(b) Any time period of Expanded Family and Medical Leave that an Eligible Employee takes counts towards the twelve workweeks of FMLA leave to which the Eligible Employee is entitled for any qualifying reason in a twelve-month period under § 825.200 of this chapter, *see* § 826.70.

(c) Section 2612(d)(2)(A) of the FMLA shall be applied, provided however, that the Eligible Employee may elect, and the Employer may require the Eligible Employee, to use only leave that would be available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's existing policies, such as personal leave or paid time off. Any leave that an Eligible Employee elects to use or that an Employer requires the Eligible Employee to use would run concurrently with Expanded Family and Medical Leave taken under this section.

§ 826.24 Amount of pay for Expanded Family and Medical Leave.

Subject to § 826.60, after the initial two weeks of Expanded Family and Medical Leave, the Employer shall pay the Eligible Employee two-thirds of the Eligible Employee's average regular rate, as computed under § 826.25, times the Eligible Employee's scheduled number of hours for each day of such leave taken.

(a) In no event shall an Employer be required to pay more than $200 per day and $10,000 in the aggregate per Eligible Employee when an Eligible Employee takes Expanded Family and Medical Leave for up to ten weeks after the initial two-week period of unpaid Expanded Family and Medical Leave.

(b) For the purpose of this section, the ''scheduled number of hours'' is determined as follows:

(1) If the Eligible Employee has a normal work schedule, the number of hours the Eligible Employee is normally scheduled to work on that workday;

(2) If the Eligible Employee has a work schedule that varies to such an extent that an Employer is unable to determine the number of hours the Eligible Employee would have worked on the day for which leave is taken and has been employed for at least six months, the average number of hours the Eligible Employee was scheduled to work each workday, over the six-month period ending on the date on which the Eligible Employee first takes Expanded Family and Medical Leave, including hours for which the Eligible Employee took leave of any type; or

(3) If the Eligible Employee has a work schedule that varies to such an extent that an Employer is unable to determine the number of hours the Eligible Employee would have worked on the day for which leave is taken and

the Eligible Employee has been employed for fewer than six months, the average number of hours the Eligible Employee and the Employer agreed at the time of hiring that the Eligible Employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the Eligible Employee was scheduled to work over the entire period of employment, including hours for which the Eligible Employee took leave of any type.

(c) As an alternative, the amount of pay for Expanded Family and Medical Leave may be computed in hourly increments instead a full day. For each hour of Expanded Family and Medical Leave taken after the first two weeks, the Employer shall pay the Eligible Employee two-thirds of the Eligible Employee's average regular rate, as computed under § 826.25.

(d) Notwithstanding paragraph (a) of this section, if an Eligible Employee elects or is required to use leave available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave, the Employer must pay the Eligible Employee a full day's pay for that day. However, the Employer is capped at taking $200 a day or $10,000 in the aggregate in tax credits for Expanded Family and Medical Leave paid under the EFMLEA.

§ 826.25 Calculating the Regular Rate under the Family First Coronavirus Response Act.

(a) *Average regular rate.* The ''average regular rate'' used to compute pay for Paid Sick Leave and Expanded Family and Medical Leave is calculated as follows:

(1) Use the methods contained in parts 531 and 778 of this chapter to compute the regular rate for each full workweek in which the Employee has been employed over the lesser of:

(i) The six-month period ending on the date on which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave; or

(ii) The entire period of employment.

(2) Compute the average of the weekly regular rates under paragraph (a)(1) of this section, weighted by the number of hours worked for each workweek.

(b) *Calculating the regular rate for commissions, tips, and piece rates.* An Employee's commissions, tips, and piece rates are incorporated into the regular rate for purposes of the FFCRA to the same extent that they are included in the calculation of the regular rate under the FLSA, and § 531.60 and part 778 of this chapter.

§ 826.30 Employee eligibility for leave.

(a) *Eligibility under the EPSLA.* All Employees of an Employer are eligible for Paid Sick Leave under the EPSLA, except as provided in paragraphs (c) and (d) of this section and in § 826.40(b).

(b) *Eligibility under the EFMLEA.* All Employees employed by an Employer for at least thirty calendar days are eligible for Expanded Family and Medical Leave under the EFMLEA, except as provided in paragraphs (c) and (d) in this section and in § 826.40(b).

(1) An Employee is considered to have been employed by an Employer for at least thirty calendar days if:

(i) The Employer had the Employee on its payroll for the thirty calendar days immediately prior to the day that the Employee's leave would begin; or

(ii) The Employee was laid off or otherwise terminated by the Employer on or after March 1, 2020, and rehired or otherwise reemployed by the Employer on or before December 31, 2020, provided that the Employee had been on the Employer's payroll for thirty or more of the sixty calendar days prior to the date the Employee was laid off or otherwise terminated.

(2) If an Employee employed by a temporary placement agency is subsequently hired by the Employer, the Employer will count the days worked as a temporary Employee at the Employer toward the thirty-day eligibility period.

(3) An Employee who has been employed by a covered Employer for at least thirty calendar days is eligible for Expanded Family and Medical Leave under the EFMLEA regardless of whether the Employee would otherwise be eligible for leave under the FMLA. Thus, for example, an Employee need not have been employed for 1,250 hours of service and twelve months of employment as otherwise required under the FMLA, *see* § 825.110(a)(1)(2) of this chapter, to be eligible for leave under the EFMLEA.

(c) *Exclusion of Employees who are health care providers and emergency responders.* An Employer whose Employee is a health care provider or an emergency responder may exclude such Employee from the EPSLA's Paid Sick Leave requirements and/or the EFMLEA's Expanded Family and Medical Leave requirements.

(1) Health care provider—

(i) For the purposes of this definition Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

(ii) This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID–19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID–19.

(iii) Application limited to leave under the EPSLA and the EFMLEA. The definition of ''health care provider'' contained in this subsection applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, and does not otherwise apply for purposes of the FMLA or section 5102(A)(2) of the EPSLA.

(2) Emergency responders—

(i) For the purposes of Employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, an emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID–19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a

declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID–19.

(ii) [Reserved]

(d) *Exclusion by OMB.* The Director of the Office of Management and Budget (OMB) has authority to exclude, for good cause, certain U.S. Government Employers with respect to certain categories of Executive Branch Eligible Employees from the requirement to provide paid leave under the EFMLEA. *See* CARES Act section 4605.

(e) The Director of the OMB has authority to exclude certain Employees, for good cause, from the definition of ''Employee'' for purposes of the EPSLA. *See* CARES Act section 4605. The categories of Employees the Director of the OMB has authority to so exclude from EPSLA are:

(1) Federal officers or Employees covered under Title II of the FMLA (which is codified in subchapter V of chapter 63 of title 5 of the United States Code);

(2) Other individuals occupying a position in the civil service (as that term is defined in 5 U.S.C. 2101(1)); and

(3) Employees of a United States Executive Agency, as defined in 5 U.S.C. 105, including the U.S. Postal Service and U.S. Postal Regulatory Commission.

§ 826.40 Employer coverage.

(a) *Private Employers.* Any private entity or individual who employs fewer than 500 Employees must provide Paid Sick Leave and Expanded Family and Medical Leave, except as provided in paragraph (b) of this section or in § 826.30(c).

(1) To determine the number of Employees employed, the Employer must count all full-time and part-time Employees employed within the United States at the time the Employee would take leave. For purposes of this count, every part-time Employee is counted as if he or she were a full-time Employee.

(i) For this purpose, ''within the United States'' means any State within the United States, the District of Columbia, or any Territory or possession of the United States.

(ii) The number of Employees includes:

(A) All Employees currently employed, regardless of how long those Employees have worked for the Employer;

(B) Any Employees on leave of any kind;

(C) Employees of temporary placement agencies who are jointly employed under the FLSA, *see* part 791 of this chapter, by the Employer and another Employer (regardless of which Employer's payroll the Employee appears on); and

(D) Day laborers supplied by a temporary placement agency (regardless of whether the Employer is the temporary placement agency or the client firm).

(iii) The number of Employees does not include workers who are independent contractors, rather than Employees, under the FLSA. Nor does the number of Employees include workers who have been laid off or furloughed and have not subsequently been reemployed.

(2) To determine the number of Employees employed, all common Employees of joint employers or all Employees of integrated employers must be counted together.

(i) Typically, a corporation (including its separate establishments or divisions) is considered a single Employer and all of its Employees must be counted together.

(ii) Where one corporation has an ownership interest in another corporation, the two corporations are separate Employers unless they are joint employers under the FLSA, *see* part 791 of this chapter, with respect to certain Employees.

(iii) In general, two or more entities are separate Employers unless they meet the integrated employer test under the FMLA. *See* § 825.104(c)(2) of this chapter. If two entities are an integrated employer under this test, then Employees of all entities making up the integrated employer must be counted.

(b) *Exemption from requirement to provide leave under the EPSLA Section 5102(a)(5) and the EFMLEA for Employers with fewer than 50 Employees.*

(1) An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

(i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

(ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

(2) To elect this small business exemption, the Employer must document that a determination has been made pursuant to the criteria set forth by the Department in § 826.40(b)(1). The Employer should not send such documentation to the Department, but rather retain the records in its files.

(3) Regardless of whether a small Employer chooses to exempt one or more Employees, the Employer is still required to post a notice pursuant to § 826.80.

(c) *Public Employers.* (1) Any public Employer must provide its Employees Paid Sick Leave except as provided in § 826.30(c) through (d).

(2) Any public Employer must provide its Eligible Employees Expanded Family and Medical Leave, except as provided in paragraph (c)(3) of this section and in § 826.30(c) through (d).

(3) The EFMLEA amended only Title I of the FMLA, resulting in a divide in coverage as to Employees of the United States and of agencies of the United States (Federal Employees). Federal Employees covered by Title I of the FMLA are eligible for Expanded Family and Medical Leave. But most Federal Employees are instead covered under Title II of the FMLA, which was not amended by the EFMLEA. Such Federal Employees are not within the EFMLEA's purview and are therefore not eligible for Expanded Family and Medical Leave. The Federal Employees covered by Title I of the FMLA are therefore eligible for Expanded Family and Medical Leave, subject to the limitations and exceptions set forth in § 826.30(b) through (d), including:

(i) Employees of the U.S. Postal Service;

(ii) Employees of the U.S. Postal Regulatory Commission;

(iii) Part-time Employees who do not have an established regular tour of duty during the administrative workweek;

(iv) Employees serving under an intermittent appointment or temporary appointment with a time limitation of one year or less;

(v) Employees of the Government Accountability Office;

(vi) Employees of the Library of Congress; and

(vii) Other Federal Employees not covered by Title II of the FMLA.

§ 826.50 Intermittent leave.

(a) *General Rule.* Subject to the conditions and applicable limits, an Employee may take Paid Sick Leave or Expanded Family and Medical Leave intermittently (*i.e.,* in separate periods of time, rather than one continuous period) only if the Employer and Employee agree. The Employer and Employee may memorialize in writing any agreement under this section, but a clear and mutual understanding between the parties is sufficient.

(b) *Reporting to Worksite.* The ability of an Employee to take Paid Sick Leave or Expanded Family and Medical Leave intermittently while reporting to an Employer's worksite depends upon the reason for the leave.

(1) If the Employer and Employee agree, an Employee may take up to the entire portion of Paid Sick Leave or Expanded Family and Medical Leave intermittently to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, because of reasons related to COVID–19. Under such circumstances, intermittent Paid Sick Leave or paid Expanded Family and Medical Leave may be taken in any increment of time agreed to by the Employer and Employee.

(2) An Employee may not take Paid Sick Leave intermittently if the leave is taken for any of the reasons specified in § 826.20(a)(1)(i) through (iv) and (vi). Once the Employee begins taking Paid Sick Leave for one or more of such reasons, the Employee must use the permitted days of leave consecutively until the Employee no longer has a qualifying reason to take Paid Sick Leave.

(c) *Teleworking.* If an Employer directs or allows an Employee to Telework, or the Employee normally works from home, the Employer and Employee may agree that the Employee may take Paid Sick Leave for any qualifying reason or Expanded Family and Medical Leave intermittently, and in any agreed increment of time (but only when the Employee is unavailable to Telework because of a COVID–19 related reason).

(d) *Calculation of Leave.* If an Employee takes Paid Sick Leave or Expanded Family and Medical Leave intermittently as the Employee and Employer have agreed, only the amount of leave actually taken may be counted toward the Employee's leave entitlements. For example, an Employee who normally works forty hours in a workweek only takes three hours of leave each work day (for a weekly total of fifteen hours) has only taken fifteen hours of the Employee's Paid Sick Leave or 37.5% of a workweek of the Employee's Expanded Family and Medical Leave.

§ 826.60 Leave to care for a Child due to School or Place of Care Closure or Child Care unavailability—intersection between the EPSLA and the EFMLEA.

(a) An Eligible Employee who needs leave to care for his or her Son or Daughter whose School or Place of Care is closed, or whose Child Care Provider is unavailable, due to COVID–19 related reasons may be eligible to take leave under both the EPSLA and the EFMLEA. If so, the benefits provided by the EPSLA run concurrently with those provided under the EFMLEA.

(1) *Intersection between the EPSLA and the EFMLEA.* An Eligible Employee may take up to twelve weeks of Expanded Family and Medical Leave to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, due to COVID–19 related reasons.

(2) The first two weeks of leave (up to 80 hours) may be paid under the EPSLA; the subsequent weeks are paid under the EFMLEA.

(3) An Employee's prior use of Paid Sick Leave under EPSLA will impact the amount of Paid Sick Leave that remains available to the Employee.

(4) An Eligible Employee who has exhausted his or her twelve workweek FMLA entitlement, *see* § 826.70, is not precluded from taking Paid Sick Leave.

(b) *Supplementing Expanded Family and Medical Leave with other accrued Employer-provided leave.*

(1) Where an Eligible Employee takes Expanded Family and Medical Leave after taking all or part of his or her Paid Sick Leave for a reason other than that provided in § 826.20(a)(1)(v), all or part of the Eligible Employee's first ten days (or first two weeks) of Expanded Family and Medical Leave may be unpaid because the Eligible Employee will have exhausted his or her Paid Sick Leave entitlement.

(2) Under the circumstances in (b)(1) of this section, the Eligible Employee may choose to substitute earned or accrued paid leave provided by the Employer during this period. The term substitute means that the preexisting paid leave provided by the Employer, which has been earned or accrued pursuant to established policies of the Employer, will run concurrently with the unpaid Expanded Family and Medical Leave. Accordingly, the Eligible Employee receives pay pursuant to the Employer's preexisting paid leave policy during the period of otherwise unpaid Expanded Family and Medical Leave.

(3) If the Eligible Employee does not elect to substitute paid leave for unpaid Expanded Family and Medical Leave under the above conditions and circumstances, the Eligible Employee will remain entitled to any paid leave that the Eligible Employee has earned or accrued under the terms of his or her Employer's plan.

§ 826.70 Leave to care for a Child due to School or Place of Care closure or Child Care unavailability—intersection of the EFMLEA and the FMLA.

(a) Certain employees are entitled to a total of twelve workweeks of FMLA leave in the twelve-month period defined in § 825.200(b) of this chapter for the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job;

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty); and

(6) To care for the Eligible Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, due to COVID–19 related reasons.

(b) If an Eligible Employee has already taken some FMLA leave for reasons (a)(1) through (5) during the twelve-month period, the Eligible Employee may take up to the remaining portion of

the twelve workweek leave for Expanded Family and Medical Leave. If an Eligible Employee has already taken the full twelve workweeks of FMLA leave during the twelve-month period, the Eligible Employee may not take Expanded Family and Medical Leave. An Eligible Employee's entitlement to take up to two weeks of Paid Sick Leave under the EPSLA is not impacted by the Eligible Employee's use of FMLA leave. For example, if an Eligible Employee used his or her full FMLA leave entitlement for birth and bonding with a newborn, he or she would still be entitled to take Paid Sick Leave (for any covered reason), but could not take Expanded Family and Medical Leave in the same twelve-month period if his or her child's day care closed due to COVID–19 related reasons.

(c) If an Eligible Employee takes fewer than twelve weeks of Expanded Family and Medical Leave, the Employee may take up to the remaining portion of the twelve weeks FMLA leave entitlement for reasons described in paragraphs (a)(1) through (5) of this section. For example, if an Eligible Employee takes eight weeks of Expanded Family and Medical Leave to care for his or her Son or Daughter whose School is closed due to COVID–19 related reasons, he or she could take up to four workweeks of unpaid FMLA leave for his or her own serious health condition later in the twelve-month period.

(d) If an employee has taken FMLA leave to care for a covered service member with a serious injury or illness, the remaining FMLA leave entitlement that may be used for Expanded Family and Medical Leave is calculated in accordance with § 825.127(e) of this chapter.

(e) An Eligible Employee can take a maximum of twelve workweeks of Expanded Family and Medical Leave during the period in which the leave may be taken (April 2, 2020 to December 31, 2020) even if that period spans two FMLA leave twelve-month periods. For example, if an Employer's twelve-month period begins on July 1, and an Eligible Employee took seven weeks of Expanded Family and Medical Leave in May and June, 2020, the Eligible Employee could only take up to five additional weeks of Expanded Family and Medical Leave between July 1 and December 31, 2020, even though the first seven weeks of Expanded Family and Medical Leave fell in the prior twelve-month period.

(f) The first two weeks of Expanded Family and Medical Leave may be unpaid and the Eligible Employee may substitute Paid Sick Leave under the EPSLA at two-thirds the Employee's regular rate of pay or accrued paid leave provided by the Employer during this period (see § 826.60). After the first two weeks of leave, Expanded Family and Medical Leave is paid at two-thirds the Eligible Employee's regular rate of pay, up to $200 per day per Eligible Employee. Because this period of Expanded Family and Medical Leave is not unpaid, the FMLA provision for substitution of the Employee's accrued paid leave is inapplicable, and neither the Eligible Employee nor the Employer may require the substitution of paid leave. However, Employers and Eligible Employees may agree, where Federal or state law permits, to have paid leave supplement pay under the EFMLEA so that the Employee receives the full amount of his or her normal pay. For example, an Eligible Employee and Employer may agree to supplement the Expanded Family and Medical Leave by substituting one-third hour of accrued vacation leave for each hour of Expanded Family and Medical Leave. If the Eligible Employee and Employer do not agree to supplement paid leave in the manner described above, the Employee will remain entitled to all the paid leave which is earned or accrued under the terms of the Employer's plan for later use. This option is not available to Federal agencies if such partial leave payment would be contrary to a governing statute or regulation.

§ 826.80 Employer notice.

(a) Every Employer covered by FFCRA's paid leave provisions is required to post and keep posted on its premises, in conspicuous places a notice explaining the FFCRA's paid leave provisions and providing information concerning the procedures for filing complaints of violations of the FFCRA with the Wage and Hour Division.

(b) An Employer may satisfy this requirement by emailing or direct mailing this notice to Employees, or posting this notice on an Employee information internal or external website.

(c) To meet the requirements of paragraph (a) of this section, Employers may duplicate the text of the Department's model notice (WHD 1422 REV 03/20) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Prototypes are available at *www.dol.gov/whd.* Employers furnishing notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(d) This section does not require translation or provision of the notice in languages other than English.

(e) For Employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation. *See* 29 U.S.C. 2619; § 825.300 of this chapter.

§ 826.90 Employee notice of need for leave.

(a) *Requirement to provide notice.* (1) An Employer may require an Employee to follow reasonable notice procedures after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave for any reason other than that described in § 826.20(a)(1)(v). Whether a procedure is reasonable will be determined under the facts and circumstances of each particular case. Nothing in this section precludes an Employee from offering notice to an Employer sooner; the Department encourages, but does not require, Employees to notify Employers about their request for Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable. If an Employee fails to give proper notice, the Employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

(2) In any case where an Employee requests leave in order to care for the Employee's Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, due to COVID–19 related reasons, if that leave was foreseeable, an Employee shall provide the Employer with notice of such Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable. If an Employee fails to give proper notice, the Employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

(b) *Timing and delivery of notice.* Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave or Expanded Family and Medical Leave. After the first workday, it will be reasonable for an Employer to require notice as soon as practicable under the facts and circumstances of the particular case. Generally, it will be reasonable for notice to be given by the Employee's spokesperson (*e.g.,* spouse, adult family member, or other responsible party) if the Employee is unable to do so personally.

(c) *Content of notice.* Generally, it will be reasonable for an Employer to require oral notice and sufficient information for an Employer to determine whether the requested leave is covered by the

EPSLA or the EFMLEA. An Employer may not require the notice to include documentation beyond what is allowed by § 826.100.

(d) *Complying with Employer policy.* Generally, it will be reasonable for the Employer to require the Employee to comply with the Employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

§ 826.100 Documentation of need for leave.

(a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA:

(1) Employee's name;

(2) Date(s) for which leave is requested;

(3) Qualifying reason for the leave; and

(4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

(b) To take Paid Sick Leave for a qualifying COVID–19 related reason under § 826.20(a)(1)(i), an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.

(c) To take Paid Sick Leave for a qualifying COVID–19 related reason under § 826.20(a)(1)(ii) an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID–19.

(d) To take Paid Sick Leave for a qualifying COVID–19 related reason under § 826.20(a)(1)(iii) an Employee must additionally provide the Employer with either:

(1) The name of the government entity that issued the Quarantine or Isolation Order to which the individual being care for is subject; or

(2) The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID–19.

(e) To take Paid Sick Leave for a qualifying COVID–19 related reason under § 826.20(a)(1)(v) or Expanded Family and Medical Leave, an Employee must additionally provide:

(1) The name of the Son or Daughter being cared for;

(2) The name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and

(3) A representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

(f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult *https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.*

§ 826.110 Health care coverage.

(a) While an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave, an Employer must maintain the Employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the Employee had been continuously employed during the entire leave period. All Employers covered by the EPSLA or the EFMLEA are subject to the requirement to maintain health coverage. The term ''group health plan'' has the same meaning as under the FMLA (see § 825.102 of this chapter). Maintenance of individual health insurance policies purchased by an Employee from an insurance provider, as described in § 825.209(a) of this chapter, is the responsibility of the Employee.

(b) The same group health plan benefits provided to an Employee prior to taking Paid Sick Leave or Expanded Family and Medical Leave must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. For example, if family member coverage is provided to an Employee, family member coverage must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. Similarly, benefit coverage for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave if provided in an Employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an Employer provides a new health plan or benefits or changes health benefits or plans while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave, the Employee is entitled to the new or changed plan/benefits to the same extent as if the Employee was not on leave. Any other plan changes (*e.g.,* in coverage, premiums, deductibles, etc.) which apply to all Employees of the workforce would also apply to Employees taking Paid Sick Leave or Expanded Family and Medical Leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an Employee taking Paid Sick Leave or Expanded Family and Medical Leave. If the Employee requests the changed coverage, the Employer must provide it.

(e) An Employee remains responsible for paying his or her portion of group health plan premiums which had been paid by the Employee prior to taking Paid Sick Leave or Expanded Family and Medical Leave. If premiums are raised or lowered, the Employee would be required to pay the new Employee premium contribution on the same terms as other Employees. The Employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. If leave is unpaid, or the Employee's pay during leave is insufficient to cover the Employee's share of the premiums, the Employer may obtain payment from the Employee in accordance with § 825.210(c) of this chapter.

(f) An Employee may choose not to retain group health plan coverage while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave. However, when an Employee returns from leave, the Employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

(g) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an Employer's obligation to maintain health benefits while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave ceases under this section if and when the employment relationship would have terminated if the Employee had not taken Paid Sick Leave or Expanded Family and Medical Leave (*e.g.,* if the Employee fails to return from leave, or if the entitlement to leave ceases because an Employer closes its business).

§ 826.120 Multiemployer plans.

(a) *Paid Sick Leave.* In accordance with its existing collective bargaining obligations, an Employer signatory to a

multiemployer collective bargaining agreement may satisfy its obligations to provide Paid Sick Leave by making contributions to a multiemployer fund, plan, or other program. Such contributions must be based on the hours of Paid Sick Leave to which each Employee is entitled under the EPSLA according to each Employee's work under the multi-employer collective bargaining agreement.

(b) *Expanded Family and Medical Leave.* In accordance with its existing collective bargaining obligations, an Employer signatory to a multiemployer collective bargaining agreement may satisfy its obligations to provide Expanded Family and Medical Leave by making contributions to a multiemployer fund, plan, or other program. Such contributions must be based on the hours of paid family and medical leave to which each Eligible Employee is entitled under the EFMLEA, according to each Eligible Employee's work under the multiemployer collective bargaining agreement.

(c) *Employee access.* Any multiemployer fund, plan, or program under section (a) or (b) of this section must enable or otherwise allow Employees to secure payments for Paid Sick Leave or Expanded Family and Medical Leave. If the multiemployer fund, plan, or program does not enable or otherwise allow Employees to secure payments for paid leave to which they are entitled under the FFCRA based on their work under the multiemployer collective bargaining agreement, the multiemployer fund, plan, or program does not satisfy the requirements of the FFCRA.

(d) *Alternative means of compliance.* In accordance with its existing collective bargaining obligations, an Employer signatory to a multiemployer collective bargaining agreement may satisfy its obligations to provide Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA by means other than those set forth in paragraph (a) and (b) of this section, provided such means are consistent with its existing bargaining obligations and any applicable collective bargaining agreement.

§ 826.130 Return to work.

(a) *General rule.* On return from Paid Sick Leave or Expanded Family and Medical Leave, an Employee has a right to be restored to the same or an equivalent position in accordance with §§ 825.214 and 825.215 of this chapter.

(b) *Restoration limitations.* Notwithstanding paragraph (a) of this section:

(1) An Employee is not protected from employment actions, such as layoffs, that would have affected the Employee regardless of whether he or she took leave. In order to deny restoration to employment, an Employer must be able to show that an Employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

(2) For leave taken under the EFMLEA, an Employer may deny job restoration to key Eligible Employees, as defined under the FMLA (§ 825.217 of this chapter), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the Employer.

(3) An Employer who employs fewer than twenty-five Eligible Employees may deny job restoration to an Eligible Employee who has taken Expanded Family and Medical Leave if all four of the following conditions exist:

(i) The Eligible Employee took leave to care for his or her Son or Daughter whose School or Place of Care was closed, or whose Child Care Provider was unavailable, for COVID–19 related reasons;

(ii) The position held by the Eligible Employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the Employer that affect employment and are caused by a Public Health Emergency during the period of leave;

(iii) The Employer makes reasonable efforts to restore the Eligible Employee to a position equivalent to the position the Eligible Employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and

(iv) Where the reasonable efforts of the Employer to restore the Eligible Employee to an equivalent position fail, the Employer makes reasonable efforts to contact the Eligible Employee during a one-year period, if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave related to a Public Health Emergency concludes or the date twelve weeks after the Eligible Employee's leave began.

§ 826.140 Recordkeeping.

(a) An Employer is required to retain all documentation provided pursuant to § 826.100 for four years, regardless whether leave was granted or denied. If an Employee provided oral statements to support his or her request for Paid Sick Leave or Expanded Family and Medical Leave, the Employer is required to document and maintain such information in its records for four years.

(b) An Employer that denies an Employee's request for Paid Sick Leave or Expanded Family and Medical Leave pursuant to § 826.40(b) shall document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years.

(c) In order to claim tax credits from the Internal Revenue Service (IRS), an Employer is advised to maintain the following records for four years:

(1) Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;

(2) Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;

(3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;

(4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941, and

(5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, please consult *https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.*

§ 826.150 Prohibited acts and enforcement under the EPSLA.

(a) *Prohibited acts.* An Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee took Paid Sick Leave under the EPSLA. Likewise, an Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee has filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding, under or related to the EPSLA, or has testified or is about to testify in any such proceeding.

(b) *Enforcement.* (1) *Failure to provide Paid Sick Leave.* An Employer who fails to provide its Employee Paid Sick Leave under the EPSLA is considered to have

failed to pay the minimum wage as required by section 6 of the FLSA, 29 U.S.C. 206, and shall be subject to the enforcement provisions set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

(2) *Discharge, discipline, or discrimination.* An Employer who discharges, disciplines, or discriminates against an Employee in the manner described in subsection (a) is considered to have violated section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3), and shall be subject to the enforcement provisions relevant to such violations set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

§ 826.151 Prohibited acts and enforcement under the EFMLEA.

(a) *Prohibited acts.* The prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries described in the FMLA, 29 U.S.C. 2615, apply to Employers with respect to Eligible Employees taking, or attempting to take, leave under the EFMLEA.

(b) *Enforcement.* An Employer who commits a prohibited act described in paragraph (a) of this section shall be subject to the enforcement provisions set forth in section 107 of the FMLA, 29 U.S.C. 2617, and § 825.400 of this chapter, except that an Eligible Employee may file a private action to enforce the EFMLEA only if the Employer is otherwise subject to the FMLA in the absence of EFMLEA.

§ 826.152 Filing a complaint with the Federal Government.

A complaint alleging any violation of the EPSLA and/or the EFMLEA may be filed in person, by mail, or by telephone, with the Wage and Hour Division, U.S. Department of Labor, including at any local office of the Wage and Hour Division. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and/or omissions, with pertinent dates, that are believed to constitute the violation.

§ 826.153 Investigative authority of the Secretary.

(a) *Investigative authority under the EPSLA.* For purposes of the EPSLA, the Secretary has the investigative authority and subpoena authority set forth in sections 9 and 11 of the FLSA, 29 U.S.C. 209, 211.

(b) *Investigative authority under the EFMLEA.* For purposes of EFMLEA, the Secretary has the investigative authority set forth in section 106(a) of the FMLA, 29 U.S.C. 2616(a), and the subpoena authority set forth in section 106(d) of the FMLA, 29 U.S.C. 2616(d).

§ 826.160 Effect on other laws, employer practices, and collective bargaining agreements.

(a) *No diminishment of other rights or benefits.* (1) An Employee's entitlement to, or actual use of, Paid Sick Leave under the EPSLA is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit, including regarding Paid Sick Leave, to which the Employee is entitled under any of the following:

(i) Another Federal, State, or local law, except the FMLA as provided in § 826.70;

(ii) A collective bargaining agreement; or

(iii) An Employer policy that existed prior to April 1, 2020.

(2) That an Employee already used any type of leave prior to April 1, 2020, for reasons related to COVID–19 or otherwise, shall not be grounds for his or her Employer to deny him or her Paid Sick Leave and Expanded Family and Medical Leave or for the Employer to delay or postpone the Employee's use of Paid Sick Leave and Expanded Family and Medical Leave. The foregoing is subject to the exception of FMLA leave as provided in § 826.70. An Employer shall permit an Employee to immediately use the Paid Sick Leave and Expanded Family and Medical Leave to which he or she is entitled under the EPSLA and the EFMLEA. However, no Employer is obligated or required to provide, and no Employee has a right or entitlement to receive, any retroactive reimbursement or financial compensation through Paid Sick Leave or Expanded Family and Medical Leave for any unpaid or partially paid leave taken prior to April 1, 2020, even if such leave was taken for COVID–19-reated reasons.

(b) *Sequencing of Paid Sick Leave.* (1) An Employee may first use Paid Sick Leave before using any other leave to which he or she is entitled by any:

(i) Other Federal, State, or local law;

(ii) Collective bargaining agreement; or

(iii) Employer policy that existed prior to April 1, 2020.

(2) No Employer may require, coerce, or unduly influence any Employee to first use any other paid leave to which the Employee is entitled before the Employee uses Paid Sick Leave. Nor may an Employer require, coerce, or unduly influence an Employee to use any source or type of unpaid leave prior to taking Paid Sick Leave.

(c) *Sequencing of Expanded Family and Medical Leave.* (1) Consistent with section 102(d)(2)(B) of the FMLA, 29 U.S.C. 2612(d)(2)(B), an Eligible Employee may elect to use, or an Employer may require that an Eligible Employee use, provided or accrued leave available to the Eligible Employee for the purpose set forth in § 826.20(b) under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave.

(2) If an Eligible Employee elects, or an Employer requires, concurrent leave, the Employer must pay the Eligible Employee the full amount to which the Eligible Employee is entitled under the Employer's preexisting paid leave policy for the period of leave taken.

(d) *No creation of requirements upon end of employment.* An Employer has no obligation to provide—and an Employee or former Employee has no right or entitlement to receive—financial compensation or other reimbursement for unused Paid Sick Leave or Expanded Family and Medical Leave upon the Employee's termination, resignation, retirement, or any other separation from employment.

(e) *No creation of requirements upon expiration.* An Employer has no obligation to provide—and an Employee or former Employee has no right or entitlement to receive—financial compensation or other reimbursement for unused Paid Sick Leave or Expanded Family and Medical Leave upon the expiration of the FFCRA on December 31, 2020.

(f) *One time use.* Any person is limited to a total of 80 hours Paid Sick Leave. An Employee who has taken all such leave and then changes Employers is not entitled to additional Paid Sick Leave from his or her new Employer. An Employee who has taken some, but fewer than 80 hours of Paid Sick Leave, and then changes Employers is entitled only to the remaining portion of such leave from his or her new Employer and only if his or her new Employer is covered by the Emergency Paid Sick Leave Act. Such an Employee's Paid Sick Leave would expire upon reaching 80 hours of Paid Sick Leave total, regardless of the Employer providing it, or when the Employee reaches the number of hours of Paid Sick Leave to which he or she is entitled based on a part-time schedule with the new Employer.

[FR Doc. 2020–07237 Filed 4–2–20; 8:45 am]

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FEDERAL REGISTER

Vol. 85 Monday,

No. 66 April 6, 2020

Part V

The President

Proclamation 10001—Cancer Control Month, 2020
Proclamation 10002—National Child Abuse Prevention Month, 2020
Proclamation 10003—National Donate Life Month, 2020
Proclamation 10004—National Sexual Assault Awareness and Prevention Month, 2020
Proclamation 10005—Second Chance Month, 2020

Federal Register
Vol. 85, No. 66
Monday, April 6, 2020

Presidential Documents

Title 3—

The President

Proclamation 10001 of March 31, 2020

Cancer Control Month, 2020

By the President of the United States of America

A Proclamation

During Cancer Control Month, we commend the unwavering courage of those across our country who are battling cancer and remember all who have been taken from us by this horrible disease. We also rejoice with the nearly 17 million cancer survivors in the United States who show us that victory over cancer is possible. We extend our sincere appreciation to the devoted healthcare professionals, scientists, and researchers who have committed their lives to discovering a cure for cancer.

While tremendous progress has been made in the fight against cancer, there is still much work to be done. Cancer remains the second-leading cause of death in the United States. Thanks to early detection, preventive measures, and medical innovation, survival rates for the most common cancer types—lung, colorectal, breast, and prostate—have vastly improved, providing much-needed hope to millions of patients and their families nationwide. Despite the decreasing death rate from cancer of nearly 30 percent over the last few decades, the disease claims the lives of roughly 1,600 Americans daily, resulting in nearly 600,000 deaths annually.

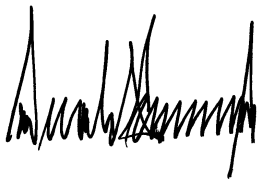
Research shows that a large proportion of cancers can be prevented, paving the way for millions of Americans to take charge of their lives by avoiding unhealthy behaviors and habits as well as commonly known carcinogens that can cause cancer. For example, the majority of melanoma cancer cases diagnosed annually could have been prevented by protecting skin from ultraviolet radiation through the use of sunscreen with sun protection factor 15 or higher and other preventive measures that shield skin from the sun's harmful rays. Moreover, tobacco products such as cigarettes and cigars are responsible for almost 9 out of every 10 cases of lung cancer. Preventive screenings, consulting your physician when detecting abnormalities, and awareness of family history can be the difference between life and death. That is why it is critical for Americans to see their doctors or healthcare providers regularly and stick to a healthy diet and routine physical activity.

My Administration is also working aggressively to protect our Nation's youth and ensure their lives are not shattered because of a cancer diagnosis. We initiated a new effort that invests $500 million over the next decade to improve pediatric cancer research. This funding will assist our Nation's most talented health professionals in learning more about the devastating cancer diagnoses our children face and finding the best cures. The National Institutes of Health has announced the Childhood Cancer Data Initiative, which supports childhood cancer research and aims to make it easier for researchers to learn from each of the approximately 16,000 children and adolescents diagnosed with cancer in the United States each year.

As we observe Cancer Control Month, we honor all those we have lost to cancer by renewing our commitment to raising awareness, emphasizing prevention and early detection, supporting innovative treatments, and prioritizing our health. By remaining steadfast in our dedication to taking preventative measures and finding a cure, we will one day defeat this disease.

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 April 2020 as Cancer Control Month. I call upon the people of the United States to speak with their doctors and healthcare providers to learn more about preventative measures that can save lives. I encourage citizens, government agencies, private businesses, nonprofit organizations, and other interested groups to join in appropriate activities that will increase awareness of what Americans can do to prevent and control cancer. I also invite the Governors of the States and Territories and officials of other areas subject to the jurisdiction of the United States to join me in recognizing Cancer Control Month.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first 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. 2020–07299
Filed 4–3–20; 8:45 am]
Billing code 3295–F0–P

Presidential Documents

Proclamation 10002 of March 31, 2020

National Child Abuse Prevention Month, 2020

By the President of the United States of America

A Proclamation

Childhood should be filled with joy, hope, unconditional love, and acceptance. Tragically, however, far too many of our Nation's young people spend this foundational time of their lives in fear, pain, and uncertainty, enduring abuse and neglect that threatens their health and well-being. During National Child Abuse Prevention Month, we condemn this horrific depravity and reaffirm our unwavering commitment to protecting our children and strengthening our families.

Each year, hundreds of thousands of children across our country suffer from abuse and neglect, a fact that is both sobering and heart-wrenching. In January, I signed an Executive Order to coordinate the Federal Government's efforts to prosecute individuals who sexually exploit children online, protect and support victims of child exploitation, and provide prevention education to raise awareness and help lower the incidence of child exploitation. I also signed into law legislation to enhance our child welfare systems by supporting at-risk families through mental health and substance abuse treatment and programs to develop parenting skills.

With our international partners in Australia, Canada, New Zealand, and the United Kingdom, the United States developed the Voluntary Principles to Counter Online Child Sexual Exploitation and Abuse. The Voluntary Principles establish a baseline framework for companies that provide online services to deter use of the internet as a tool for sexually exploiting and abusing children. Several major technology companies have publicly adopted the principles and more will follow in the coming months. These companies have a responsibility to prevent their platforms from becoming a haven for child predators and to also ensure law enforcement is able to investigate and prosecute offenders when children have been victimized.

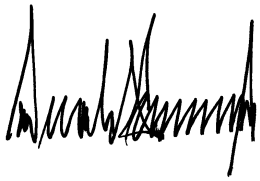
Child abuse causes the loss of innocence and hope. Loving, devoted, and caring families can serve as a bulwark against our children suffering from neglect and abuse. Child Welfare Information Gateway, the information service of the Department of Health and Human Services' Children's Bureau, offers several resources on preventing child abuse and promoting healthy families through its National Child Abuse Prevention Month website. Familiarizing yourself with the information provided by the Department of Health and Human Services can help you learn more about what you and your community can do to support children and families during this month and throughout the year.

To eradicate this blight on our society, compassionate and concerned Americans must work to effect change and impact young lives. Child welfare agencies, clergy members, educators, medical and law enforcement professionals, neighbors, friends, and extended family members all contribute to protecting and nurturing our Nation's youth. Foster, kinship, and adoptive parents open their hearts and their homes to children in crisis and empower them to find happiness and achieve their dreams. Working together, these forces for good can ensure the welfare of children who have experienced the traumas of abuse or neglect and give them a promising future.

The success of our Nation is reflected in our economic and cultural prosperity and military might, but our character is revealed by how we cherish and protect the weak, innocent, and vulnerable. All children are uniquely created in the image of God and gifted with both purpose and unlimited potential. We can and must relentlessly protect our children, homes, and communities from the scourge of these shameful tragedies and support families and communities to ensure that all children have the opportunity to reach their potential.

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 April 2020 as National Child Abuse Prevention Month. I call upon all Americans to invest in the lives of our Nation's children, to be aware of their safety and well-being, and to support efforts that promote their psychological, physical, and emotional development.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first 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. 2020–07303
Filed 4–3–20; 8:45 am]
Billing code 3295–F0–P

Presidential Documents

Proclamation 10003 of March 31, 2020

National Donate Life Month, 2020

By the President of the United States of America

A Proclamation

During National Donate Life Month, we honor the selfless individuals whose remarkable generosity has helped give others the gift of life. Countless Americans have benefited from people who have registered as organ, eye, or tissue donors, and we recognize our Nation's unrivaled medical community for helping make donor transplants possible. Through the talents of doctors all across our country and the gifts of donors, the quality of life for thousands of Americans has been improved.

Approximately 60 percent of American adults have registered as organ, eye, and tissue donors. In 2019, almost 40,000 American patients received transplants, which resulted in the most lives saved through organ donations ever during a single year. We all have the power to help: One donor can save up to 8 lives through organ donation and help improve more than 75 other lives through eye and tissue donation.

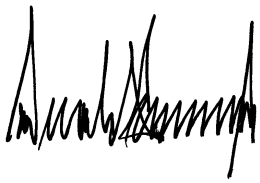
Today, more than 110,000 men, women, and children in the United States are awaiting lifesaving organ transplants. While tremendous progress has been made, the need for additional organ donors is vital. Every 9 minutes another name is added to the long list of Americans desperately waiting for transplants. Additionally, nearly 18,000 people in the United States have been diagnosed with illnesses for which blood stem cell transplantation is the best treatment option. Over 65 percent of these individuals do not have appropriately matched family members and rely upon blood stem cell donors from outside their family to help save their lives. We are grateful for the more than 30 million adults who are currently registered as marrow donors. But more are needed to ensure all who need a transplant can find a match.

To help increase access to transplants, in July 2019, I signed an Executive Order on Advancing American Kidney Health. The Executive Order increases access to kidney transplants by modernizing the organ recovery and transplantation systems and updating and fixing outdated and counterproductive regulations. It also provides increased support for living donors, increasing the supply of transplantable kidneys by removing financial barriers to living donations.

Every person is a potential organ or tissue donor with the power to give the gift of life. This month, we are grateful to the generous Americans who register as donors and to the researchers, scientists, and medical professionals who ensure transplants are safe and successful. I strongly encourage all willing and able Americans to sign up as organ or tissue donors to help instill greater hope in those awaiting a donor match and improve and save the lives of their fellow citizens.

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 April 2020 as National Donate Life Month. I call upon health professionals, volunteers, educators, government agencies, faith-based and community groups, and private organizations to help raise awareness of the urgent need for organ and tissue donors throughout our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first 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. 2020–07305
Filed 4–3–20; 8:45 am]
Billing code 3295–F0–P

Presidential Documents

Proclamation 10004 of March 31, 2020

National Sexual Assault Awareness and Prevention Month, 2020

By the President of the United States of America

A Proclamation

No person should ever have to endure the anguish and indignity of sexual assault. This horrific crime affects Americans of every age, ethnicity, and socioeconomic status. During National Sexual Assault Awareness and Prevention Month, we reaffirm our commitment to supporting survivors of sexual assault, encouraging strong criminal justice responses to these crimes, and ending the scourge of sexual violence in our homes and communities.

Sexual assault is a particularly egregious and dehumanizing form of violence. Even after physical injuries of a sexual assault have healed, emotional and mental trauma can persist. Survivors often struggle with lingering anxiety, fear, anger, shame, and depression. The devastating aftermath of sexual assault can also harm a survivor's relationships with their loved ones. My Administration has made combating sexual assault a top priority.

Last year, I signed an Executive Order establishing the Task Force on Missing and Murdered American Indians and Alaska Natives to address unacceptable acts of violence against Native Americans, particularly women and girls. Too often, sexual assaults are committed in conjunction with other forms of violence against women and girls in Indian Country. This Task Force is enhancing collaboration across the Federal Government to improve the ability of law enforcement and prosecutors to respond to new and unsolved cases in these communities and to ensure they receive vital health and human services. In addition, the Office on Violence Against Women and the Office for Victims of Crime within the Department of Justice (DOJ) are spearheading an initiative to ensure that sexual assault victims in Native and Tribal communities have access to high-quality medical care from trained Sexual Assault Forensic Examiners and other services they may need to heal and achieve justice.

DOJ is also providing grant funding to facilitate the analysis of thousands of sexual assault kits in crime laboratories across our Nation to identify criminals. The Department is also making sure that law enforcement officers, prosecutors, and victim advocates have the resources they need to support victims and bring offenders to justice. Further, DOJ and the Department of Health and Human Services have identified best practices in the collection and preservation of forensic evidence, as well as in the care and treatment of survivors of sexual assault.

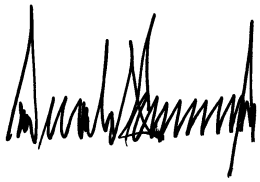
Human trafficking has become rampant throughout the world, and often includes sexual assault. In 2019 alone, the National Human Trafficking Hotline received reports of nearly 12,000 cases of potential human trafficking in the United States, identifying more than 25,000 victims. More than 65 percent of these cases referenced women, and more than one in five referenced children. My Administration will use every tool at our disposal to dismantle this global problem, deliver justice, and ensure the safety and well-being of the survivors. That is why I signed an Executive Order on Combating Human Trafficking and Online Child Exploitation in the United States, which prioritizes the Federal Government's resources to prosecute offenders, assist victims, and provide prevention education to combat human

trafficking and online sexual exploitation of children. I also signed into law legislation authorizing $430 million to fight sex and labor trafficking, and my fiscal year 2021 budget request to Congress seeks an increase of $42.5 million to address human trafficking. And importantly, we are holding these foreign governments that fail to address human trafficking to account by imposing restrictions on foreign assistance.

This month, we pause to recognize the devastation caused by sexual assault and to recommit ourselves to eliminating this atrocious crime. We are grateful to the professionals serving in healthcare, victim and human services, law enforcement, and criminal justice for their steadfast resolve against sexual assault while also caring for and supporting survivors. As a Nation, we stand with the courageous men, women, and children who have survived sexual assault and pledge to use every tool at our disposal to help prevent Americans from ever enduring the trauma of sexual assault.

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 April 2020 as National Sexual Assault Awareness and Prevention Month. I urge all Americans, families, law enforcement personnel, healthcare providers, and community and faith-based organizations to support survivors of sexual assault and work together to prevent these crimes in their communities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first 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. 2020–07308
Filed 4–3–20; 8:45 am]
Billing code 3295–F0–P

Presidential Documents

Proclamation 10005 of March 31, 2020

Second Chance Month, 2020

By the President of the United States of America

A Proclamation

As Americans, we believe that every person has unbound potential. It is therefore important that we offer former inmates who have served their sentences and learned from their earlier mistakes the opportunity for redemption through a second chance to become productive members of society. During Second Chance Month, we celebrate those who have set out to create better lives following incarceration and recommit to helping former inmates contribute to the strength and prosperity of our Nation.

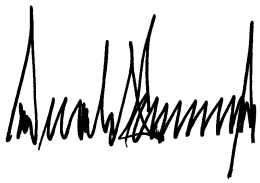
In 2018, I signed into law the First Step Act, landmark legislation that brought needed reform to our criminal justice system. The First Step Act reduced penalties and eliminated the three-strike mandatory life sentence provision for certain non-violent offenders. This legislation also expanded judges' discretion to impose sentences that are below the mandatory minimum for drug offenders with little or no criminal history. Additionally, it allows certain low-level drug offenders to petition the courts for a review of their sentence, which a judge can reduce after reviewing all the circumstances, including public safety, criminal history, and the nature of the offense. Further, through expanded rehabilitative programs my Administration has established in accordance with this legislation, inmates are receiving training and education to help them develop skills that will help them re-enter society successfully. Based on an assessment of their risk of recidivism and needs, inmates that complete some of these programs can secure early release to home confinement or a halfway house.

While we must be tough on crime, we can also be smart about reducing recidivism. One of the best ways to break the cycle of crime is to help former inmates find rewarding work. That is why my Administration is promoting second chance hiring to build on the reforms of the First Step Act and help former inmates live crime-free lives. I launched the Federal Interagency Crime Prevention and Improving Reentry Council to create more second chances for those returning home from prison. We are also working to expand Pell Grants to provide education and training to inmates before release and providing grants to States to expand their use of fidelity bonds to help persons with criminal records find gainful employment.

This month, we extend our heartfelt thanks to all who know in their hearts that redemption is possible. Second chances are possible only through a network of people who believe in themselves and others, former inmates determined to improve their lives, judges and public servants dedicated to reducing recidivism, and families and community members willing to lend their support to people striving to triumph over their past mistakes.

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 April 2020 as Second Chance Month. I call on all Americans to commemorate this month with events and activities that raise public awareness about preventing crime and providing those who have completed their sentences an opportunity for an honest second chance.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first 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. 2020–07309
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Billing code 3295–F0–P

FEDERAL REGISTER

Vol. 85 Monday,

No. 66 April 6, 2020

Part VI

The President

Notice of April 3, 2020—Continuation of the National Emergency With Respect to Somalia

Federal Register
Vol. 85, No. 66
Monday, April 6, 2020

Presidential Documents

Title 3—

The President

Notice of April 3, 2020

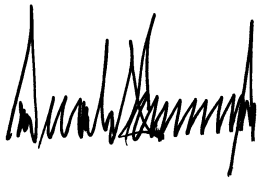
Continuation of the National Emergency With Respect to Somalia

On April 12, 2010, by Executive Order 13536, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, which have been the subject of the United Nations Security Council resolutions, and violations of the arms embargo imposed by the United Nations Security Council.

On July 20, 2012, the President issued Executive Order 13620 to take additional steps to deal with the national emergency declared in Executive Order 13536 in view of United Nations Security Council Resolution 2036 of February 22, 2012, and Resolution 2002 of July 29, 2011, and to address: exports of charcoal from Somalia, which generate significant revenue for al-Shabaab; the misappropriation of Somali public assets; and certain acts of violence committed against civilians in Somalia, all of which contribute to the deterioration of the security situation and the persistence of violence in Somalia.

The situation with respect to Somalia 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 12, 2010, and the measures adopted on that date and on July 20, 2012, to deal with that emergency, must continue in effect beyond April 12, 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 13536.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
April 3, 2020.

[FR Doc. 2020–07373
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