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

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# Presidential Documents

**Memorandum of April 14, 2020**

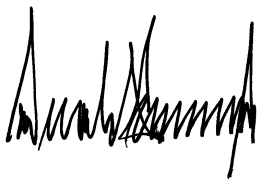
## Delegation of Authorities Under the National Defense Authorization Act for Fiscal Year 2020 and the Eastern Mediterranean Security and Energy Partnership Act of 2019

**Memorandum for the Secretary of State**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State the authorities vested in the President by section 1250A(d) of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92) and section 205(d) of the Eastern Mediterranean Security and Energy Partnership Act of 2019 (Title II, Div. J, Public Law 116–94).

Any reference in this memorandum to either Act shall be deemed to be a reference to such Acts as amended from time to time.

You are authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
*Washington, April 14, 2020*

[FR Doc. 2020–12859
Filed 6–11–20; 8:45 am]
Billing code 4710–10–P

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

### 7 CFR Part 9

**[Docket ID: FSA–2020–0004]**

**RIN 0530–AA65**

## Coronavirus Food Assistance Program; Correction

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Correcting amendments.

**SUMMARY:** The Secretary of Agriculture is correcting a final rule that appeared in the **Federal Register** on May 21, 2020. The document was issued to implement the Coronavirus Food Assistance Program (CFAP) that provides assistance to agricultural producers impacted by the effects of the COVID–19 outbreak. There is one typo in the table of payment rates for the commodity of carrots that needs to be corrected. Additional corrections are being made to add clarity to the rule.

**DATES:** *Effective Date:* June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** William L. Beam; telephone: (202) 720–3175; email: Bill.Beam@usda.gov. Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

**SUPPLEMENTARY INFORMATION:** This document corrects the final rule that was published in the **Federal Register** on May 21, 2020 (85 FR 30825–30835). This document clarifies the definition of ''Slaughter Cattle—fed cattle'' to specify that the term refers to cattle with a weight of 1,200 pounds or more that are intended for slaughter.

This document clarifies specialty crop eligibility in § 9.5(b), and specifies that specialty crops that were harvested and shipped but that were subsequently spoiled or unpaid due to loss of marketing channels between January 15, 2020, and April 15, 2020, are eligible for payment under § 9.5(b)(2). It corrects § 9.5(b)(3) to specify that it includes donated crops and to remove the term ''unpriced,'' which does not apply to payments for specialty crops that did not leave the farm or were donated, or mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to loss of marketing channels. This document clarifies payment calculations for livestock under § 9.5(c)(1), (d)(1), and (f)(1) to specify that they are based on unpriced livestock sales, and it clarifies § 9.5(c)(2), (d)(2), and (f)(2) to specify that they apply to livestock inventory owned between April 16, 2020, and May 14, 2020. This document removes the definition of ''unpriced inventory'' and adds a similar definition of ''unpriced'' to be consistent with the use of the term throughout the regulation; the new definition also specifies that ''unpriced'' is based on whether a forward contract, agreement, or similar binding document was in place as of January 15, 2020.

The final rule did not address eligibility of dairy operations that went out of business prior to the second quarter or during second quarter production. This correction specifies that dairy operations that dissolved on or before March 31, 2020, are eligible for payment under § 9.5(e)(1) using the CARES Act payment rate, and dairy operations that dissolve or have dissolved after March 31, 2020, are eligible for a prorated payment for the number of days the dairy operation commercially markets milk in the second quarter under § 9.5(e)(2) using the CCC payment rate. This clarification will not increase CFAP costs.

This document also corrects the CARES Act payment rate for sales losses for carrots, and table headings.

### List of Subjects in 7 CFR Part 9

Agricultural commodities, Agriculture, Disaster assistance, Indemnity payments.

Accordingly, 7 CFR part 9 is corrected by making the following correcting amendments:

## PART 9—CORONAVIRUS FOOD ASSISTANCE PROGRAM

■ 1. The authority citation for part 9 continues to read as follows:

**Authority:** 15 U.S.C. 714b and 714c; and Division B, Title I, Pub. L. 116–136.

■ 2. Amend § 9.2 as follows:

■ a. Add the definition of ''Second quarter'' in alphabetical order;
■ b. Revise the definition of ''Slaughter cattle—fed cattle''; and
■ c. Add the definition ''Unpriced'' in alphabetical order;
■ d. Remove the definition of ''Unpriced inventory''.

The additions and revision read as follows:

**§ 9.2 Definitions.**

* * * * *

*Second quarter* means April, May, and June of 2020.

*Slaughter Cattle—fed cattle* means cattle with a weight of 1,200 pounds or more that are intended for slaughter.

* * * * *

*Unpriced* means not subject to an agreed-upon price in the future through a forward contract, agreement, or similar binding document as of January 15, 2020.

* * * * *

■ 3. Amend § 9.5 as follows:
■ a. Revise paragraph (b) introductory text;
■ b. Revise paragraph (b)(2);
■ c. Revise paragraph (b)(3);
■ d. In paragraph (c)(1), remove the word ''Cattle'' and add the words ''Unpriced cattle'' in its place;
■ e. In paragraph (c)(2), remove the words ''Unpriced cattle inventory'' and add the words ''Cattle inventory owned'' in their place;
■ f. In paragraph (d)(1), remove the word ''Hogs'' and add the words ''Unpriced hogs'' in its place;
■ g. In paragraph (d)(2), remove the words ''Unpriced hog and pig inventory'' and add the words ''Hog and pig inventory owned'' in their place;
■ h. Add paragraph (e)(3);
■ i. In paragraph (f)(1), remove the word ''Lambs'' and add the words ''Unpriced lambs'' in its place;
■ j. In paragraph (f)(2), remove the words ''Unpriced lambs and yearlings in inventory'' and add the words ''Lambs and yearlings in inventory owned'' in their place;
■ k. In Table 1 to paragraph (h), revise the table heading, revise the heading for column 3, and revise the entry for ''carrots''; and
■ l. In Table 2 to paragraph (h), revise the table heading.

The addition and revisions read as follows:

**§ 9.5 Calculation of payments.**

* * * * *

(b) CFAP covers losses for specialty crops that experienced immediate losses, a price decline, spoiled, were unpaid, or were unharvested due to market conditions between January 15, 2020, and April 15, 2020. Specialty crops in inventory or in storage facilities that may be sold after April 15, 2020, are not eligible. Specialty crops that were under an agreed upon set price before January 15, 2020, and were or will be paid at that price or higher, do not qualify for assistance under paragraph (b)(1) of this section, but may qualify under paragraphs (b)(2) or (b)(3) of this section. Payments for eligible specialty crops will be the sum of:

* * * * *

(2) For specialty crops harvested and shipped but that were subsequently spoiled or unpaid due to loss of marketing channels between January 15, 2020, and April 15, 2020, the harvested and shipped quantity that spoiled or is unpaid multiplied by the payment rate in column 3 of Table 1 in paragraph (h) of this section; and

(3) For specialty crops that did not leave the farm, were donated, or were mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to loss of marketing channel, the sum of the quantity of crops that did not leave the farm or were donated, or the quantity of mature crops that remained unharvested, multiplied by the payment rate in column 4 of Table 1 in paragraph (h) of this section.

* * * * *

(e) * * *

(3) Dairy operations that dissolved on or before March 31, 2020, are eligible for payment under paragraph (e)(1) of this section. Dairy operations that dissolve or have dissolved after March 31, 2020, are eligible for a prorated payment under paragraph (e)(2) of this section for the number of days the dairy operation commercially markets milk in the second quarter.

* * * * *

(h) * * *

TABLE 1 TO PARAGRAPH (h)—PAYMENT RATES FOR SPECIALTY CROPS

| Commodity | CARES Act payment rate for sales losses ($/lb) | CARES Act payment rate for product that left the farm but spoiled or is unpaid due to loss of marketing channel ($/lb) | CCC payment rate ($/lb) |
|---|---|---|---|
| * * * * * * * | | | |
| Carrots | 0.02 | 0.11 | 0.02 |
| * * * * * * * | | | |

* * * * *

TABLE 2 TO PARAGRAPH (h)—PAYMENT RATES FOR NON-SPECIALTY CROPS, DAIRY, LIVESTOCK, AND WOOL

* * * * *

**Stephen L. Censky,**

*Vice Chairman, Commodity Credit Corporation, and Deputy Secretary, U.S. Department of Agriculture.*

[FR Doc. 2020–12528 Filed 6–10–20; 4:15 pm]

**BILLING CODE 3410–05–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 31315; Amdt. No. 3908]**

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective June 12, 2020. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 12, 2020.

**ADDRESSES:** Availability of matter incorporated by reference in the amendment is as follows:

**For Examination**

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC, 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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.*

**Availability**

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center

online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29 Room 104, Oklahoma City, OK 73169. Telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

## Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

## The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## List of Subjects in 14 CFR part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on May 29, 2020.

**Robert C. Carty,**

*Executive Deputy Director, Flight Standards Service.*

## Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

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| 16–Jul–20 | AR | Little Rock | Bill And Hillary Clinton National/Adams Field. | 0/7024 | 5/15/20 | RNAV (GPS) RWY 22L, Amdt 1E |
| 16–Jul–20 | AR | Little Rock | Bill And Hillary Clinton National/Adams Field. | 0/7025 | 5/15/20 | ILS OR LOC RWY 22L, Orig–E |
| 16–Jul–20 | MI | Lakeview | Lakeview-Griffith Field | 0/8486 | 5/19/20 | RNAV (GPS) RWY 10, Orig–C |
| 16–Jul–20 | WV | Martinsburg | Eastern WV Rgnl/Shepherd Fld. | 0/8534 | 5/7/20 | VOR–A, Amdt 10 |
| 16–Jul–20 | AR | Almyra | Almyra Muni | 0/8915 | 5/14/20 | RNAV (GPS) RWY 36, Amdt 1 |
| 16–Jul–20 | SC | Myrtle Beach | Myrtle Beach Intl | 0/9472 | 5/14/20 | RNAV (GPS) RWY 36, Amdt 4 |
| 16–Jul–20 | FL | Tallahassee | Tallahassee Intl | 0/9492 | 5/13/20 | VOR RWY 18, Amdt 12B |
| 16–Jul–20 | FL | Tallahassee | Tallahassee Intl | 0/9493 | 5/13/20 | VOR/DME OR TACAN RWY 36, Amdt 1B |
| 16–Jul–20 | FL | Tallahassee | Tallahassee Intl | 0/9494 | 5/13/20 | RNAV (GPS) RWY 36, Amdt 2A |
| 16–Jul–20 | ND | Watford City | Watford City Muni | 0/9498 | 5/11/20 | RNAV (GPS) RWY 12, Orig–C |
| 16–Jul–20 | ND | Watford City | Watford City Muni | 0/9507 | 5/11/20 | RNAV (GPS) RWY 30, Orig–B |
| 16–Jul–20 | TN | Gallatin | Sumner County Rgnl | 0/9669 | 5/26/20 | Takeoff Minimums and Obstacle DP, Amdt 4 |
| 16–Jul–20 | TN | Gallatin | Sumner County Rgnl | 0/9670 | 5/26/20 | RNAV (GPS) RWY 35, Amdt 3 |
| 16–Jul–20 | TN | Gallatin | Sumner County Rgnl | 0/9672 | 5/26/20 | RNAV (GPS) RWY 17, Amdt 3 |
| 16–Jul–20 | TN | Gallatin | Sumner County Rgnl | 0/9673 | 5/26/20 | VOR–A, Amdt 3 |

[FR Doc. 2020–12712 Filed 6–11–20; 8:45 am]
**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 31314 Amdt. No. 3907]**

## Standard Instruction Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective June 12, 2020. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 12, 2020.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

### For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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.*

### Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29, Room 104, Oklahoma City, OK 73169. Telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums

and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

### Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

### The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on May 29, 2020.

**Robert C. Carty,**

*Executive Deputy Director, Flight Standards Service.*

### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

**Effective 16 July 2020**

Gulkana, AK, Gulkana, RNAV (GPS) RWY 15, Amdt 2, CANCELLED
Gulkana, AK, Gulkana, RNAV (GPS) RWY 15L, Orig
Gulkana, AK, Gulkana, RNAV (GPS) RWY 33, Amdt 2, CANCELLED
Gulkana, AK, Gulkana, RNAV (GPS) RWY 33R, Orig
Gulkana, AK, Gulkana, VOR RWY 15L, Orig
Gulkana, AK, Gulkana, VOR/DME RWY 15, Orig, CANCELLED
Teller, AK, Teller, Takeoff Minimums and Obstacle DP, Amdt 1
Unalakleet, AK, Unalakleet, VOR–D, Amdt 6, CANCELLED
Keystone Heights, FL, Keystone Heights, RNAV (GPS) RWY 5, Orig-B
Atlanta, GA, Newnan Coweta County, Takeoff Minimums and Obstacle DP, Amdt 3C
Blakely, GA, Early County, LOC/NDB RWY 23, Amdt 1B, CANCELLED
Camilla, GA, Camilla-Mitchell County, NDB RWY 8, Amdt 3A, CANCELLED
Canton, GA, Cherokee County Rgnl, Takeoff Minimums and Obstacle DP, Amdt 2A
Cairo, IL, Cairo Rgnl, NDB RWY 14, Amdt 2C
Cairo, IL, Cairo Rgnl, RNAV (GPS) RWY 14, Orig-C
Abilene, KS, Abilene Muni, RNAV (GPS) RWY 17, Amdt 1C
Shreveport, LA, Shreveport Rgnl, LOC RWY 6, Amdt 4
Shreveport, LA, Shreveport Rgnl, RADAR–1, Amdt 6
Shreveport, LA, Shreveport Rgnl, RNAV (GPS) RWY 6, Amdt 4
Shreveport, LA, Shreveport Rgnl, Takeoff Minimums and Obstacle DP, Amdt 2
Baltimore, MD, Martin State, VOR OR TACAN RWY 15, Orig-C
Caribou, ME, Caribou Muni, RNAV (GPS) RWY 1, Orig-A
Caribou, ME, Caribou Muni, RNAV (GPS) RWY 19, Amdt 1A
Battle Creek, MI, W K Kellogg, RADAR–1, Amdt 2, CANCELLED
Muskegon, MI, Muskegon County, RADAR–1, Amdt 15, CANCELLED
Austin, MN, Austin Muni, RNAV (GPS) RWY 17, Amdt 2A
Malden, MO, Malden Rgnl, RNAV (GPS) RWY 18, Amdt 1B
Perryville, MO, Perryville Rgnl, RNAV (GPS) RWY 2, Orig-B
North Wilkesboro, NC, Wilkes County, ILS Y OR LOC Y RWY 1, Amdt 1A
North Wilkesboro, NC, Wilkes County, ILS Z OR LOC Z RWY 1, Orig-A
Statesville, NC, Statesville Rgnl, VOR/DME RWY 10, Amdt 9A, CANCELLED
Cambridge, NE, Cambridge Muni, NDB RWY 15, Amdt 4, CANCELLED
Raton, NM, Raton Muni/Crews Field, VOR/DME RWY 2, Amdt 7, CANCELLED
Altus, OK, Altus/Quartz Mountain Rgnl, RNAV (GPS) RWY 35, Amdt 1A
Franklin, PA, Venango Rgnl, RNAV (GPS) RWY 3, Amdt 1C
Dickson, TN, Dickson Muni, NDB RWY 17, Amdt 3A, CANCELLED
Georgetown, TX, Georgetown Muni, RNAV (GPS) RWY 11, Amdt 1A
Georgetown, TX, Georgetown Muni, RNAV (GPS) RWY 29, Amdt 1A

Hearne, TX, Hearne Muni, RNAV (GPS) RWY 18, Orig-B
St George, UT, St George Muni, VOR/DME–A, Orig-A, CANCELLED
Waupaca, WI, Waupaca Muni, RNAV (GPS) RWY 10, Amdt 2A
Elkins, WV, Elkins-Randolph Co-Jennings Randolph Fld, RNAV (GPS) RWY 23, Orig-B

[FR Doc. 2020–12711 Filed 6–11–20; 8:45 am]

BILLING CODE 4910–13–P

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 39

**RIN 3038–AE66**

### Derivatives Clearing Organization General Provisions and Core Principles

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Correcting amendments.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is correcting final rules published in the **Federal Register** on January 27, 2020 (final rules). The final rules, which amended certain regulations applicable to derivatives clearing organizations (DCOs), took effect on February 26, 2020. This correction amends three provisions of the final rules that were inadvertently modified by operation of the amendatory instructions and rule text in the final rules.

**DATES:** Effective on June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Eileen A. Donovan, Deputy Director, 202–418–5096, *edonovan@cftc.gov;* Parisa Nouri, Associate Director, 202–418–6620, *pnouri@cftc.gov;* Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** On January 27, 2020, the Commission published final rules amending certain regulations applicable to DCOs to, among other things, address certain risk management and reporting obligations, clarify the meaning of certain provisions, simplify processes for registration and reporting, and codify existing staff relief and guidance.[1] In renumbering § 39.11(b)(1)(vi) as § 39.11(b)(1)(v), the final rules inadvertently retained § 39.11(b)(1)(vi), such that paragraphs (b)(1)(v) and (vi) were duplicated as identical provisions.[2] The proposed rule text published on May 16, 2019 (proposed rules) [3] illustrates the intended renumbering of § 39.11(b)(1), and the Commission indicated in the preamble to the final rules its intention to renumber § 39.11(b)(1)(vi).[4] Therefore, the Commission is making a correcting amendment to § 39.11(b)(1) to resolve that error.

Further, in renumbering § 39.11(e)(3)(i)–(iii) as § 39.11(e)(4)(i)–(iii), the final rules inadvertently omitted paragraphs (e)(4)(ii) and (iii), which were contained in the proposed rules [5] and were not otherwise modified in the final rules.[6] Therefore, the Commission is making a correcting amendment to § 39.11(e)(4) to resolve that error.

Lastly, the final rules inadvertently omitted § 39.13(g)(8)(iii), which was not proposed to be modified.[7] The proposed rules include § 39.13(g)(8)(iii) unchanged from what was previously codified,[8] and the preamble to the final rules states that there was no intent to change paragraph (g)(8)(iii).[9] Thus, the omission of paragraph (g)(8)(iii) by operation of the amendatory instruction and rule text in the final rules was an inadvertent error.[10] Therefore, the Commission is making a correcting amendment to § 39.13(g)(8)(iii) to resolve that error.

### List of Subjects in 17 CFR Part 39

Application form, Business and industry, Commodity futures, Consumer protection, Default rules and procedures, Definitions, Enforcement authority, Participant and product eligibility, Reporting and recordkeeping requirements, Risk management, Settlement procedures, Swaps, Treatment of funds.

In consideration of the foregoing, 17 CFR part 39 is corrected by making the following correcting amendments:

## PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

**Authority:** 7 U.S.C. 2, 7a–1, and 12a; 12 U.S.C. 5464; 15 U.S.C. 8325.

■ 2. Amend § 39.11 by removing paragraph (b)(1)(vi) and adding paragraphs (e)(4)(ii) and (iii) to read as follows:

**§ 39.11 Financial resources.**

* * * * *

(e) * * *

(4)(i) * * *

(ii) Cash balances shall be invested or placed in safekeeping in a manner that bears little or no principal risk; and

(iii) Letters of credit shall not be a permissible asset for a guaranty fund.

* * * * *

■ 3. In § 39.13, add paragraph (g)(8)(iii) to read as follows:

**§ 39.13 Risk management.**

* * * * *

(g) * * *

(8) * * *

(iii) *Withdrawal of customer initial margin.* A derivatives clearing organization shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in a customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in such customer's account which are cleared by the derivatives clearing organization.

* * * * *

Issued in Washington, DC, on May 14, 2020 by the Commission.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

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

### Appendix to Derivatives Clearing Organization General Provisions and Core Principles—Commission Voting Summary

On this matter, Chairman Tarbert, and Commissioners Quintenz, Behnam, Stump,

[1] Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800 (Jan. 27, 2020).

[2] The duplicate provisions state that the financial resources available to satisfy the requirements of § 39.11(a)(1) may include any other financial resource deemed acceptable by the Commission. Commission regulations referred to herein are found at 17 CFR chapter I.

[3] Derivatives Clearing Organization General Provisions and Core Principles, 84 FR 22226, 22268 (May 16, 2019).

[4] *See* 85 FR at 4807.

[5] *See* 84 FR at 22269 (illustrating the intended renumbering of § 39.11(e)(3)(i)–(iii) to (e)(4)(i)–(iii)).

[6] The inadvertently omitted paragraphs state that a DCO's cash balances shall be invested or placed in safekeeping in a manner that bears little or no principal risk, and letters of credit shall not be a permissible asset for a guaranty fund.

[7] The inadvertently omitted paragraph states that a DCO shall require its clearing members to ensure that their customers do not withdraw funds from their accounts with such clearing members unless the net liquidating value plus the margin deposits remaining in a customer's account after such withdrawal are sufficient to meet the customer initial margin requirements with respect to all products and swap portfolios held in such customer's account which are cleared by the DCO.

[8] *See* 84 FR at 22272.

[9] *See* 85 FR at 4828, n. 51.

[10] *See* 85 FR at 4855, 4856.

and Berkovitz voted in the affirmative. No Commissioner voted in negative.

[FR Doc. 2020–10809 Filed 6–11–20; 8:45 am]

**BILLING CODE 6351–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2020–0228]**

**RIN 1625–AA00**

## Safety Zone; Harbor Beach Fireworks, Lake Huron, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters within a 200-yard radius of a portion of Lake Huron, Harbor Beach, MI. This zone is necessary to protect spectators and vessels from potential hazards associated with the Harbor Beach Fireworks.

**DATES:** This temporary final rule is effective from 10 p.m. on July 10, 2020 through 11 p.m. on July 12, 2020.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2020–0228 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313–568–9564, or email *Tracy.M.Girard@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Detroit
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

### II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b) (B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard did not receive the final details of this fireworks display in time to publish an NPRM. As such, it is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Detroit (COTP) has determined that potential hazard associated with fireworks from 10 p.m. on July 10, 2020 through 11 p.m. on July 12, 2020 will be a safety concern to anyone within a 200-yard radius of the launch site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the fireworks are being displayed.

### IV. Discussion of the Rule

This rule establishes a safety zone from 10 p.m. on July 10, 2020 through 11 p.m. on July 12, 2020. The safety zone will be enforced from 10 p.m. until 11 p.m. on July 10, 2020 and July 11, 2020. In the case of inclement weather on July 10, 2020 or July 11, 2020, this safety zone will be enforced from 10 p.m. to 11 p.m. on July 12, 2020. The safety zone will encompass all U.S. navigable waters of Lake Huron, Harbor Beach, MI, within a 200-yard radius of position 43°50.77′ N, 082°38.63′ W (NAD 83). No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

### V. Regulatory Analyses

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

#### *A. Regulatory Planning and Review*

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

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of Lake Huron from 10 p.m. on July 10, 2020 through 11 p.m. on July 12, 2020. Moreover, the Coast Guard will issue Broadcast Notice to Mariners (BNM) via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

#### *B. Impact on Small Entities*

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

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

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's

responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

*C. Collection of Information*

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

*D. Federalism and Indian Tribal Governments*

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting one and a half hours on two nights that will prohibit entry into a designated area. It is categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

*G. Protest Activities*

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

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0228 to read as follows:

**§ 165.T09–0228 Safety Zone; Harbor Beach Fireworks, Lake Huron, MI.**

(a) *Location.* A safety zone is established to include all U.S. navigable waters of Lake Huron, Harbor Beach, within a 200-yard radius of position 43°50.77′ N, 082°38.63′ W (NAD 83).

(b) *Enforcement period.* The regulated area described in paragraph (a) of this section will be enforced from 10 p.m. until 11 p.m. on July 10, 2020 and July 11, 2020. In the case of inclement weather on July 10, 2020 or July 11, 2020, this safety zone will be enforced from 10 p.m. to 11 p.m. on July 12, 2020.

(c) *Regulations.* (1) No vessel or person may enter, transit through, or anchor within the safety zone unless authorized by the Captain of the Port Detroit (COTP), or his on-scene representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or his on-scene representative.

(3) The ''on-scene representative'' of COTP is any Coast Guard commissioned, warrant or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port Detroit to act on his behalf.

(4) Vessel operators shall contact the COTP or his on-scene representative to obtain permission to enter or operate within the safety zone. The COTP or his on-scene representative may be contacted via VHF Channel 16 or at (313) 568–9464. Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the COTP or his on-scene representative.

Dated: May 13, 2020.

**Jeffrey W. Novak,**

*Captain, U.S. Coast Guard, Captain of the Port Detroit.*

[FR Doc. 2020–11302 Filed 6–11–20; 8:45 am]

**BILLING CODE 9110–04–P**

## POSTAL REGULATORY COMMISSION

### 39 CFR Part 3030

**[Docket No. RM2020–5; Order No. 5510]**

### Market Dominant Postal Products

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is revising its rules concerning rate incentives for market dominant products to clarify the definition of ''rate of general applicability'' within the context of a market dominant rate adjustment proceeding; to add an additional criterion for a rate incentive to be included in a percentage change in rates calculation at discounted prices; and to state clearly what information the Postal Service must file to support a claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation at discounted prices.

**DATES:** *Effective:* July 13, 2020.

**ADDRESSES:** For additional information, Order No. 5510 can be accessed electronically through the Commission's website at *https://www.prc.gov.*

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**



## I. Background

The Commission's rules permit the Postal Service, when adjusting market dominant rates as part of a market dominant rate adjustment proceeding, to include discounted prices for rate incentives that the Postal Service plans to offer in the percentage change in rates calculation, as long as the rate incentive meets certain criteria. 39 CFR 3030.523(e). These criteria are: (1) That the rate incentive is in the form of a discount or can be easily translated into a discount; (2) that sufficient billing determinants are available for the rate incentive to be included in the percentage change in rates calculation; and (3) that the rate incentive is a rate of general applicability. 39 CFR 3030.523(e)(2). The Commission's rules also require the Postal Service to provide ''sufficient information to demonstrate that the rate incentive is a rate of general applicability.'' 39 CFR 3030.512(b)(9)(i).

When the Commission previously promulgated rules with regard to the treatment of market dominant rate incentives, it included a specific definition of ''rate of general applicability'' in the context of market dominant rate adjustments which provided, *inter alia,* that ''[a] rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies.'' 39 CFR 3030.501(g). The Commission explained that mail volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under an incentive program apply.[1]

In the most recent market dominant rate adjustment proceeding that the Commission conducted, a question arose regarding the extent to which a particular rate incentive proposed by the Postal Service constituted a ''rate of general applicability'' appropriate for inclusion in the percentage change in rates calculation at discounted prices.[2] After determining that a potential ambiguity existed in the Commission's rules concerning whether a rate incentive featuring a mailer-specific volume threshold based on historical volume data could constitute a ''rate of general applicability,'' the Commission permitted the rate incentive to be included in the percentage change in rates calculation in Docket No. R2020–1, but indicated that it would initiate a rulemaking proceeding to clarify the issue. *Id.* at 23–24. The Commission then opened Docket No. RM2020–5 and issued a Notice of Proposed Rulemaking proposing amendments to its rules regarding rate incentives for market dominant products and soliciting comments from the public.[3]

## II. Basis for Rule Changes

In Order No. 5433, the Commission proposed to clarify its rules by making three revisions. First, the Commission proposed to amend § 3030.501(g) to clarify that in order to qualify as a rate of general applicability, a rate cannot be based on mailer-specific data, such as historical mailer volume. Order No. 5433 at 8, 10, 13. Second, the Commission proposed to amend § 3030.523(e)(2) to add an additional criterion for a rate incentive to be eligible for inclusion in a percentage change in rates calculation at discounted prices—the rate incentive must be made available to all mailers equally on the same terms and conditions. Order No. 5433 at 8, 10, 14–15.

The Commission explained that its basis for proposing these revisions was twofold. The Commission was concerned that interpreting ''rate of general applicability'' to permit volume thresholds based on historical volume data would contravene the policy reasons underlying the general applicability requirement, because, as the Commission has found before, ''volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under [an] incentive program apply[,]'' due to the fact that past behavior by mailers bears no relationship to mail being sent in the present.[4] The Commission stated that it was equally concerned about the fairness of permitting mailer-specific thresholds for determining eligibility for market dominant rate incentives. Where a rate incentive is not made available to all mailers on the same terms and conditions, the potential exists for non-qualifying mailers to be forced to subsidize the rate incentives received by qualifying mailers.

The third and final revision the Commission proposed was to amend § 3030.512(b)(9) to add additional requirements intended to ensure that the Postal Service provides sufficient information at the outset of a market dominant rate adjustment proceeding to permit the Commission and stakeholders to verify that all rate incentives included in a percentage change in rates calculation comply with the definition of ''rates of general applicability'' and are made available to all mailers equally on the same terms and conditions.

The Commission received four sets of comments with regard to its proposed rule revisions. Order No. 5510 at 7. In general, commenters other than the Postal Service were supportive of the changes. *Id.* at 7–8. The Postal Service argued that mailer-specific volume thresholds promote fairness among mailers because more mailers would participate in such promotions than would participate under a static volume threshold. *Id.* at 8–9. However, the Commission found that this did not address its primary concern, which is fairness among all mailers in a class, including those not eligible to participate in promotions. *Id.* at 9–10. The Commission determined that from a policy standpoint it is necessary to have bright-line rules with regard to what promotions can and cannot be included in a percentage change in rates calculation. *Id.* at 10. Therefore, the Commission adopted the proposed rules without modification. *Id.* at 11.

## III. Final Rules

*Final § 3030.501(g).* Final § 3030.501(g) is revised to state clearly that the definition of ''rate of general applicability'' within the context of a market dominant rate adjustment proceeding means a rate incentive that is not based on mailer-specific data, such as historical volume data.

*Final § 3030.512(b)(9).* Final § 3030.512(b)(9) is revised to state clearly what information the Postal Service must file to support its claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation.

*Final § 3030.523(e)(2)(iv).* Final § 3030.523(e)(2)(iv) is added to make it a criterion for a market dominant rate incentive to be included in a percentage change in rates calculation that the incentive be available to all mailers equally on the same terms and conditions.

[1] *See* Docket No. RM2014–3, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, June 3, 2014, at 15–16 (Order No. 2086).

[2] Docket No. R2020–1, Order on Price Adjustments for USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 22, 2019, at 17, 19–24 (Order No. 5321).

[3] Docket No. RM2020–5, Notice of Proposed Rulemaking to Amend Rules Regarding Rate Incentives for Market Dominant Products, February 14, 2020 (Order No. 5433).

[4] Order No. 5433 at 8–9 (citing Order No. 2086 at 15).

**List of Subjects for 39 CFR Part 3030**

Administrative practice and procedure.

For the reasons stated in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

## PART 3030—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

■ 1. The authority citation for part 3030 continues to read as follows:

**Authority:** 39 U.S.C. 503; 3622.

■ 2. Amend § 3030.501 by revising paragraph (g) to read as follows:

**§ 3030.501 Definitions.**

* * * * *

(g) Rate of general applicability means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies, including the volume of mail sent by a mailer in a past year or years. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

■ 3. Amend § 3030.512 by revising paragraph (b)(9) to read as follows:

**§ 3030.512 Contents of notice of rate adjustment.**

* * * * *

(b) * * *

(9) For a notice that includes a rate incentive:

(i) Whether the rate incentive is being treated under § 3030.523(e)(2) or under §§ 3030.523(e)(1) and 3030.524.

(ii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3030.523(e)(2), whether the rate incentive is available to all mailers equally on the same terms and conditions.

(iii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3030.523(e)(2), sufficient information to demonstrate that the rate incentive is a rate of general applicability, which at a minimum includes: The terms and conditions of the rate incentive; the factors that determine eligibility for the rate incentive; a statement that affirms that the rate incentive will not benefit a single mailer; and a statement that affirms that the rate incentive is not only available upon the written agreement of both the Postal Service and a mailer, or group of mailers, or a foreign postal operator.

■ 4. Amend § 3030.523 by revising paragraph (e)(2) to read as follows:

**§ 3030.523 Calculation of percentage change in rates.**

* * * * *

(e) * * *

(2) A rate incentive may be included in a percentage change in rates calculation if it meets the following criteria:

(i) The rate incentive is in the form of a discount or can easily be translated into a discount;

(ii) Sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation for the class, which may be adjusted based on known mail characteristics or historical volume data (as opposed to forecasts of mailer behavior);

(iii) The rate incentive is a rate of general applicability; and

(iv) The rate incentive is made available to all mailers equally on the same terms and conditions.

By the Commission.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2020–10902 Filed 6–11–20; 8:45 am]

**BILLING CODE 7710–FW–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R08–OAR–2019–0696; FRL–10009–49–Region 8]**

## Approval and Promulgation of Air Quality State Implementation Plans; Provo, Utah Second 10-Year Carbon Monoxide Maintenance Plan

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve State Implementation Plan (SIP) revisions submitted by the State of Utah on January 14, 2019. This submittal includes a Clean Air Act (CAA) section 175A(b) second 10-year limited maintenance plan (LMP) for the Provo area for the Carbon Monoxide (CO) National Ambient Air Quality Standard (NAAQS) and revisions to R307–110–12, which incorporates the LMP into the Utah SIP, Section IX, Part C, Carbon Monoxide into Air Quality rules. The EPA is taking this action pursuant to the CAA.

**DATES:** This rule is effective on July 13, 2020.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2019–0696. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Amrita Singh, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–QP, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6103, *singh.amrita@epa.gov.*

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

### I. Background

On March 2, 2020 (85 FR 12241), the EPA proposed approval of the Provo, second 10-year maintenance plan; which is located at Section IX, Part C.6 of the Utah SIP. The CAA section 175A(b) requires that eight years after an area is redesignated to attainment, the state must submit a subsequent maintenance plan to the EPA, covering a second 10-year period.[1] This second 10-year maintenance plan must demonstrate continued compliance with the NAAQS during this second 10-year period. To fulfill this requirement of the CAA, the Governor of Utah, submitted the second 10-year update of the Provo CO maintenance plan (hereafter; ''revised Provo Maintenance Plan'') to us on January 14, 2019. Additionally, Utah submitted revisions to R307–110–12, Section IX, Control Measures for Area and Point Sources, Part C, Carbon Monoxide, which incorporates the revised CO LMP.

For the revised Provo Maintenance Plan, the State used the LMP option to demonstrate continued maintenance of the CO NAAQS in the Provo area. The

[1] In this case, the initial maintenance period extended through 2015.

EPA has verified that the Provo area qualifies for the LMP option because the maximum design value for the most recent eight consecutive quarters with certified data at the time the State adopted the plan was 1.6 ppm.

## II. Response to Comments

The comment period for our March 2, 2020 (85 FR 12241), proposed rule was open for 30 days. The EPA received one comment on the proposed rule pertaining to EPA's *Motor Vehicle Emission Simulator (MOVES) 2014* modeling.

*Comment:* The commenter asserts that EPA needs to recalculate the mobile source emission inventory using MOVES2014 modeling based on the newest updates to the finalized clean car regulations. Referring to recently lowered fuel economy standards, the commenter states that EPA needs to update its MOVES2014 modeling to assume the lower fuel economy and higher $NO_X$, and HC emission. The commenter urges the only way that EPA can be sure the Provo area can maintain the CO standard for another 10 years is by accounting for the decreases in fuel economy.

*Response:* We do not agree that the 2016 attainment inventory submitted by the Utah Division of Air Quality (UDAQ) as part of this Second 10-year LMP is flawed or needs to be recalculated based on new changes to fuel economy standards. The purpose of the requirement to provide an attainment inventory in a LMP is to identify a level of emissions in the area sufficient to attain the NAAQS. *See* EPA'S LMP October 6, 1995 guidance document (Docket EPA–R08–OAR–2019–0696–003), at 3. By definition, areas that meet the criteria to qualify for a LMP are not providing a projection of future emissions in order to demonstrate maintenance of the NAAQS; these areas qualify for an exemption from that demonstration by virtue of attaining a design value that is well below the level of the NAAQS over an extended period of time.

The attainment year inventory submitted by UDAQ in this case provided emissions for the year 2016. To prepare the 2016 attainment year inventory to support the CO LMP for Provo, the UDAQ used the EPA's MOVES model (MOVES2014a) to calculate the CO emissions inventory for a typical winter day in 2016. As the commenter notes, the EPA and U.S. Department of Transportation have recently promulgated new vehicle fuel economy standards in the Safer Affordable Fuel Efficient (SAFE) Vehicles final rule. However, the SAFE rule will only affect vehicle model years 2021–2026. As the SAFE rule would only have an effect on the emission inventories prepared for 2021 and later, it has no bearing on the accuracy of the 2016 attainment inventory. The EPA therefore finds MOVES modeling completed by the UDAQ, for the Provo CO LMP, appropriately captures the emissions for the 2016 attainment year inventory and additional modeling is not necessary.

## III. Final Action

The EPA is approving the revised Provo CO LMP and revision to R307–110–12 submitted on January 14, 2019. The Provo CO LMP is located at Section IX, Part C.6 of the Utah SIP. This maintenance plan meets the applicable CAA requirements, and we have determined it is sufficient to provide for maintenance of the CO NAAQS over the course of the second 10-year maintenance period out to 2025. In addition, the EPA is approving the Provo LMP as meeting the appropriate transportation conformity requirements found in 40 CFR part 93, subpart A.

## IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text in an EPA final rule that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing to incorporate by reference the UDAQ rules promulgated in the DAR, R307–110–12 and Section IX, Part C.6 as discussed in section III of the preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the State implementation plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[2]

## V. Statutory and Executive Orders Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, 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 the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 11, 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, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: May 18, 2020.

**Gregory Sopkin,**

*Regional Administrator, Region 8.*

Accordingly, 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 TT—Utah

■ 2. In § 52.2320:

■ a. In the table in paragraph (c), revise the entry ''R307–110–12''.

■ b. In the table in paragraph (e), revise the entry ''Section IX.C.6. Carbon Monoxide, Provo''.

The revisions read as follows:

**§ 52.2320 Identification of plan.**

* * * * *

(c) * * *

| Rule No. | Rule title | State effective date | Final rule citation, date | Comments |
|---|---|---|---|---|
| * | * | * | * | * |
| **R307–110. General Requirements: State Implementation Plan** | | | | |
| * | * | * | * | * |
| R307–110–12 | Section IX. Control Measures for Area and Point Sources, Part C, Carbon Monoxide. | 6/7/2018 | [insert **Federal Register** citation], 6/12/2020. | Only include provisions incorporated from Section IX, Part C.6 (Provo). |
| * | * | * | * | * |

* * * * *

(e) * * *

| Rule title | State effective date | Final rule citation, date | Comments |
|---|---|---|---|
| * | * | * | * |
| **IX. Control Measures for Area and Point Sources** | | | |
| * | * | * | * |
| Section IX.C.6. Carbon Monoxide, Provo ..... | 6/7/2018 | [insert **Federal Register** citation], 6/12/2020. | |
| * | * | * | * |

[FR Doc. 2020–11163 Filed 6–11–20; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register
Vol. 85, No. 114
Friday, June 12, 2020

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

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

### 7 CFR Part 9

**[Docket ID: FSA–2020–0004]**

## Notice of Funding Availability; Coronavirus Food Assistance Program (CFAP) Additional Commodities Request for Information; Correction

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Notice of funding availability; request for comments; correction.

**SUMMARY:** This document corrects the supplementary information section to the notice of funding availability and additional commodities request for information published in the **Federal Register** on May 22, 2020, concerning CFAP. This document adds questions to request specific information related to certain specialty crops. This is intended to add clarity. USDA is still requesting comments on additional commodities that are not already identified and on the paperwork reduction act for CFAP activities. The questions added in this correction cover additional commodities and the development of their payment rates as envisioned in the cost analysis for the CFAP rule and are not expected to impact the costs of CFAP.

**DATES:** We will consider comments that we receive on additional commodities by June 22, 2020.

We will consider comments that we receive on the Paperwork Reduction Act by July 21, 2020.

**ADDRESSES:** We invite you to submit comments to provide information about additional commodities and comment on the information collection specified in this document. In your comment, specify [Docket ID: FSA–2020–0004], and include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by either of the following methods:

- *Federal Rulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID FSA–2020–0004. Follow the instructions for submitting comments.
- *Mail:* Director, SND, FSA, US Department of Agriculture, 1400 Independence Avenue SW, Stop 0522, Washington, DC 20250–0522.

Comments will be available for viewing online at *http://www.regulations.gov.* In addition, comments will be available for public inspection at the above address during business hours from 8 a.m. to 5 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** William L. Beam, telephone (202) 720–3175; email *Bill.Beam@usda.gov.* Persons with disabilities or who require alternative means for communication should contact the USDA Target Center at (202) 720–2600.

**SUPPLEMENTARY INFORMATION:**

### Correction

In the **Federal Register** of May 22, 2020, at 85 FR 31062–31065, the Secretary is making the following correction, in the **SUPPLEMENTARY** section. On page 31063, in the third column, add ''Specialty Crops'' before the heading ''Nursery Products'' to read as follows:

*Specialty Crops*

In addition to the questions above applicable to specialty crops, for producers of specialty crops that have been shipped from the farm by April 15, 2020, but subsequently spoiled or are unpaid due to loss of marketing channels, payments will be based on the volume of shipped, spoiled crops or that are unpaid multiplied by a pre-specified payment rate expected to represent 30 percent of the crop's sales value. For producers with specialty crop shipments that have not left the farm or mature crops that were unharvested between January 15, 2020 and April 15, 2020, and which have not been and will not be sold, payments will be based on the volume of unharvested or unshipped crops multiplied by a pre-specified payment rate expected to represent 5.875 percent of the crop's value.

If you are providing information for a specialty crop meeting the above conditions, please specify your response to the questions below:

(1) The quantity and price of the crop(s) you produced that left your farm by April 15, 2020, and subsequently spoiled or are unpaid due to no market, and for which you did not have Federal crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage for the loss.

(2) The quantity and price of crop(s) ready for sale that did not leave the farm by April 15, 2020, and that will not be sold due to lack of markets.

The questions in this correction, in addition to the questions in the initial NOFA, cover additional commodities and the development of their payment rates as envisioned in the cost analysis for the CFAP rule and are not expected to impact the costs of CFAP.

**Stephen L. Censky,**

*Vice Chairman, Commodity Credit Corporation, and Deputy Secretary, U.S. Department of Agriculture.*

[FR Doc. 2020–12529 Filed 6–10–20; 4:15 pm]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2020–0542; Project Identifier AD–2020–00582–E]**

**RIN 2120–AA64**

## Airworthiness Directives; Pratt & Whitney Division Turbofan Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Pratt & Whitney Division (PW) PW4164, PW4164–1D, PW4168, PW4168–1D, PW4168A, PW4168A–1D, and PW4170 model turbofan engines with a certain outer combustion chamber assembly and 3rd stage low-pressure turbine (LPT) duct segments installed. This proposed AD was prompted by reports of damaged or failed 3rd stage LPT duct segments on PW engines with the Talon IIB outer combustion chamber assembly configuration installed. This proposed AD would require removing and replacing certain 3rd stage LPT duct segments. 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 July 27, 2020.

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

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

**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–2020–0542; 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:** Carol Nguyen, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7655; fax: 781–238–7199; email: *carol.nguyen@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–2020–0542; Project Identifier AD–2020–00582–E'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Carol Nguyen, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Discussion**

The FAA received multiple reports of damaged or failed 3rd stage LPT duct segments that resulted in engine surges, in-flight shutdowns, diversions, and air turnbacks. The reports were attributed to elevated gas path temperature at the outer diameter of the turbine flowpath and high-pressure turbine 2nd stage blade outer air seal spallation, which led to the distortion and liberation of 3rd stage LPT duct segments. This condition, if not addressed, could result in uncontained release of LPT blades and vanes, damage to the engine, and damage to the airplane.

**Related Service Information**

The FAA reviewed PW Service Bulletin (SB) No. PW4G–100–72–214, dated December 15, 2011; PW SB No. PW4G–100–72–219, Revision 1, dated October 5, 2011; and PW SB No. PW4G–100–72–253, dated November 24, 2014. PW SB No. PW4G–100–72–214 introduces the Talon IIB outer combustion chamber assembly that reduces the combustor exit temperature levels at the outer diameter of the combustor. PW SB No. PW4G–100–72–219, Revision 1, describes procedures for installing the Advantage70 engine upgrade kit to improve engine reliability and fuel consumption, and to reduce maintenance costs. PW SB No. PW4G–100–72–253 describes procedures for replacing the outer combustion chamber assembly waspaloy nuts.

**FAA's Determination**

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

**Proposed AD Requirements**

This proposed AD would require removing and replacing certain 3rd stage LPT duct segments.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 99 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Remove and replace 3rd stage LPT duct segments. | 56 work-hours × $85 per hour = $4,760 ..... | $85,000 | $89,760 | $8,886,240 |

**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):

**Pratt & Whitney Division:** Docket No. FAA–2020–0542; Project Identifier AD–2020–00582–E.

**(a) Comments Due Date**

The FAA must receive comments by July 27, 2020.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all Pratt & Whitney Division (PW) PW4164, PW4164–1D, PW4168, PW4168–1D, PW4168A, PW4168A–1D, and PW4170 model turbofan engines that have 3rd stage low-pressure turbine (LPT) duct segments, part number (P/N) 50N434–01 or P/N 50N450–01 installed, and have the Talon IIB outer combustion chamber assembly, P/N 51J500 or P/N 51J381, installed.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

**(e) Unsafe Condition**

This AD was prompted by reports of damaged or failed 3rd stage LPT duct segments on PW engines with the Talon IIB outer combustion chamber assembly configuration installed. The FAA is issuing this AD to prevent failure of the 3rd stage LPT duct segments. The unsafe condition, if not addressed, could result in uncontained release of LPT blades and vanes, damage to the engine, and damage to the airplane.

**(f) Compliance**

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

**(g) Required Action**

At every engine shop visit after the effective date of this AD, remove from service the 3rd stage LPT duct segments, P/N 50N434–01 and P/N 50N450–01, and replace them with parts with zero flight cycles.

**(h) Terminating Action**

Removal of the 3rd stage LPT duct segments, P/N 50N434–01 and P/N 50N450–01, and their replacement with parts having P/Ns other than P/N 50N434–01 and P/N 50N450–01, constitutes terminating action for the repetitive replacement required by paragraph (g) of this AD.

**(i) Definition**

For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges (lettered flanges). The separation of engine flanges solely for the purpose of transportation without subsequent engine maintenance does not constitute an engine shop visit.

**(j) Alternative Methods of Compliance (AMOCs)**

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

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

**(k) Related Information**

For more information about this AD, contact Carol Nguyen, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7655; fax: 781–238–7199; email: *carol.nguyen@faa.gov.*

Issued on June 5, 2020.

**Lance T. Gant,**

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

[FR Doc. 2020–12626 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2020–0463; Product Identifier 2013–SW–041–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to remove Airworthiness Directive (AD) 2015–17–01, which applies to certain Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters. AD 2015–17–01 requires certain inspections of each tail rotor pitch horn assembly (pitch horn) for a crack, replacement of a cracked pitch horn, and a repetitive visual inspection of certain pitch horns. AD 2015–17–01 is no longer necessary because the cause of the unsafe condition has been removed from all affected helicopter models. Accordingly, the FAA proposes to remove AD 2015–17–01.

**DATES:** The FAA must receive comments on this proposed AD by July 27, 2020.

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

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

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.

**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–2020–0463; 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 proposal, 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:** Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to 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–2020–0463; Product Identifier 2013–SW–041–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 issued AD 2015–17–01, Amendment 39–18234 (80 FR 50554, August 20, 2015) (''AD 2015–17–01''), for certain Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters. AD 2015–17–01 requires certain inspections of each pitch horn for a crack, repetitive visual inspections of certain pitch horns for a crack, replacing a cracked pitch horn before further flight, and before installing any pitch horn having part number 350A121368 with more than 0 hours time-in-service, dye-penetrant inspecting it for a crack. AD 2015–17–01 was prompted by a report of a crack in the yoke of a pitch horn and is intended to detect a crack in the pitch horn to prevent failure of the pitch horn, loss of the anti-torque function, and subsequent loss of control of the helicopter. The FAA issued AD 2015–17–01 to detect a crack in the pitch horn to prevent failure of the pitch horn, loss of the anti-torque function, and subsequent loss of control of the helicopter.

**Actions Since AD 2015–17–01 Was Issued**

Since issuing AD 2015–17–01, the FAA has determined that the chin weights installed per Airbus Modification 07 5601 (that caused the pitch horn to crack) can only be installed on Model AS350B3 helicopters. The FAA had previously issued AD 2014–05–10, Amendment 39–17783 (79 FR 17408, March 28, 2014), which requires Model AS350B3 helicopters to remove the chin weights. The FAA has determined that with the chin weights removed, the unsafe condition no longer exists on Model AS350 and AS355 helicopters.

**FAA's Conclusions**

Upon further consideration, the FAA has determined that AD 2015–17–01 is no longer necessary. Accordingly, this proposed AD would remove AD 2015–17–01. Removal of AD 2015–17–01 would not preclude the FAA from issuing another related action or commit the FAA to any course of action in the future.

**Related Costs of Compliance**

This proposed AD would add no cost. This proposed AD would remove AD 2015–17–01 from 14 CFR part 39; therefore, operators would no longer be required to show compliance with that AD.

**Authority for This Rulemaking**

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority.

**Regulatory Findings**

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2015–17–01, Amendment 39–18234 (80 FR 50554, August 20, 2015), and adding the following new AD:

**Airbus Helicopters:** Docket No. FAA–2020–0463; Product Identifier 2013–SW–041–AD.

**(a) Comments Due Date**

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

**(b) Affected ADs**

This AD replaces AD 2015–17–01, Amendment 39–18234 (80 FR 50554, August 20, 2015).

**(c) Applicability**

This AD applies to Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters with tail rotor hub pitch horn (pitch horn) assembly, part number (P/N) 350A121368.01,

350A121368.02, 350A121368.03, or 350A121368.04, with a pitch horn, P/N 350A121368.XX, where XX stands for a two-digit dash number, installed, certificated in any category. The pitch horn may be marked with either the pitch horn assembly P/N or pitch horn P/N.

**(d) Related Information**

For more information about this AD, 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.*

Issued on May 29, 2020.

**Lance T. Gant,**

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

[FR Doc. 2020–12029 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2020–0592; Project Identifier AD–2020–00251–E]**

**RIN 2120–AA64**

## Airworthiness Directives; General Electric Company Turbofan Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all General Electric Company (GE) GEnx–1B64/P2, GEnx–1B67/P2, GEnx–1B70/75/P2, GEnx–1B70/P2, GEnx–1B70C/P2, GEnx–1B74/75/P2, GEnx–1B76/P2, GEnx–1B76A/P2, and GEnx–2B67/P model turbofan engines with a certain a high-pressure turbine (HPT) rotor stage 2 disk installed. This proposed AD was prompted by a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. This proposed AD would require an immersion ultrasonic inspection (USI) of the HPT rotor stage 2 disk and, depending on the results of the inspection, replacement of the HPT rotor stage 2 disk with a part eligible for installation. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by July 27, 2020.

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

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

For service information identified in this NPRM, contact General Electric Company, GE Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215; phone: 513–552–3272; email: *aviation.fleetsupport@ge.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

**Examining the AD Docket**

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0592; 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:** Mehdi Lamnyi, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7743; fax: 781–238–7199; email: *Mehdi.Lamnyi@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–2020–0592; Project Identifier AD–2020–00251–E'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

Except for Confidential Business Information as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Mehdi Lamnyi, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**Discussion**

The FAA received a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. During an investigation by GE into melt-related material anomalies, a subsurface anomaly was found in an early production HPT rotor stage 2 disk. This type of subsurface anomaly has the potential to cause the failure of the HPT rotor stage 2 disk. In response, GE published service information that introduces inspections to prevent failure of the HPT rotor stage 2 disk. This condition, if not addressed, could result in uncontained HPT rotor stage 2 disk release, damage to the engine, and damage to the airplane.

**Related Service Information Under 1 CFR Part 51**

The FAA reviewed GE GEnx–1B Service Bulletin (SB) 72–0463 R01, dated January 6, 2020, and GE GEnx–2B SB 72–0402 R01, dated January 8, 2020. The service information describes procedures for performing an immersion

USI of the affected HPT rotor stage 2 disks on GEnx–1B and GEnx–2B model turbofan engines. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**FAA's Determination**

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

**Proposed AD Requirements**

This proposed AD would require an immersion USI of the HPT rotor stage 2 disk and, depending on the results of the inspection, replacement of the HPT rotor stage 2 disk with a part eligible for installation.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 276 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| USI of HPT rotor stage 2 disk | 8 work-hours × $85 per hour = $680 | $0 | $680 | $187,680 |

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

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Remove and replace the HPT rotor stage 2 disk | 2 work-hours × $85 per hour = $170 | $458,900 | $459,070 |

**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):

**General Electric Company:** Docket No. FAA–2020–0592; Project Identifier AD–2020–00251–E.

**(a) Comments Due Date**

The FAA must receive comments by July 27, 2020.

**(b) Affected ADs**

None.

**(c) Applicability**

(1) This AD applies to all General Electric Company (GE) GEnx–1B64/P2, GEnx–1B67/P2, GEnx–1B70/75/P2, GEnx–1B70/P2, GEnx–1B70C/P2, GEnx–1B74/75/P2, GEnx–1B76/P2, and GEnx–1B76A/P2 model turbofan engines that have a high-pressure turbine (HPT) rotor stage 2 disk, part number (P/N) 2383M86P02, and a serial number (S/N) listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx–1B Service Bulletin (SB) 72–0463 R01, dated January 6, 2020, installed.

(2) This AD applies to all GE GEnx–2B67/P model turbofan engines that have a HPT rotor stage 2 disk, P/N 2383M86P02, and a S/N listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx–2B SB 72–0402 R01, dated January 8, 2020, installed.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

**(e) Unsafe Condition**

This AD was prompted by a report of the potential for undetected subsurface anomalies formed during the manufacturing process that could result in uncontained failure of the HPT rotor stage 2 disk. The FAA is issuing this AD to prevent failure of the HPT rotor stage 2 disk. The unsafe condition, if not addressed, could result in

uncontained HPT rotor stage 2 disk release, damage to the engine, and damage to the airplane.

**(f) Compliance**

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

**(g) Required Actions**

(1) For affected GE GEnx–1B engines, at the next engine shop visit after the effective date of this AD, or before the HPT rotor stage 2 disk has accumulated 6,500 cycles since new (CSN), whichever occurs first, perform an immersion ultrasonic inspection (USI) of the HPT rotor stage 2 disk using paragraph 3.B.(1) of GE GEnx–1B SB 72–0463 R01, dated January 6, 2020.

(2) If, during the USI required by paragraph (g)(1) of this AD, a rejectable indication is found, before further flight, remove the HPT rotor stage 2 disk from service and replace it with a part eligible for installation.

(3) For affected GE GEnx–2B engines, at the next engine shop visit after the effective date of this AD, or before the HPT rotor stage 2 disk has accumulated 6,500 CSN, whichever occurs first, perform an immersion USI of the HPT rotor stage 2 disk using paragraph 3.B.(1) of GE GEnx–2B SB 72–0402 R01, dated January 8, 2020.

(4) If, during the USI required by paragraph (g)(3) of this AD, a rejectable indication is found, before further flight, remove the HPT rotor stage 2 disk from service and replace it with a part eligible for installation.

**(h) Definitions**

(1) For the purpose of this AD, an engine shop visit is when a major engine flange is separated for purposes other than the removal of the fan for transportation.

(2) For the purposes of this AD, a ''part eligible for installation'' is:

(i) An HPT rotor stage 2 disk, which is not a S/N listed in paragraph 4, Appendix—A, Table 1, Table 2, or Table 3, of GE GEnx–1B SB 72–0463 R01, dated January 6, 2020, or GE GEnx–2B SB 72–0402 R01, dated January 8, 2020; or,

(ii) An HPT rotor stage 2 disk that has successfully passed the immersion USI required by paragraph (g)(1) or (3) of this AD, or passed the immersion USI using GE GEnx–1B SB 72–0463 R00, dated November 20, 2019, or GE GEnx–2B SB 72–0402 R00, dated November 20, 2019, before the effective date of this AD.

**(i) Credit for Previous Actions**

You may take credit for the immersion USI of the HPT rotor stage 2 disk required by paragraph (g)(1) or (3) of this AD if you performed the inspection before the effective date of this AD using GE GEnx–1B SB 72–0463 R00, dated November 20, 2019, or GE GEnx–2B SB 72–0402 R00, dated November 20, 2019.

**(j) Alternative Methods of Compliance (AMOCs)**

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

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

**(k) Related Information**

(1) For more information about this AD, contact Mehdi Lamnyi, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7743; fax: 781–238–7199; email: *Mehdi.Lamnyi@faa.gov*.

(2) For service information identified in this AD, contact General Electric Company, GE Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215; phone: 513–552–3272; email: *aviation.fleetsupport@ge.com*. You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued on June 8, 2020.

**Lance T. Gant,**

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

[FR Doc. 2020–12650 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2020–0504; Airspace Docket No. 20–AAL–4]**

**RIN 2120–AA66**

## Proposed Removal of Colored Federal Airways Amber 7 (A–7), Green 11 (G–11), and Amendment of Amber 1 (A–1); Alaska

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to remove two Colored Federal airways, A–7 and G–11, and amend one Colored Federal airway, A–1 in Alaska. The modifications are necessary due to the planned decommissioning of to the Campbell Lake Non-Directional Beacon (NDB) in Anchorage, AK, which provides navigation guidance for portions of the affected routes. The Campbell Lake NDB is to be decommissioned effective November 5, 2020 due to ongoing maintenance problems.

**DATES:** Comments must be received on or before July 27, 2020.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0504; Airspace Docket No. 20–AAL–4 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

**FOR FURTHER INFORMATION CONTACT:** Christopher McMullin, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views,

or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2020–0504; Airspace Docket No. 20–AAL–4) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2020–0504; Airspace Docket No. 20–AAL–4.'' The postcard will be date/time stamped and returned to the commenter.

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

**Availability of NPRMs**

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

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

**Availability and Summary of Documents for Incorporation by Reference**

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

**Background**

The upcoming decommissioning of the Campbell Lake NDB (CMQ) will require removal of Federal Colored airways A–7 and G–11, and amendment of A–1 to remove associated airway segments.

Colored Federal airway A–7 has only one segment that runs from the Campbell Lake, AK, NDB; to the Mineral Creek, AK, NDB. The airway is seldom used and can be mitigated by utilizing V–481, or T–226, to the Johnstone Point, AK, Very High Frequency Omnidirectional Radio Range (VOR); then V–319, or T–269 to the Anchorage, AK, VOR.

Colored Federal airway G–11 navigates aircraft from the Campbell Lake, AK, NDB, to the Glennallen, AK, NDB, and ends at the Nabesna, AK, NDB. The portion of the airway from the Glennallen, AK, NDB to the Nebesna, AK, NDB is not affected by the Campbell Lake, AK, NDB, however, due to the planned decommissioning of the Glennallen, AK, NDB, this section will also be removed. Loss of this airway can be mitigated by utilizing V–456 to the Big Lake, AK, VOR, to the Gulkana, AK, VOR, then to the Northway, AK, VOR. Furthermore, there is a proposal to realign Federal airway V–456 to match the current route of G–11, which allows for a lower Minimum En Route Altitude for pilots to navigate. This will give pilots an option to navigate at an altitude that does not require the use of supplemental oxygen, since the anticipated MEA will be 9,000 feet Mean Sea Level.

Colored Federal airway A–1 will require removal of the segment between the Orca Bay, AK, NDB and the Takotna River, AK, NDB. Loss of this section can be mitigated by utilizing V–319 or T–269 from the Johnstone Point, AK, VOR to the Anchorage, AK, VOR, then V–440 or T–246 to the McGrath, AK, VOR.

**The Proposal**

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to remove Colored Federal airways A–7 and G–11, and amend Colored Federal airway A–1. The proposed Colored Federal airway actions are described below.

*A–7:* A–7 currently extends between the Campbell Lake, AK, NDB and the Mineral Creek, AK, NDB. This action proposes to remove the entire route.

*G–11:* G–11 currently extends between the Campbell Lake, AK, NDB and the Nabesna, AK, NDB. This action proposes to remove the entire route.

*A–1:* A–1 currently extends from the Abbotsford, BC, Canada, NDB and the Fort Davis, AK, NDB. The FAA proposes to remove the segment between the Orca Bay, AK, NDB and the Takotna River, AK, NDB. The unaffected portions of the existing route would remain as charted. The portion within Canada is excluded.

Colored Federal airways are published in paragraph 6009 of FAA Order 7400.11D dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR part 71.1. The Colored Federal Airways listed in this document will be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

**Regulatory Notices and Analyses**

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

**Environmental Review**

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

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

**§ 71.1 [Amended]**

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

*Paragraph 6009 Colored Federal Airways.*

* * * * *

**A–1 [Amended]**

From Abbotsford, BC Canada NDB, to Victoria, BC Canada NDB, Sandspit, BC, Canada, NDB 96 miles 12 AGL, 102 miles 35 MSL, 57 miles 12 AGL, via Sitka, AK, NDB; 31 miles 12 AGL, 50 miles 47 MSL, 88 miles 20 MSL, 40 miles 12 AGL, Ocean Cape, AK, NDB; INT Ocean Cape NDB 283° and Orca Bay, AK, NDB 106° bearings; Orca Bay NDB; From Takotna River, AK, NDB; 24 miles 12 AGL, 53 miles 55 MSL; 51 miles 40 MSL, 25 miles 12 AGL, North River, AK, NDB; 17 miles 12 AGL, 89 miles 25 MSL, 17 miles 12 AGL, to Fort Davis, AK, NDB. Excluding that airspace within Canada.

* * * * *

**G–7 [Removed]**

* * * * *

**G–11 [Removed]**

* * * * *

Issued in Washington, DC, on June 3, 2020.

**Scott M. Rosenbloom,**

*Acting Manager, Rules and Regulations Group.*

[FR Doc. 2020–12700 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 3

**RIN 3038–AE46**

## Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking; reopening of comment period.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is proposing to amend the conditions in Commission regulation 3.10(c) under which a person located outside of the United States engaged in the activity of a commodity pool operator (CPO; each person located outside of the United States a non-U.S. CPO) in connection with commodity interest transactions on behalf of persons located outside the United States (collectively, an offshore commodity pool or offshore pool) would qualify for an exemption from CPO registration and regulation with respect to that offshore pool. Specifically, through amendments to Commission regulation 3.10(c), the Commission is proposing that non-U.S. CPOs may claim an exemption from registration with respect to its qualifying offshore commodity pools, while maintaining another exemption from registration, relying on an exclusion, or registering as a CPO with respect to the operation of other commodity pools. The Commission is also proposing to add a safe harbor by which a non-U.S. CPO of an offshore commodity pool may rely upon the proposed exemption in Commission regulation 3.10(c) if they satisfy enumerated factors related to the operation of the offshore commodity pool. Additionally, the Commission is proposing to permit certain U.S. control affiliates of a non-U.S. CPO to contribute capital to such CPO's offshore pools as part of the initial capitalization without rendering the non-U.S. CPO ineligible for the exemption from registration under Commission regulation 3.10.

**DATES:** Comments must be received on or before August 11, 2020.

**ADDRESSES:** You may submit comments, identified by RIN 3038–AE46, by any of the following methods:

*CFTC Comments Portal: http://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.

*Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.

*Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make publicly available. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

**FOR FURTHER INFORMATION CONTACT:** Joshua B. Sterling, Director, (202) 418–6056, *jsterling@cftc.gov,* Amanda Lesher Olear, Deputy Director, (202) 418–5283, *aolear@cftc.gov,* or regarding Section III of this Notice of Proposed Rulemaking, Frank Fisanich, Chief Counsel, (202) 418–5949, *ffisanich@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 1a(11) of the Commodity Exchange Act (CEA or Act)[2] defines the term ''commodity pool operator'' as any

[1] 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR Chapter I (2019).

[2] *See* 7 U.S.C. 1, *et seq.* (2019). The CEA and the Commission's regulations are accessible through the Commission's website, *https://www.cftc.gov.*

person [3] engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests.[4] CEA section 1a(10) defines a ''commodity pool'' as any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests.[5] CEA section 4m(1) generally requires each person who satisfies the CPO definition to register as such with the Commission.[6] With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within or exclude from the term ''commodity pool operator'' any person engaged in the business of operating a commodity pool if the Commission determines that the rule or regulation will effectuate the purposes of the CEA.[7]

Additionally, CEA section 4(c), in relevant part with respect to this proposal, provides that the Commission, to promote responsible economic or financial innovation and fair competition, by rule, regulation, or order, after notice and opportunity for hearing, may exempt, among other things, any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to commodity interests from any provision of the Act.[8] Section 4(c) authorizes the Commission to grant exemptive relief if the Commission determines, *inter alia,* that the exemption would be consistent with the ''public interest.'' [9]

To provide an exemption pursuant to section 4(c) of the Act with respect to registration as a CPO, the Commission must determine that the agreements, contracts, or transactions undertaken by the exempt CPO should not require registration and that the exemption from registration would be consistent with the public interest and the Act.[10] The Commission must further determine that the agreement, contract, or transaction will be entered into solely between appropriate persons and that it will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the Act.[11] The term ''appropriate person'' as used in section 4(c) includes a commodity pool formed or operated by a person subject to regulation under the Act.[12] The Commission has previously interpreted the clause ''subject to regulation under the Act'' as including persons who are exempt from registration or excluded from the definition of a registration category.[13]

Part 3 of the Commission's regulations governs the registration of intermediaries engaged in, *inter alia,* the offering and selling of, and the provision of advice concerning, all commodity interest transactions. Commission regulation 3.10 establishes the procedure that intermediaries, including CPOs, must use to register with the Commission.[14] Commission regulation 3.10 also establishes certain exemptions from registration.[15] In particular, Commission regulation 3.10(c)(3) (referred to herein as the 3.10 Exemption) provides that, *inter alia,* a person engaged in the activity of a CPO, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, is not required to register as a CPO, provided that:

1. The person is located outside the United States, its territories, and possessions (the United States or U.S.) (a non-U.S. CPO);

2. The person acts only on behalf of persons located outside the United States (an offshore commodity pool); and

3. The commodity interest transaction is submitted for clearing through a registered futures commission merchant.[16]

A person acting in accordance with the 3.10 Exemption remains subject to the antifraud provisions of CEA section 4*o,*[17] but is otherwise not required to comply with those provisions of the CEA or Commission regulations applicable to any person registered in such intermediary capacity or persons required to be so registered.[18] The 3.10 Exemption provides that it is available to non-U.S. CPOs whose activities, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, are confined to acting on behalf of offshore commodity pools.[19] This exemption was first adopted in 2007 and was based on a long-standing no-action position articulated by the Commission's Office of General Counsel in 1976.[20]

In adopting the final rule amending Commission regulation 3.10, the Commission agreed with commenters who cited its longstanding policy of focusing ''customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets.'' [21] The Commission further stated that the protection of non-U.S. customers of non-U.S. firms may be best deferred to foreign regulators.[22] The

[3] *See* 17 CFR 1.3 (defining ''person'' to include individuals, associations, partnerships, corporations, and trusts).

[4] 7 U.S.C. 1a(11). *See also* 17 CFR 1.3 (defining ''commodity interest'' to include any contract for the purchase or sale of a commodity for future delivery, and any swap as defined in the CEA); Adaptation of Regulations to Incorporate Swaps, 77 FR 66288, 66295 (Nov. 2, 2012) (discussing the modification of the term ''commodity interest'' to include swaps).

[5] 7 U.S.C. 1a(10).

[6] 7 U.S.C. 6m(1).

[7] 7 U.S.C. 1a(11)(B).

[8] 7 U.S.C. 6(c)(1).

[9] *See* Conference Report, H.R. Report 102–978 at 8 (Oct. 2, 1992) (''The goal of providing the Commission with broad exemptive powers . . . is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'').

[10] 7 U.S.C. 6(c)(2)(A).

[11] *Id.* at 6(c)(2)(B).

[12] *Id.* at 6(c)(3)(E).

[13] *See* Further Definition of ''Swap Dealer'', 77 FR 30596, 30655 (May 23, 2012) (finding, in the context of the eligible contract participant definition, that ''construing the phrase 'formed and operated by a person subject to regulation under the [CEA]' to refer to a person excluded from the CPO definition, registered as a CPO or properly exempt from CPO registration appropriately reflects Congressional intent'').

[14] *See, e.g.,* 17 CFR 3.10(a)(1)(i) (requiring the filing of a Form 7–R with the National Futures Association (NFA)).

[15] *See* 17 CFR 3.10(c) (exemption from registration for certain persons).

[16] 17 CFR 3.10(c)(3)(i). *But see* CFTC Staff Letters No. 16–08 and 15–37. Pursuant to these letters, Commission staff in the Division of Swap Dealer and Intermediary Oversight (DSIO) recognized that not all swaps are required to be cleared, and thus provided relief from registration for certain intermediaries acting on behalf of persons located outside the United States or on behalf of certain International Financial Institutions in connection with swaps not subject to a Commission clearing requirement. In 2016, the Commission published a proposed rule that would codify the position articulated in these DSIO staff letters. *See* Exemption from Registration for Certain Foreign Persons, 81 FR 51824 (Aug. 5, 2016). The Commission is reopening the comment period on such proposed rule pursuant to this Proposal. *See* Section III, *infra.*

[17] 7 U.S.C. 6*o.*

[18] 17 CFR 3.10(c)(3)(ii). As market participants, however, such persons remain subject to all other applicable provisions of the CEA and the Commission's regulations promulgated thereunder.

[19] 17 CFR 3.10(c)(3)(i).

[20] Exemption from Registration for Certain Foreign Persons, 72 FR 63976, 63977 (Nov. 14, 2007). *See* CFTC Staff Interpretative Letter 76–21.

[21] Exemption from Registration for Certain Foreign Persons, 72 FR at 63977, *quoting* Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 FR 35248, 35261 (Aug. 3, 1983).

[22] *Id.* The Commission also cited this policy position in the initial proposal for what ultimately

Continued

Commission noted its understanding that, pursuant to the terms of the 3.10 Exemption, ''[a]ny person seeking to act in accordance with any of the foregoing exemptions from registration should note that the prohibition on contact with U.S. customers applies to solicitation as well as acceptance of orders.'' [23] Moreover, the Commission stated that ''[if] a person located outside the U.S. were to solicit prospective customers located in the U.S. as well as outside of the U.S., these exemptions would not be available, even if the only customers resulting from the efforts were located outside the U.S.'' [24]

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [25] amended the definition of ''commodity pool operator'' and ''commodity pool'' to include those persons operating collective investment vehicles that engage in swaps,[26] which resulted in an expansion of the universe of persons captured within the statutory definitions of both CPOs and commodity pools. When combined with the rescission of Commission regulation 4.13(a)(4) in 2012,[27] an increasing number of non-U.S. CPOs were required to either register with the Commission or claim an available exemption or exclusion with respect to the operation of their commodity pools, both offshore pools and those offered to U.S. participants.

In 2018, the Commission proposed adding a new exemption in Commission regulation 4.13 to codify the relief provided in CFTC Staff Advisory 18–96 (Advisory 18–96).[28] As part of that proposal, the Commission noted that the proposed exemption based on Advisory 18–96 could be claimed on a pool-by-pool basis, and stated that ''[t]his characteristic would effectively differentiate the [proposed exemption] from the relief currently provided'' under the 3.10 Exemption.[29] The Commission received several comments regarding that aspect of the proposal. One commenter noted that the 3.10 Exemption ''is widely relied on around the world by non-U.S. managers of offshore funds that are not offered to U.S. investors but that may trade in the U.S. commodity interest markets.'' [30] This commenter further noted that ''CPO registration for these offshore entities with global operations is not a viable option[,]'' due to the logistical and regulatory issues involved.[31] Another commenter stated that, ''it is critical to bear in mind that the Commission . . . to our knowledge has never addressed, the separate and distinct question of whether an offshore CPO may rely on Rule 3.10(c)(3)(i) with respect to some of its offshore pools in combination with relying on other exemptions with respect to its other pools.'' [32] Several other commenters expressed similar views and requested that the Commission affirm the ability to claim the 3.10 Exemption on a pool-by-pool basis and to rely upon that exemption in addition to other exemptions, exclusions, or registration.[33]

In 2019, the Commission withdrew its proposal to codify the relief provided in Advisory 18–96, and, in light of the comments received in response to the discussion of the 3.10 Exemption, instead undertook an inquiry as to whether the 3.10 Exemption should be amended to respond to the current CPO space and the issues articulated by commenters.[34] Based on the foregoing, and in light of the increasingly global nature of the commodity pool space, the Commission preliminarily believes that the statutory and regulatory developments since 2007 have resulted in a growing mismatch between the Commission's stated policy purposes underlying the 3.10 Exemption, which are to focus the Commission's resources on the protection of U.S. persons, and the 3.10 Exemption as adopted in 2007. Therefore, the Commission has preliminarily determined that it is appropriate to amend the 3.10 Exemption to better align the terms of the exemption with the Commission's continued policy goals. The result is this proposal.

## II. The Proposal

The Commission is proposing, pursuant to its authority under CEA section 4(c), several amendments to the current 3.10 Exemption (the Proposal). Specifically, the Commission is proposing amendments to the 3.10 Exemption such that non-U.S. CPOs may rely on that exemption on a pool-by-pool basis to better reflect the current state of operations of CPOs. The Commission is also proposing a conditional safe harbor to enable non-U.S. CPOs who, by virtue of the structure of their offshore pool, cannot with certainty represent that there are no U.S. participants in their operated pool, to rely on the 3.10 Exemption. The Commission is further proposing that the revised 3.10 Exemption be available to be claimed along with other exemptions or exclusions available to CPOs generally and to provide an exception from the U.S. participant prohibition in the 3.10 Exemption for initial capital contributions received from a U.S. controlling affiliate of an offshore pool's non-U.S. CPO.

### *a. Pool-by-Pool Exemption*

The Commission understands that non-U.S. CPOs may operate both offshore commodity pools and commodity pools on behalf of persons located inside the United States (U.S. commodity pools or U.S. pools). As stated previously, however, the 3.10 Exemption prohibits persons from relying on that relief with respect to certain pools, but not others. Under a categorical prohibition on contact with U.S. persons by non-U.S. CPOs seeking to rely on the 3.10 Exemption, a non-U.S. CPO that operates both offshore pools and pools offered to U.S. persons would not be eligible for registration relief under Commission regulation 3.10(c). As a result, a non-U.S. CPO that operates a combination of offshore and onshore commodity pools would be required to either list its offshore pools with the Commission and comply with part 4 of the Commission's regulations with respect to the operation of those

became Commission regulation 3.10(c)(3)(i). *See* Exemption from Registration for Certain Foreign Persons, 72 FR 15637, 15638 (Apr. 2, 2007).

[23] Exemption from Registration for Certain Foreign Persons, 72 FR at 63977–78.

[24] *Id.* at 63978.

[25] Public Law 111–203, H.R. 4173 (2010).

[26] *See* Section 721 of the Dodd-Frank Act.

[27] *See* Commodity Pool Operators and Commodity Trading Advisors; Compliance Obligations, 77 FR 11252, 11264 (Feb. 24, 2012). Former Commission regulation 4.13(a)(4) provided an exemption from registration as a CPO for operators of commodity pools offered and sold to sophisticated participants. *See* 17 CFR 4.13(a)(4) (2010).

[28] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018); CFTC Staff Advisory 18–96 (Apr. 11, 1996).

[29] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR at 52914.

[30] *See* Comment letter from the Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA AMG) at 9 (Dec. 17, 2018), available at *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61922&SearchText=.*

[31] *Id.* at 12.

[32] *See* Comment letter from Fried, Frank, Harris, Shriver, & Jacobson, LLP (Fried Frank) at 6 (Dec. 17, 2018), available at *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61920&SearchText=.*

[33] *See, e.g.,* Comment letter from Willkie, Farr, and Gallagher, LLP (Willkie) at 6 (Dec. 11, 2018), available at *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61927&SearchText=*; Comment letter from Alternative Investment Management Association (AIMA) at 6 (Dec. 17, 2018), available at *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61907&SearchText=.*

[34] Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs, 84 FR 67355, 67357 (Dec. 10, 2019).

pools as if those pools were no different from U.S. commodity pools, find another available exemption from registration, or claim a regulatory exclusion with respect to those offshore pools.

The Commission continues to believe that it is advisable to focus its customer protection activities on U.S. persons and on the persons and firms that solicit derivatives transactions from those U.S. person customers.[35] The Commission's regulatory regime was designed with a view to ensuring U.S. persons solicited for and participating in commodity pools receive the full benefit of the customer protections provided under the Act. The current terms of the 3.10 Exemption may result in the Commission overseeing the operation of commodity pools that are themselves not domestic either in terms of their location or participants. The Commission's mandate regarding protection of customers in the U.S. commodity interest markets with respect to the operation of commodity pools is primarily focused on protecting U.S. pool participants, not commodity pools located outside the United States that have only non-U.S. pool participants. Reducing regulation of commodity pools that are outside of the Commission's primary customer protection mandate also allows the Commission to more effectively apply its resources for this purpose. Therefore, the Commission is proposing to amend Commission regulation 3.10(c)(3) such that non-U.S. CPOs may avail themselves of the 3.10 Exemption on a pool-by-pool basis by specifying that the availability of the 3.10 Exemption would be determined by whether all of the participants in a particular offshore pool are located outside the United States. The Commission preliminarily believes that amending the 3.10 Exemption such that non-U.S. CPOs may claim relief on a pool-by-pool basis appropriately focuses Commission oversight on those pools that solicit and/or accept U.S. persons as pool participants.

Moreover, since the adoption of the 3.10 Exemption in 2007, Congress expanded the Commission's jurisdiction to include, among other things, transactions in swaps [36] and rolling spot retail foreign exchange transactions.[37] When combined with amendments to, as well as the rescission of, various regulatory exemptions, this has necessarily resulted in an increase in the variety of persons captured within the definition of a CPO.[38] Additionally, the Commission notes the increasing globalization of the commodity pool industry. For example, unlike when Commission regulation 3.10(c)(3)(i) was originally adopted, when measured by assets under management, today several of the largest CPOs are located outside the United States, and these larger CPOs typically operate many different commodity pools including some pools for U.S. investors and other pools for non-U.S. investors. Upon consideration of these developments, the Commission has preliminarily concluded that the 3.10 Exemption should be amended to reflect the Commission's regulatory interests in such an integrated international investment management environment. Therefore, the Commission preliminarily believes that the Proposal, if adopted, would provide much-needed regulatory flexibility for non-U.S. CPOs operating offshore commodity pools by taking into account the global nature of their operations without compromising the Commission's mission of protecting U.S. pool participants.

For the reasons stated above, the Commission preliminarily believes that amending the 3.10 Exemption such that non-U.S. CPOs may claim the exemption from registration with respect to the operation of their offshore pools, while claiming an alternative exemption or exclusion, or registering regarding the operations of their commodity pools that are offered or sold to U.S. persons, is an appropriate exercise of its exemptive authority under section 4(c) of the Act. Additionally, the Commission preliminarily believes that clearly enabling non-U.S. CPOs to avoid the additional organizational complexity associated with separately organizing their offshore and domestic facing businesses in an effort to comply with the provisions of the 3.10 Exemption may result in more non-U.S. CPOs undertaking to design and offer commodity pools for persons in the United States. Moreover, the Commission preliminarily believes that this could result in greater diversity of pool participation opportunities for U.S. persons and that this increased competition amongst commodity pools and CPOs could foster additional innovation regarding commodity pool operations, which is already one of the more dynamic sectors of the Commission's responsibility. The Commission further preliminarily believes that this potential for increased competition and variation in commodity pools and CPOs would further promote the vibrancy of the U.S. commodity interest markets.

The Commission has preliminarily determined that the proposed revisions to the 3.10 Exemption set forth herein will not have a material adverse effect on the ability of the Commission or any contract market to discharge their duties under the Act, because non-U.S. CPOs that would be exempt under the terms of this Proposal would remain subject to the statutory and regulatory obligations imposed on all participants in the U.S. commodity interest markets.[39] The Commission notes that this preliminary conclusion is consistent with section 4(d) of the Act, which provides that any exemption granted pursuant to section 4(c) will not affect the authority of the Commission to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of the CEA or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.[40] Moreover, the Commission would retain the authority to take enforcement action against any non-U.S. CPO claiming the 3.10 Exemption based on their activities within the U.S. commodity interest markets consistent with its authority regarding market participants generally.

*b. Proposed Safe Harbor With Respect to Inadvertent Participation of U.S. Participants in Offshore Pools*

As discussed above, one of the criteria for relief in current Commission regulation 3.10(c)(3)(i) is that, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, the claiming non-U.S. CPO be acting only on behalf of persons located outside the United States, its

[35] *See* Exemption from Registration for Certain Foreign Persons, 72 FR at 63977.

[36] Wall Street Transparency and Accountability Act of 2010, Public Law 111–203, 124 Stat. 1376 (2010).

[37] Food, Conservation, and Energy Act of 2008, Public Law 110–246, 122 Stat. 1651, 2189–2204 (2008).

[38] *See, e.g.,* 17 CFR 4.13(a)(3) (swaps added to the enumerated commodity interests subject to the de minimis threshold following the Dodd-Frank Act, which effectively narrowed the availability of the exemption); Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 FR 7976 (Feb. 11, 2011) (rescinding Regulation 4.13(a)(4), which provided an exemption from registration for certain privately offered commodity pools).

[39] *See, e.g.,* 7 U.S.C. 9 (prohibiting the use or employment of any manipulative or deceptive device in connection with any swap or contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity).

[40] 7 U.S.C. 6(d).

territories, or possessions.[41] The Commission understands that non-U.S. CPOs of offshore pools that are traded in offshore secondary markets may not have the ability to make such a representation with certainty as they cannot be assured that only persons located outside the U.S. would be accepted as participants because the participation units are not purchased directly from the offshore pool. Moreover, the Commission also understands that, given the common use of complex entity structures for tax purposes, a non-U.S. CPO may not have complete visibility into the ultimate beneficial owners of its offshore pool's participation units, even in the absence of secondary market trading.

Despite this fairly common lack of visibility into the ultimate ownership of some offshore pools, the Commission preliminarily believes that a non-U.S. CPO should be able to rely on the 3.10 Exemption provided that the non-U.S. CPO undertakes reasonable efforts to minimize the possibility of U.S. persons being solicited for or sold participation units in the offshore pool. The Commission preliminarily believes that non-U.S. CPOs should not be foreclosed from relying upon the relief available under the 3.10 Exemption solely due to the nature and structure of the operated offshore pool preventing them from representing with absolute certainty that no U.S. persons are participating in that pool, provided that such non-U.S. CPOs take reasonable actions available to them to ensure that only non-U.S. persons are solicited and admitted as pool participants.

Therefore, the Commission is proposing to add a safe harbor as new Commission regulation 3.10(c)(3)(iv) for non-U.S. CPOs that have taken, what the Commission preliminarily believes are, reasonable steps designed to ensure that participation units in the operated offshore pool are not being offered or sold to persons located in the United States. Pursuant to that proposed safe harbor, a non-U.S. CPO would be permitted to engage in the U.S. commodity interest markets on behalf of offshore pools for which it cannot represent with absolute certainty that all of the pool participants are offshore, consistent with the requirements under the 3.10 Exemption, provided that such non-U.S. CPO meets the following conditions with respect to the operated offshore pool:

1. The offshore pool's offering materials and any underwriting or distribution agreements include clear, written prohibitions on the offshore pool's offering to participants located in the United States and on U.S. ownership of the offshore pool's participation units; [42]

2. The offshore pool's constitutional documents and offering materials: (a) are reasonably designed to preclude persons located in the United States from participating therein, and (b) include mechanisms reasonably designed to enable the CPO to exclude any persons located in the United States who attempt to participate in the offshore pool notwithstanding those prohibitions;

3. The non-U.S. CPO exclusively uses non-U.S. intermediaries for the distribution of participations in the offshore pool;

4. The non-U.S. CPO uses reasonable investor due diligence methods at the time of sale to preclude persons located in the United States from participating in the offshore pool; and

5. The offshore pool's participation units are directed and distributed to participants outside the United States, including by means of listing and trading such units on secondary markets organized and operated outside of the United States, and in which the non-U.S. CPO has reasonably determined participation by persons located in the United States is unlikely.

For this purpose, the Commission has preliminarily determined that a non-U.S. intermediary would include a non-U.S. branch or office of a U.S. entity, or a non-U.S. affiliate of a U.S. entity, provided that the distribution takes place exclusively outside of the United States.

By satisfying the factors of the safe harbor, for example, that the offshore pool's offering materials clearly prohibit ownership by participants that are U.S. persons,[43] and by using offshore distribution channels and exchanges, the Commission preliminarily believes that the non-U.S. CPO is exercising sufficient diligence with respect to those circumstances within its control to demonstrate its intention to avoid engaging with U.S. persons concerning the offered offshore pool. Moreover, the Commission preliminarily believes that if a non-U.S. CPO meets the five factors in the safe harbor, the absence of U.S. participants is sufficiently ensured so as to allow reliance on the 3.10 Exemption. As with any of the Commission's other registration exemptions available to CPOs, whether domestic or offshore, the Commission would expect non-U.S. CPOs claiming the 3.10 Exemption to maintain adequate documentation to demonstrate compliance with the terms of the safe harbor.

The Commission preliminarily believes that providing a safe harbor with appropriate conditions for non-U.S. CPOs of commodity pools, regarding the absence of U.S. participants in their offshore pools to avail themselves of the exemptive relief in the 3.10 Exemption, may result in more offshore pools choosing to engage in the commodity interest markets in the United States. Moreover, as noted above, pursuant to section 4(d) of the Act, the Commission expressly retains the statutory authority to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of the CEA or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.[44] Moreover, again as noted above, the Commission would retain the authority to take enforcement action against any non-U.S. CPO claiming the 3.10 Exemption based on their activities within the U.S. commodity interest markets. Therefore, the Commission preliminarily believes that the safe harbor proposed herein is an appropriate exercise of its authority pursuant to section 4(c) of the Act.

*c. Utilizing the 3.10 Exemption Concurrent With Other Regulatory Relief Available to CPOs*

As discussed above, the Commission is proposing that the 3.10 Exemption for non-U.S. CPOs be available on a pool-by-pool basis. Consistent with these proposed amendments, the Commission also preliminarily believes it is appropriate to propose amendments to explicitly provide that non-U.S. CPOs may claim the 3.10 Exemption while that CPO also claims other registration exemptions or regulatory exclusions with respect to other pools it operates, *e.g.,* the *de minimis* exemption under Commission regulation 4.13(a)(3),[45] or an exclusion from the definition of CPO under Commission regulation 4.5,[46] or to register with respect to such pools,[47]

[41] 17 CFR 3.10(c)(3)(i).

[42] The Commission notes that, for purposes of the safe harbor, and consistent with the proposed exception for initial capital contributions from a U.S. controlling affiliate, proposed Commission regulation 3.10(c)(3)(iii) discussed *infra,* such U.S. controlling affiliate is not considered to be a ''participant.''

[43] *See* note 45, *supra.*

[44] 7 U.S.C. 6(d).

[45] 17 CFR 4.13(a)(3).

[46] 17 CFR 4.5.

[47] The Commission notes that including registration among the provisions a non-U.S. CPO may ''stack'' with the 3.10 Exemption is not strictly necessary, as such status is implied given the amendments described earlier to allow the 3.10

in order to address the concerns articulated by commenters to the 2018 Proposal.[48] The Commission understands that this practice is known colloquially as the ability to ''stack'' exemptions.

Currently, the 3.10 Exemption does not have a provision that contemplates its simultaneous use with other exemptions available under other Commission regulations. This stands in contrast with the language in Commission regulation 4.13(f), for example, which states that, the filing of a notice of exemption from registration under this section will not affect the ability of a person to qualify for exclusion from the definition of the term 'commodity pool operator' under § 4.5 in connection with its operation of another trading vehicle that is not covered under this § 4.13.[49]

With respect to those non-U.S. CPOs that operate both U.S. pools and pools that meet the terms of the 3.10 Exemption, the Commission preliminarily believes that such non-U.S. CPOs should have the ability to rely on other regulatory exemptions or exclusions that they qualify for, just like any other CPO. The Commission preliminarily believes that the fact that the CPO of a U.S. commodity pool that otherwise meets the criteria for its operator to claim registration relief under Commission regulation 4.13(a)(3), for example, has also claimed the 3.10 Exemption for one or more of its offshore pools does not raise heightened regulatory concerns regarding the operation of the U.S. pool. The Commission has independently developed the terms under which CPOs of U.S. commodity pools may claim registration relief, and the fact that a non-U.S. CPO operates both offshore and U.S. commodity pools does not undermine the rationale providing the foundation for the Commission's other regulatory exemptions available to CPOs generally.

The Commission therefore preliminarily concludes that a non-U.S. CPO relying upon the 3.10 Exemption for one or more of its offshore pools should not be, by virtue of that reliance, foreclosed from utilizing other relief generally available to CPOs of U.S. pools. Thus, the Commission is also proposing to add Commission regulation 3.10(c)(3)(iv) to establish that a non-U.S. CPO's reliance upon the 3.10 Exemption for one or more pools will not affect that CPO's ability to claim other exclusions or exemptions, including those in Commission regulations 4.5 or 4.13, or to register with respect to the other pools that it operates.

*d. Affiliate Investment Exception*

The Commission is also proposing to add Commission regulation 3.10(c)(3)(iii), which provides that initial capital contributed by a non-U.S. CPO's U.S. controlling affiliate to that CPO's offshore commodity pool would not be considered in assessing whether that pool is an offshore pool for purposes of the 3.10 Exemption because the U.S. controlling affiliate would not be considered a ''participant'' for purposes of either proposed Commission regulation 3.10(c)(3)(ii) or 3.10(c)(3)(iv). For the purpose of this proposed amendment, the term ''control'' would be defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.[50]

Although the 3.10 Exemption is intended to focus the Commission's resources on protecting U.S. participants, the Commission preliminarily believes that the control typically exercised by a controlling affiliate over its non-U.S. CPO affiliate should provide a meaningful degree of protection and transparency with respect to the controlling affiliate's contribution of initial capital to the non-U.S. CPO's offshore commodity pool. Moreover, the majority of a CPO's compliance obligations generally focus on customer protection through a variety of disclosures regarding a person's participation in a pool, which is information the controlling affiliate would likely already be in a position to obtain independent of the Commission's regulations, thereby obviating the need for the Commission to mandate such disclosure and reporting.[51]

A controlling person must, by definition, have the corporate or other legal authority to require the controlled CPO to provide more information than is required by the Commission, such as detailed information about the non-U.S. CPO's finances, management and operations, and, more relevant to the proposal herein, access to investment and performance information for the offshore pool. Accordingly, the Commission preliminarily believes that due to the fundamentally different features of the relationship between a controlling affiliate and a non-U.S. CPO as compared to an outside investor and a CPO, a U.S. controlling affiliate's participation, through an initial investment, in its affiliated non-U.S. CPO's offshore pool does not raise the same customer protection concerns as similar investments in the same pool by unaffiliated persons located in the United States.

Commission staff in the Division of Swap Dealer and Intermediary Oversight (DSIO) previously granted staff no-action relief for a non-U.S. CPO of offshore pools that received initial capital contributions from U.S. sources affiliated with the non-U.S. CPO for a limited period of time.[52] Specifically, in CFTC Staff Letter 15–46, DSIO articulated a no-action position related to initial capital contributions provided to offshore pools operated by a non-U.S. CPO derived from the U.S. employees of the affiliated U.S. investment advisers to the offshore pools.[53] In that instance, in part because the participants were natural person employees of the affiliated U.S. investment advisers, staff determined that it was appropriate to limit the time in which the U.S. derived capital could remain in the offshore pools without the non-U.S. CPO registering with the Commission.[54]

With respect to the exception proposed herein, the Commission preliminarily believes that imposing a time limit is not necessary where the initial investment capital is deriving not from natural person employees, but rather the corporate funds of a U.S. controlling affiliate. Unlike the facts presented in CFTC Staff Letter 15–46, the Commission preliminarily believes that the control that a U.S. controlling affiliate is able to exercise with respect to the operations of the non-U.S. CPO and its offshore pools provides adequate assurances that the U.S. controlling affiliate is able to obtain and act upon

Exemption to apply on a pool-by-pool basis. Nevertheless, the Commission is explicitly stating that such a status is possible to provide certainty to affected non-U.S. CPOs.

[48] *See, e.g.,* AIMA, at 6; Willkie, at 6.

[49] 17 CFR 4.13(f).

[50] The Commission currently uses this definition of ''control'' in its part 49 regulations on swap data reporting. *See* 17 CFR 49.2(a)(4). In January 2020, the Commission also proposed to implement this definition of ''control'' in the context of cross-border regulation of swap dealers. *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 952, 1002 (Jan. 8, 2020) (proposing to add the ''control'' definition at § 23.23(a)(1)).

[51] *See* 17 CFR 4.22(c)(8) (providing that a CPO need not distribute an annual report to pools operated by persons controlling, controlled by, or under common control with the CPO, provided that information regarding the underlying pool is contained in the investor pool's annual financial statement).

[52] *See* CFTC Staff Letter 15–46 (May 8, 2015).

[53] *Id.* at 2.

[54] *Id.*

the information relevant to its participation in the offshore pool.[55]

The Commission preliminarily intends to limit the exception for U.S. controlling affiliate capital contributions to those made at or near a pool's inception, which generally result from commercial decisions by the U.S. controlling affiliate, typically in conjunction with the non-U.S. CPO, to support the offshore pool until such time as it has an established performance history for solicitation purposes, although the contributed capital may remain in the offshore pool for the duration of its operations. The Commission preliminarily believes that this limitation is appropriate to ensure that the capital is being contributed in an effort to support the operations of the offshore pool at a time when its viability is being tested, rather than as a mechanism for the U.S. controlling affiliate to generate returns for its own investors.

The Commission notes, however, that the proposed exclusion may not be used to evade the Commission's CPO compliance requirements with respect to offshore commodity pools. For example, a controlling affiliate located in the U.S. could invest in its affiliated non-U.S. CPO's offshore pool, and then solicit persons located in the U.S. for investment in that controlling affiliate, for the purpose of providing such investors indirect exposure to that offshore pool. Under these circumstances, the Commission preliminarily believes that such practices would generally constitute evasion of the Commission's regulation of CPOs and commodity pools soliciting and serving participants located in the U.S. and would render the non-U.S. CPO ineligible for the 3.10 Exemption. Additionally, the Commission preliminarily believes that U.S. controlling affiliates that are barred from participating in the U.S. commodity interest markets should not be permitted to gain indirect access to those markets through an affiliated non-U.S. CPO's offshore pool as this would undermine the purposes of such a ban. Therefore, the Commission is proposing to include provisions in the proposed exemption to prohibit such evasive conduct marked by either pooling of U.S. participant capital in the U.S. controlling affiliate or the contribution of initial capital to an offshore pool by a person subject to a statutory disqualification, ongoing registration suspension or bar, prohibition on acting as a principal, or trading ban with respect to participating in the U.S. commodity interest markets.

Consistent with its authority under section 4(c) of the Act, the Commission preliminarily believes that providing an exception for initial capital contributions by U.S. controlling affiliates in offshore pools operated by affiliated non-U.S. CPOs could result in increased economic or financial innovation by non-U.S. CPOs and their offshore pools participating in the U.S. commodity interest markets. The Commission further preliminarily believes enabling U.S. controlling affiliates to provide initial capital to offshore pools operated by affiliated non-U.S. CPOs could provide such non-U.S. CPOs with the ability to test novel trading programs or otherwise engage in proof of concept testing with respect to innovations in the collective investment industry that might otherwise not be possible due to a lack of a performance history for the offered pool. For the reasons set forth above, the Commission has preliminarily concluded that it is appropriate to provide an exception for initial capital contributions by U.S. controlling affiliates in offshore pools operated by affiliated non-U.S. CPOs from the U.S. participant prohibition in the 3.10 Exemption pursuant to section 4(c) of the Act.

*e. General Request for Comment*

The Commission requests comment on all aspects of the Proposal. Specifically, given the concerns regarding potential evasion of CPO regulation using the controlling affiliate provision, the Commission seeks comment on several potential additional conditions on the exception that could be included in the final regulation.

1. To establish that the funds of the controlling affiliate are being used for seeding purposes, should the exception state that the purpose of the investment by the controlling affiliate shall be for establishing the commodity pool and providing sufficient initial equity to permit the pool to attract unaffiliated non-U.S. investors? Similarly, should the exception be conditioned on the investment being limited in time to one, two, or three years after which time the investments of the controlling affiliate must be reduced to a de minimis amount of the pool's capital, such as 3 or 5 percent? What customer protection benefits would such limitations serve?

2. Regarding the nature of controlling affiliates, to protect the U.S. persons invested therein, should the exception be limited to entities or persons that are otherwise financial institutions that are regulated in the United States to provide investor protections? For example, should the exception only be available to U.S. controlling affiliates regulated by the Securities and Exchange Commission, a federal banking regulator, or an insurance regulator?

3. The Proposal notes that one of the reasons underlying the U.S. controlling affiliate exception is the affiliate's likely ability to demand that the non-U.S. CPO provide it with the information necessary to assess the operations and performance of the offshore pool. However, because these offshore pools are by definition non-U.S. entities and it is not possible to ascertain with certainty whether such information must be provided to a U.S. controlling affiliate under the laws applicable to the non-U.S. CPO and offshore pool, should the exception be conditioned on there being an obligation on the non-U.S. CPO that is legally binding in its home jurisdiction to provide the U.S. controlling affiliate with information regarding the operation of the offshore pool by the affiliated non-U.S. CPO?

## III. Reopening of Comment Period Under 2016 Proposal

On July 27, 2016, the Commission proposed to amend Commission regulation 3.10(c) to amend the conditions under which the exemption from registration would apply.[56] Generally, the proposed amendment would permit a foreign broker or persons located outside the United States acting in the capacity of an introducing broker, commodity trading advisor, or commodity pool operator, each as defined in Commission regulation 1.3, to be eligible for an exemption from registration with the Commission if the foreign broker or person, in connection with a commodity interest transaction, only acts on behalf of (1) persons located outside the United States, or (2) International Financial Institutions (as defined in the proposed rule amendments), without regard to whether such persons or institutions clear such commodity interest transaction.

In response to the Proposal, the Commission received six comments,[57] most of which were supportive of the proposal. Given the passage of time, however, the Commission now requests

[55] The Commission notes that certain control affiliates may be subject to the time limitations imposed on the contribution of initial capital to affiliated covered funds under the Volcker Rule due to their status as banking entities. *See* 17 CFR 75.12. The exemption proposed herein with respect to initial capital contributions does not affect or negate any other limitations imposed by other statutory or regulatory provisions applicable to the control affiliate.

[56] Exemption from Registration for Certain Foreign Persons, 81 FR 51824 (Aug. 5, 2016) (the ''2016 Proposal'').

[57] These comment letters are on the Commission's website at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1724.*

comment on whether it would be appropriate to finalize the 2016 Proposal along with the other amendments to Commission regulation 3.10 proposed in this release. Thus, the Commission is reopening the comment period on all aspects of the 2016 Proposal for 60 days.

In addition, with respect to the 2016 Proposal, the Commission requests specific comment on whether Commission regulation 3.10 should require commodity interest transactions of persons located outside of the United States or of International Financial Institutions that are required or intended to be cleared on a registered derivatives clearing organization (DCO) to be submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act, unless such person or International Financial Institution is itself a clearing member of such registered DCO?

## IV. Related Matters

### *a. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking.[58]

The Proposal by the Commission today would affect only CPOs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the requirements of the RFA.[59] With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under Commission regulation 4.13(a)(2).[60] With respect to small CPOs operating pursuant to Commission regulation 4.13(a)(2), the Commission preliminarily believes that, should the amendments to the 3.10 Exemption be adopted as final, certain of those small CPOs may choose to operate additional pools outside the United States, which could provide additional opportunities to develop their operations not currently available to them. The Commission notes, however, that such small CPOs would remain subject to the total limitations on aggregate gross capital contributions and pool participants set forth in Commission regulation 4.13(a)(2) because that exemption is based on the entirety of the CPO's pool operations. Because investment vehicles operated under the 3.10 Exemption remain commodity pools under the CEA, the Commission preliminarily does not believe that the amendments proposed herein would result in a significant economic impact on a substantial number of small CPOs. Further, the Commission notes that the Proposal would impose no new obligation, significant or otherwise. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

### *b. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA.[61] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission has preliminarily determined that the proposed amendments, if adopted, will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget (OMB) under the PRA.

The Commission invites the public and other interested parties to comment on this PRA determination. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission generally solicits comments in order to: (1) Evaluate whether a proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of a proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) mitigate the burden of a collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission specifically invites public comment on the accuracy of its estimate that no additional information collection requirements or changes to existing collection requirements would result from the regulatory amendments proposed herein.

Comments may be submitted directly to the Office of Information and Regulatory Affairs (OIRA), by fax at (202) 395–6566 or by email at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments, so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. OMB is required to make a decision concerning a collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

### *c. Cost-Benefit Considerations*

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the CEA.[62] Section 15(a) of the Act further specifies that the costs and benefits of the proposed rules shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of the futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA. The Commission invites public comment on its cost-benefit considerations.

[58] 5 U.S.C. 601, *et seq.*

[59] *See, e.g.,* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18620 (Apr. 30, 1982).

[60] *Id.* at 18619–20. Commission regulation 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed $400,000. *See* 17 CFR 4.13(a)(2).

[61] 44 U.S.C. 3501, *et seq.*

[62] 7 U.S.C. 19(a).

As explained above, the current 3.10 Exemption provides relief from registration to non-U.S. CPOs operating offshore pools with foreign participants.[63] The 3.10 Exemption provides that it is only available to non-U.S. CPOs acting on behalf of offshore commodity pools. In a prior proposal that discussed the 3.10 Exemption, the Commission stated that the current registration exemption is not available on a pool-by-pool basis, meaning that a non-U.S. CPO would be unable to claim the exemption with respect to its offshore pools meeting the specified criteria for the 3.10 Exemption while maintaining CPO registration with respect to other pools—*e.g.,* pools, regardless of domicile, with U.S. participants. Therefore, non-U.S. CPOs that operate a mix of some offshore pools that are not available to U.S. participants and other pools that are offered and sold to U.S. participants would have to either register and list all of their operated pools or claim an alternative exemption or exclusion. One such available source of exemptive relief is Staff Advisory 18–96 (Advisory 18–96), which, although still requiring registration of the CPO, does provide relief from the majority of the compliance obligations set forth in part 4 of the Commission's regulations.[64]

The Commission is proposing several amendments to the current 3.10 Exemption. Specifically, the Commission is proposing to amend the 3.10 Exemption such that non-U.S. CPOs may rely on that exemption on a pool-by-pool basis through proposed Commission regulation 3.10(c)(3)(ii). Next, proposed Commission regulation 3.10(c)(3)(iii) would make it clear that a non-U.S. CPO's eligibility to rely upon the 3.10 Exemption is unaffected by any contributions the non-U.S. CPO's offshore pools might receive from the non-U.S. CPO's U.S. controlling affiliate. The Commission is also proposing Commission regulation 3.10(c)(3)(iv), which would establish a regulatory safe harbor for those non-U.S. CPOs that cannot represent with absolute certainty that there are no U.S. participants in the operated offshore pool. Finally, the Commission is proposing Commission regulation 3.10(c)(3)(v), which would permit non-U.S. CPOs to claim an available exemption from registration, claim an exclusion, or register with respect to the other pools they operate. The proposed amendments would grant non-U.S. CPOs relief that will likely generate costs and benefits. The baseline against which these costs and benefits are compared is the regulatory *status quo* set forth in current Commission regulation 3.10(c)(3).

The consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with some leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of this proposal on all activity subject to the proposed amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with activities in or effect on U.S. commerce under CEA section 2(i).[65]

i. Proposed Commission Regulation 3.10(c)(3)(ii): Providing That the 3.10 Exemption May Be Claimed on a Pool-by-Pool Basis

Specifically, pursuant to the Proposal, a non-U.S. CPO would be able to claim the 3.10 Exemption from registration with respect to its eligible offshore pools, while either registering as a CPO or claiming another available exemption or exclusion for its other pools that are either located in the U.S., or that solicit and/or accept as participants persons located within the U.S. Absent the proposed amendment, such CPOs would face some costs and compliance burdens associated with the operation of their offshore pools,[66] despite the Commission's historical focus on prioritizing customer protection with respect to persons located in the United States. For example, certain registered U.S. and non-U.S. CPOs file self-executing notices pursuant to Advisory 18–96 with respect to their offshore pools. The Advisory provides compliance relief with respect to all of the pool-based disclosures required under the Commission's regulations, as well as many of the reporting and recordkeeping obligations that otherwise would apply to registered CPOs, with the exception of the requirement to file Form CPO–PQR under Commission regulation 4.27. The relief pursuant to Advisory 18–96 also allows qualifying, registered U.S. CPOs to maintain their offshore pool's original books and records at the pool's offshore location, rather than at the CPO's main business office in the United States.[67]

Currently, based on the notices filed pursuant to Advisory 18–96, the Commission is aware of 23 non-U.S. CPOs that operate 84 offshore pools and 20 U.S. CPOs that operate 88 offshore pools. In total, 43 CPOs file 18–96 notices. However, the Commission preliminarily believes that there are likely a number of registered non-U.S. CPOs that do not list their offshore pools with the Commission, and, therefore, do not claim relief under Advisory 18–96. Although these exemption notices must be filed by hardcopy, the Commission believes the administrative costs are low.[68] CPOs must employ at least one staff-person to manage and file the one-time notice under Advisory 18–96. For a notice under Advisory 18–96 to be effective, the CPO must provide, among other things, business-identifying and contact information; representations that its principals are not statutorily disqualified; enumerated rules from which the CPO seeks relief; and contact information for person(s) who will maintain offshore books and records.[69] Under the Proposal, the current 23 registered non-U.S. CPOs would be able to delist their offshore pools and no longer file 18–96 notices acknowledging that they operate one of the 84 offshore pools. Upon delisting of such pools, those registered non-U.S. CPOs would no longer have to include their offshore pools in their Form CPO–PQR filings, which will result in cost savings for those CPOs. The 20 U.S. CPOs, however, would continue to claim relief under Advisory 18–96, because they remain ineligible for the 3.10 Exemption due to their location in the United States.

Currently, one way that a registered CPO can avoid the requirement to list its offshore pools with the Commission is to establish a separate, foreign-domiciled CPO for all of the pools that are eligible for the 3.10 Exemption. The Commission preliminarily believes that the Proposal would eliminate the incentive to establish a separately organized CPO solely to operate the pools that would qualify for the 3.10 Exemption. The Commission preliminarily believes, however, that the

[63] *See* Section I, *supra.*

[64] CFTC Staff Advisory 18–96 (Apr. 11, 1996).

[65] 7 U.S.C. 2(i).

[66] As discussed, *infra,* certain CPOs may be eligible for significant compliance relief pursuant to Advisory 18–96.

[67] *See* note 28, *supra.*

[68] *See https://www.nfa.futures.org/members/cpo/cpo-exemptions.html.*

[69] *See* note 28, *supra.*

financial expenses associated with establishing a foreign CPO varies depending on the operating size and structure of the registered CPO. The Commission further notes that incentives to establish additional CPOs may also be affected by the amount of the financial outlay to establish foreign-domiciled CPOs given that set-up costs—such as, costs to pay staff and experts; expenses for business licenses and registrations; costs to draft operational and disclosure documents; fees to establish technological services—would be expected to vary by jurisdiction. Therefore, although the Commission believes that there are costs associated with establishing a separate, foreign-domiciled CPO, the Commission preliminarily believes that such costs may be marginal and would be dependent on the organization and domicile of the registered CPO.

The Commission expects that amending the 3.10 Exemption such that non-U.S. CPOs may claim the exemption on a pool-by-pool basis would result in such CPOs saving the costs associated with forming and maintaining a new CPO to operate the other pools in its overall structure, and would thereby remove unnecessary complexity in pool operations. Therefore, by amending the 3.10 Exemption such that non-U.S. CPOs may claim the exemption on a pool-by-pool basis, the Commission preliminarily believes that it would eliminate a large portion of CFTC-registered, non-U.S. CPOs' compliance costs associated with the operation of their offshore pools, which by their very characteristics implicate fewer of the Commission's regulatory interests. This is only for U.S. compliance costs, as non-U.S. CPOs would still have compliance costs with non-US regulatory regimes. Moreover, the Commission preliminarily believes that this targeting of its CPO oversight appropriately recognizes the global nature of the asset management industry.

The Commission also does not expect that non-U.S. CPOs would experience any increased costs associated with the amendments such that the 3.10 Exemption may be claimed on a pool-by-pool basis. As noted above, the Commission is proposing to permit the exemption to be claimed without any filing by the non-U.S. CPO. This is no different from how the current exemption is implemented. The current terms of the 3.10 Exemption would require a CPO to monitor the operations of its offshore pools to ensure that the pools are not offered in the United States and that they do not have any participants located in the United States. Under the terms of the Proposal, such CPOs would continue to be required to engage in such monitoring.

The Commission preliminarily believes that there may be some loss of information available to the public regarding the existence of the offshore pools operated by registered non-U.S. CPOs because such offshore pools would no longer be listed with the Commission, and consequently, the pools' existence and identifying information would not be publicly disclosed on NFA's BASIC database. The Commission has preliminarily concluded that this loss of information would have a minimal impact on the general public because persons located within the United States would typically not be permitted by the non-U.S. CPO to participate in such pools.

ii. Proposed Commission Regulation 3.10(c)(3)(iv): Regulatory Safe Harbor for Non-U.S. CPOs With Possible Inadvertent U.S. Participants in Offshore Pools

As explained previously, the Commission is proposing Commission regulation 3.10(c)(3)(iv) to provide a regulatory safe harbor for those non-U.S. CPOs who, due to the structure of their offshore pools, cannot represent with absolute certainty that there are no U.S. participants in their offshore pools, provided that such non-U.S. CPOs take certain enumerated actions to ensure that no U.S. persons are participating in the offshore pool. The Commission preliminarily believes that proposed Commission regulation 3.10(c)(3)(iv) benefits non-U.S. CPOs by making the registration relief provided under the 3.10 Exemption more widely available by recognizing the informational limitations inherent in certain pool structures. Therefore, the Commission preliminarily believes that this proposed safe harbor could result in more non-U.S. CPOs relying upon the 3.10 Exemption with respect to more pools. At this time, the Commission lacks sufficient information to quantify the number of additional non-U.S. CPOs and offshore pools that may claim relief under proposed Commission regulation 3.10(c)(3)(iv) because the Commission does not currently receive information of the nature necessary to determine which offshore pools currently listed with the Commission are offered and sold solely to offshore participants and what subset of those pools may have participation units traded in the secondary market. Given, however, that exchange traded commodity pools currently comprise less than 1% of the total number of pools listed with the Commission, the Commission preliminarily believes that it is reasonable to estimate the number of offshore pools operated in a similar manner to be equally small.

The Commission preliminarily believes that non-U.S. CPOs that would be eligible for registration relief under proposed Commission regulation 3.10(c)(3)(iv) would avail themselves of that relief. This could result in the Commission receiving less information regarding the operation of such offshore pools operated pursuant to the proposed regulatory safe harbor. As noted above, the Commission preliminarily believes that the amount of information lost as a result of the deregistration of such non-U.S. CPOs and associated delisting of their eligible offshore pools would be minimal due to the expected small number of CPOs and pools relative to the total population of registered CPOs and listed pools.

The Commission also preliminarily expects that there may be some inadvertent U.S. participants in offshore pools who would lose the customer protection afforded by part 4 of the Commission's regulations should a non-U.S. CPO decide to delist its offshore pools and claim relief under the 3.10 Exemption, given the clarity and certainty provided by the regulatory safe harbor. The Commission preliminarily believes that the enumerated actions comprising the regulatory safe harbor provide assurance that the number of U.S. persons so impacted would be small. Moreover, the Commission preliminarily believes that such U.S. persons, to the extent that they are aware that they are participating in what is known to be an offshore pool through the purchase of participation units sold in an offshore secondary market, may not expect to benefit from the customer protection provisions in part 4 of the Commission's regulations, but would instead expect to rely upon the regulatory protections of the offshore pool's home jurisdiction.

iii. Proposed Commission Regulation 3.10(c)(3)(v): Utilizing the 3.10 Exemption Concurrent With Other Available Exclusions and Exemptions

As explained above, the Commission is also proposing to add Commission regulation 3.10(c)(3)(v) such that non-U.S. CPOs may rely upon the 3.10 Exemption concurrent with other exemptions and exclusions, or, alternatively, registration under the Commission's regulations. The Commission preliminarily believes that proposed Commission regulation 3.10(c)(3)(v) therefore benefits non-U.S. CPOs through consistent treatment of

CPOs of pools that are operated in a substantively identical manner with respect to their use of derivatives or their size, regardless of where the CPO is based. The Commission has also preliminarily determined that these proposed amendments will benefit the non-U.S. CPO industry generally by providing certainty regarding the ability to simultaneously rely upon the 3.10 Exemption and other exclusions and exemptions available under the Commission's regulations. The Commission also notes that this proposed amendment is consistent with other instances in its CPO regulatory program, where the Commission already permits CPOs to claim more than one type of exemption or exclusion or to register with respect to the variety of commodity pools operated by them.[70]

The Commission further preliminarily believes that by clarifying the permissibility of using Commission regulation 4.13 exemptions, for example, in conjunction with the 3.10 Exemption, non-U.S. CPOs may be more likely to claim the relief under Commission regulation 4.13 for their eligible pools, rather than registering and listing those pools. The Commission preliminarily concludes that clearly establishing the availability of other exemptions and exclusions or, alternatively, registration with respect to the operation of certain pools offered or sold to persons within the United States will further enable the Commission to more efficiently deploy its resources in the oversight of CPOs and commodity pools that it has previously determined more fully implicate its regulatory concerns and interests under the CEA.

If more non-U.S. CPOs claim exemptions under Commission regulation 4.13(a)(3), for example, for some of their U.S. facing pools as a result of the Proposal, this could result in pools that were previously listed and associated with a CPO registration being delisted. Under these circumstances, the Commission would, as a result, no longer receive financial reporting with respect to those pools, including on Form CPO–PQR. Because these commodity pools would in fact already be operated consistent with an existing exemption or exclusion, and because the Commission has previously determined that pools operated in such a manner generally do not require a registered CPO, the Commission has preliminarily determined that any resulting loss of insight into such pools and their CPOs would also be consistent with the Commission's overall regulatory policy concerning CPOs and commodity pools.[71]

iv. Proposed § 3.10(c)(3)(iii): Exclusion of Controlling Affiliate Investments in Offshore Pools From the 3.10 Exemption Eligibility Determination

The Commission is also proposing to permit non-U.S. CPOs to rely upon the 3.10 Exemption for the operation of an offshore pool, even if a controlling affiliate within the United States provides initial capital for the offshore pool. Absent the relief provided by proposed Commission regulation 3.10(c)(3)(iii), a non-U.S. CPO of an offshore pool receiving initial capital from a controlling affiliate within the U.S. would generally be required to register as a CPO and list that pool with the Commission, unless another exemption or exclusion was available. As a registered CPO with respect to that offshore pool, the non-U.S. CPO would then be required to comply with the compliance obligations set forth in part 4 of the Commission's regulations.

As discussed previously, the Commission has preliminarily concluded that participation in an offshore pool by a U.S. controlling affiliate does not raise the same regulatory concerns as would an investment in the same pool by an unaffiliated participant located within the United States. In addition to the reasons outline above, the Commission preliminarily believes that this proposed relief or condition to the proposed 3.10 Exemption would provide regulatory relief for a small number of currently-registered CPOs. Based on the number of claims filed under Advisory 18–96, there are 23 non-U.S. CPOs that operate 84 offshore commodity pools. The Commission is unaware, however, of whether any of the offshore pools operated by those non-U.S. CPOs actually received initial capital contributions from a U.S. controlling affiliate, in part, because the Commission does not collect such information. Nevertheless, because of the small number of claims by non-U.S. CPOs under Advisory 18–96, the Commission preliminarily believes that the number of these CPOs that would be subject to proposed Commission regulation 3.10(c)(3)(iii) would be less than the 23. The Commission preliminarily believes that there may be an unknown number of registered non-U.S. CPOs that have never listed their offshore pools with the Commission, and hence did not seek relief under the Advisory. Therefore, the total number of non-U.S. CPOs utilizing this exemption could also be higher. In addition, as a result of the Commission being unware of the current number of offshore pools operated by a non-U.S. CPO receiving seed capital from a U.S. controlling affiliate, it is unable to predict how many pools will utilize this proposed exclusion in the future, if this Proposal is finalized.

The Commission also preliminarily believes that this proposed amendment would result in reduced costs for non-U.S. CPOs with initial capital contributions from U.S. controlling affiliates by removing such investments from consideration for 3.10 Exemption eligibility, thereby eliminating any registration and compliance costs for such pools. The proposed amendment would, however, result in U.S. controlling affiliates not being able to rely upon the protections provided by CPO registration and by part 4 of the Commission's regulations, with respect to their investments in an offshore pool operated by their affiliated non-U.S. CPO.[72] The Commission preliminarily believes that this loss would be mitigated by such a U.S. controlling affiliate's ability to exercise control over the operations of the affiliated non-U.S. CPO, and thereby obtain whatever information regarding the offshore pool a U.S. controlling affiliate may deem material to its investment. Moreover, the Commission preliminarily believes this approach is consistent with the Commission's focus on protecting U.S. investors participating in commodity pools and recognizes that U.S. controlling affiliates may also be regulated by other federal and state authorities.

In the event, should this proposal be finalized, that a non-U.S. CPO has listed one or more offshore pools with the Commission due to the fact that the offshore pool received initial capital contributions from a U.S. controlling affiliate, and such non-U.S. CPO determines to delist the offshore pool in question and instead rely upon the revised 3.10 Exemption, the Commission would as a result no longer receive financial reporting with respect to such pool, including on Form CPO–PQR. Because, however, the Commission has preliminarily determined that initial capital

[70] *See, e.g.,* 17 CFR 4.13(e)(2) and 4.13(f).

[71] The Commission notes that it retains special call authority with respect to those CPOs claiming an exemption from registration pursuant to Commission regulation 4.13, which enables the Commission to obtain additional information regarding the operation of commodity pools by such exempt CPOs. *See* 17 CFR 4.13(c)(iii).

[72] For example, a U.S. controlling affiliate would not be able to rely upon the Commission's part 4 regulations to require its affiliated non-U.S. CPO to provide the controlling affiliate with disclosures and reporting generally mandated by those rules.

contributions by a U.S. controlling affiliate do not raise the same customer protection concerns as capital received from other U.S. participants, the Commission has preliminarily determined that any resulting loss of insight into such pools and their CPOs would also be consistent with the Commission's overall regulatory policy concerning CPOs and commodity pools.

v. Section 15(a) Factors

1. Protection of Market Participants and the Public

The Commission preliminarily believes that the Proposal would not have a material negative effect on the protection of market participants and the public. The proposed amendments enhance the Commission ability to focus its efforts on protecting U.S. investors. The Commission will continue to receive identifying information from U.S. CPOs operating offshore pools and pools offered to U.S. investors. Regarding a non-U.S. CPO whose offshore pools receive initial capital contributions from a controlling affiliate in the United States, the Commission preliminarily believes that although those offshore pools may no longer be subject to part 4 of the Commission's regulations, controlling affiliates, by virtue of their control over the non-U.S. CPO, need not be as reliant upon the customer protection provided by compliance with the Commission's regulations. The Commission also preliminarily expects that some U.S. participants in offshore pools operated pursuant to the regulatory safe harbor may also lose the customer protections afforded by part 4 of the Commission's regulations; however, the Commission preliminarily expects the number of such U.S persons to be small due to the criteria required for reliance upon the safe harbor.

2. Efficiency, Competitiveness and Financial Integrity of the Futures Markets

The Commission has not identified any impact that the Proposal would have on the efficiency, competitiveness and financial integrity of the futures markets.

3. Price Discovery

The Commission has not identified any particular impact that the Proposal would have on price discovery.

4. Sound Risk Management Practices

The Commission has not identified any impact that the Proposal would have on sound risk management practices.

5. Other Public Interest Considerations

The Commission has not identified any other public interest considerations impacted by the Proposal beyond those preliminarily identified as part of its analysis supporting the Commission's exercise of its authority under section 4(c) of the Act.

*d. Anti-Trust Considerations*

Section 15(b) of the Act requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the Act.[73] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition.

The Commission has considered the Proposal to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the Proposal is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the Proposal is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the Act. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the Act that would otherwise be served by adopting the Proposal.

vi. Request for Comment

The Commission is seeking comment on all aspects of the costs and benefits associated with this Proposal. The Commission specifically seeks comment regarding the treatment of U.S. CPOs operating both U.S. and offshore pools by foreign regulatory bodies.

**List of Subjects in 17 CFR Part 3**

Consumer protection, Definitions, Foreign futures, Foreign options, Registration requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 3 as follows:

[73] 7 U.S.C. 19(b).

## PART 3—REGISTRATION

■ 1. The authority citation for part 3 is revised to read as follows:

**Authority:** 5 U.S.C. 522, 522b; 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1, 6c, 6d, 6e, 6f, 6g, 6h, 6*i,* 6k, 6m, 6n, 6*o,* 6p, 6s, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23.

■ 2. Amend § 3.10 by:
■ a. Revising paragraph (c)(3)(i);
■ b. Redesignating paragraph (c)(3)(ii) as paragraph (c)(3)(v);
■ c. Adding new paragraphs (c)(3)(ii) through (iv);
■ d. Revising newly redesignated paragraph (c)(3)(v), and
■ e. Adding paragraph (c)(3)(vi).

The revisions and additions read as follows:

**§ 3.10 Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, major swap participants, and leverage transaction merchants.**

* * * * *

(c) * * *

(3)(i) A person located outside the United States, its territories or possessions engaged in the activity of: An introducing broker, as defined in § 1.3 of this chapter; or a commodity trading advisor, as defined in § 1.3 of this chapter, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

(ii) A person located outside the United States, its territories or possessions engaged in the activity of a commodity pool operator, as defined in § 1.3 of this chapter, in connection with any commodity interest transactions that are executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, is not required to register in such capacity when such transactions are executed on behalf of a commodity pool the participants of which are all located outside the United States, its territories or possessions, and provided that, any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act.

(iii) With respect to paragraphs (c)(3)(ii) and (iv) of this section, initial

capital contributed to a commodity pool by an affiliate, as defined by § 4.7(a)(1)(i) of this chapter, that controls, as defined by § 49.2(a)(4) of this chapter, the pool's commodity pool operator shall not be a ''participant'' for purposes of determining whether such commodity pool operator is executing commodity interest transactions on behalf of a commodity pool, the participants of which are all located outside of the United States, its territories or possessions, *provided that:*

(A) The control affiliate and its principals are not subject to a statutory disqualification, ongoing registration suspension or bar, prohibition on acting as a principal, or trading ban with respect to participating in commodity interest markets in the United States, its territories or possessions; and

(B) Interests in the control affiliate are not marketed as providing access to trading in commodity interest markets in the United States, its territories or possessions.

(iv) With respect to paragraph (c)(3)(ii) of this section, a commodity pool operated by a person located outside the United States, its territories or possessions shall be considered to be satisfying the terms of paragraph (c)(3)(ii) of this section if:

(A) The commodity pool is organized and operated outside of the United States, its territories or possessions;

(B) The commodity pool's offering materials and any underwriting or distribution agreements include clear, written prohibitions on the commodity pool's offering to participants located in the United States and on U.S. ownership of the commodity pool's participation units;

(C) The commodity pool's constitutional documents and offering materials are reasonably designed to preclude persons located in the United States from participating therein and include mechanisms reasonably designed to enable its operator to exclude any persons located in the United States who attempt to participate in the offshore pool notwithstanding those prohibitions;

(D) The commodity pool operator exclusively uses non-U.S. intermediaries for the distribution of participations in the commodity pool;

(E) The commodity pool operator uses reasonable investor due diligence methods at the time of sale to preclude persons located in the United States from participating in the commodity pool; and

(F) The commodity pool's participation units are directed and distributed to participants outside the United States, including by means of listing and trading such units on secondary markets organized and operated outside of the United States, and in which the commodity pool operator has reasonably determined participation by persons located in the United States is unlikely.

(v) Claiming an exemption under paragraph (c)(3)(ii) of this section will not affect the ability of a person to register with the Commission or qualify for and/or claim an exclusion or exemption otherwise available under § 4.5 or 4.13 of this chapter, with respect to the operation of a qualifying commodity pool or trading vehicle not covered by the relief in this section.

(vi) A person acting in accordance with paragraph (c)(3)(i) or (ii) of this section remains subject to section 4*o* of the Act, but otherwise is not required to comply with those provisions of the Act and of the rules, regulations and orders thereunder applicable solely to any person registered in such capacity, or any person required to be so registered.

* * * * *

Issued in Washington, DC, on June 1, 2020, by the Commission.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

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

## Appendices to Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

### Appendix 1—Commission Voting Summary

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

### Appendix 2—Supporting Statement of Chairman Heath P. Tarbert

In his second inaugural address in 1893, President Grover Cleveland remarked that ''[u]nder our scheme of government the waste of public money is a crime against the citizen.'' [1] The CFTC is a taxpayer-funded agency, and Congress expects us to deploy our resources to serve the needs of American taxpayers. That is why as Chairman and Chief Executive, I have sought to revisit our agency's regulations where there does not appear to be a clear connection to furthering the interests of the United States or our citizens.

The CFTC's framework for regulating foreign commodity pool operators (''CPOs'') protects U.S. investors who put their money in commodity investment funds run from outside the United States. But, in some instances, the only benefit of CFTC regulation of offshore CPOs is to *foreign* investors. There is no statutory mandate for the CFTC to regulate funds never offered or sold to U.S. investors. To do so absent a compelling reason would be—in President Cleveland's words—a waste of public money.

Consequently, I am pleased to support today's proposal to amend the exemption for CPOs in regulation 3.10(c) (''3.10 Exemption''). If adopted, the proposal would eliminate the potential need for the CFTC to require the registration and oversight of non-U.S. CPOs whose pools have no U.S. investors. The proposal would additionally exempt U.S.-based affiliates of fund sponsors who put seed money into offshore funds that have only foreign investors. In so doing, the proposal would provide much-needed regulatory flexibility for non-U.S. CPOs operating offshore commodity pools, without compromising the CFTC's mission to protect U.S. investors.

Exemption for Foreign CPOs Sponsoring Funds Without U.S. Investors

The proposal would amend the conditions under which a foreign CPO, in connection with commodity interest transactions on behalf of persons located outside the United States, would qualify for an exemption from CPO registration and regulation with respect to that offshore pool. Specifically, through amendments to our regulation 3.10(c), a non-U.S. CPO would be able to claim an exemption from registration for its qualifying offshore commodity pools, without being required to register as a CPO with respect to the operation of other commodity pools.[2]

Absent a compelling reason, the CFTC should be focused on U.S. markets and U.S. investors, and refrain from extending our reach outside the United States.[3] The protection of non-U.S. customers of non-U.S. firms is best left to foreign regulators with the

[1] Second Inaugural Address of Grover Cleveland (Mar. 4, 1893), reprinted in *American History Through Its Greatest Speeches: A Documentary History of the United States* 278 (Courtney Smith, et al., eds. 2016).

[2] The proposal also would add a safe harbor as new regulation 3.10(c)(3)(iv) for non-U.S. CPOs that have taken what the Commission preliminarily believes are reasonable steps designed to ensure that participation units in the operated offshore pool are not being offered or sold to persons located in the United States.

[3] For example, section 2(i) of the Commodity Exchange Act provides that the swap provisions of Title VII of the Dodd-Frank Act shall not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of Title VII. In interpreting this provision, the Commission has taken the position that ''[r]ather than exercising its authority with respect to swap activities outside the United States, the Commission will be guided by international comity principles and will focus its authority on potential significant risks to the U.S. financial system.'' Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 952, 955 (Jan. 8, 2020).

relevant jurisdiction and mandate.[4] Therefore, I believe it is appropriate for the proposed rule to allow foreign CPOs to rely on the 3.10 Exemption for their foreign commodity pools when they have no U.S. investors. Where a foreign CPO does have U.S. investors, other exemptions or exclusions from registration might be available.

Unfortunately, under a strict construction of the current rule, if a foreign CPO has one fund with U.S. investors, then the foreign CPO must register *all* its funds or rely on some other exemption besides the 3.10 Exemption. This ''all or nothing'' reading of the rule has produced two competing consequences—neither of which makes for good regulatory policy. First, if the CPO chooses to register all its funds, the CFTC ends up regulating some foreign-based funds without any U.S. investors. Second, if the CPO refuses to register any of its funds, then U.S. investors are effectively denied the liquidity and investment opportunities offered by foreign commodity pools.

In the last decade, statutory and regulatory developments have produced a growing mismatch between the Commission's stated policy purposes underlying the 3.10 Exemption (that focus the CFTC's resources on the protection of U.S. persons) and the strict construction of the 3.10 Exemption (that leads to its ''all or nothing'' application). To address this mismatch, today's proposal would amend the 3.10 Exemption to align the plain text of the exemption with our longstanding policy goal of regulating only foreign CPOs that offer their funds to U.S. investors. In effect, the Commission's walk would finally conform to our talk.[5]

Affiliate Investment Exemption

In addition to ensuring the CFTC's resources are focused on commodity pools with U.S. investors, we must also strive to protect those who are truly arms-length, third-party investors. To that end, the proposal would permit certain U.S. control affiliates of a non-U.S. CPO to contribute capital to that CPO's offshore pools as part of the initial capitalization without rendering the non-U.S. CPO ineligible for the 3.10 Exemption. In other words, the proposal would simply allow a U.S. parent company of a foreign CPO to invest in what is effectively its own offshore fund, without triggering registration requirements.

It is hard to imagine how an entity that ultimately controls a given foreign CPO could lack a sufficient degree of transparency with respect to its own contribution of initial capital to an offshore commodity pool run by that same foreign CPO. In short, a U.S. controlling affiliate's initial investment in its affiliated non-U.S. CPO's offshore pool does not raise the same investor protection concerns as similar investments in the same pool by unaffiliated persons located in the United States. In many cases, moreover, the parent company is itself regulated by other U.S. regulators—for instance, state insurance departments in the case of insurance companies that wish to deploy their own general account assets as they best see fit, in keeping with their separate regulatory regimes. Accordingly, I see no reason to deploy the limited, taxpayer-funded resources of the CFTC to protect U.S. parents of foreign CPOs who are far better positioned than our federal agency to safeguard their own interests.

## Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I am pleased to support today's proposal to amend the Commission's regulation providing an exemption from registration for a foreign commodity pool operator trading on U.S. markets on behalf of foreign investors.[1] Building on previously granted staff no-action relief, the proposal would create new possibilities for fund managers and provide for simplified compliance. At the same time, the proposal ensures that the Commodity Exchange Act continues to protect U.S. market participants. Like the Commission's proposal from January addressing its jurisdiction over foreign swap dealing activities,[2] this rulemaking sensibly marks the boundaries of the Commission's reach into foreign derivatives trading activities in light of market realities. And like the proposal from earlier this year amending the Commission's regulations governing commodity broker bankruptcies,[3] in this rulemaking the Commission staff applies their experience to make the Commission's regulations more efficient.

I would like to highlight certain aspects of the proposal. It would permit a foreign fund manager to satisfy the exemption's requirement that its pool does not contain funds of U.S. investors by complying with certain safe harbors, such as fund documentation disclosures.[4] The proposal recognizes that the manner in which fund interests are sold in the real world often makes it impossible for a fund manager to make a blanket attestation that there is no U.S. investment in a given commodity pool. I am also particularly pleased to see that U.S. affiliates of foreign pools would have the ability to contribute initial capital to those pools.[5]

I applaud the staff of the Commission for continuing their work despite the COVID–19 pandemic and I look forward to reviewing the industry's comments.

## Appendix 4—Statement of Commissioner Rostin Behnam

I will support today's notice of proposed rulemaking and reopening of a comment period primarily aimed at amending the conditions of the current exemption under Commission regulation 3.10(c)(3) (referred to as the ''3.10 Exemption'') available to certain non-U.S. commodity pool operators (CPOs) to further reflect the increasingly global nature of the CPO space and clarify the Commission's approach with respect to its oversight of foreign intermediaries that are not engaged in commodity interest activities on behalf of U.S. customers. I greatly appreciate the time and consideration that the staff of the Division of Swap Dealer and Intermediary Oversight (DSIO) gave to my comments and concerns. I also wish to thank the Office of General Counsel (OGC) staff for ensuring that we consistently adhere to the letter and spirit of the Commodity Exchange Act (CEA or the ''Act'') and regulations. I am pleased that the ongoing dialog that has become a hallmark of many working relationships within the Commission is enduring better than ever through the pandemic, and that we can advance important policy and regulatory initiatives without sacrificing constructive debate and deliberation.

Today's proposal both expands the availability of the 3.10 Exemption to non-U.S. CPOs who operate both qualifying offshore commodity pools and other commodity pools that may or may not meet an alternative regulatory registration exemption or exclusion and eases certain identifiable and unduly restrictive impediments to relying on the 3.10 Exemption. Like several recent rulemakings undertaken with respect to Part 4 of the Commission Regulations, today's proposal is a continuation of the Commission's ongoing efforts in honing its regulatory footprint with respect to this dynamic segment of the derivatives market by refining our approach through calibrating decades of policy and rulemakings to the needs of the market participants, consumers, and the national public interest we are charged with protecting.

Though today's proposal is brief in its delivery, it reflects many years of staff experience and familiarity with the Commission's historical positions and reasoning in addressing material policy issues raised by appropriately balancing the financial interests of foreign intermediaries and their customers with our commitment to the financial integrity of U.S. markets and U.S. customer protection. I believe today's proposal equally reflects the Commission's commitment to making targeted changes in step with improvements in surveillance and monitoring capabilities as well with our

[4] The Commission also cited this policy position in the initial proposal for what ultimately became Commission regulation 3.10(c)(3)(i). *See* 72 FR 15637, 15638 (Apr. 2, 2007).

[5] Apart from policy incoherence inside the CFTC, the mismatch has also caused confusion among CPOs and their investors. A number of foreign CPOs have not adopted the strict ''all or nothing'' reading of the 3.10 Exemption, but have instead quite sensibly latched on to the Commission's stated policy behind the rule to conclude that a foreign CPO may rely on the current 3.10 Exemption for non-U.S. pools with only non-U.S. investors even if the foreign CPO operates other non-U.S. pools with U.S. investors. Given that the confusion largely stems from the Commission's own doing, I would not support any enforcement action against foreign CPOs whose interpretation followed the spirit, if not the letter, of the 3.10 Exemption. Furthermore, today's proposal, if adopted, would vindicate their reading.

[1] CFTC regulation 3.10(c)(3) (17 CFR 3.10(c)(3)).

[2] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants (Notice of Proposed Rulemaking), 85 FR 952 (Jan. 8, 2020).

[3] Bankruptcy Regulations (Notice of Proposed Rulemaking) issued by the Commission on Apr. 14, 2020, publication in the **Federal Register** pending.

[4] Proposed regulation 3.10(c)(3)(iv).

[5] Proposed regulation 3.10(c)(3)(iii).

relationships with both the National Futures Association (NFA) and foreign regulators.

Last fall, when the Commission finalized several amendments to part 4 of the regulations addressing various registration and compliance requirements for CPOs and commodity trading advisors, I commended its decision to not move forward at that time on proposals to exempt from registration qualifying CPOs operating commodity pools outside of the U.S. consistent with Commission Staff Advisory 18–96 [1] and adding a prohibition against statutory disqualifications for certain exempt CPOs.[2] The decision not to act reflected a thoughtful consideration of the comments received and the practicalities of both proposals as they related to ongoing concerns about cross-border issues and the Commission's regulatory goals.

Today's proposal results from ongoing review and discussions with market participants and the NFA to determine how best to provide relief that better aligns the Commission's customer protection concerns with the Commission's regulatory provisions in an increasingly international asset management space.[3] Other aspects of today's proposal include the addition of a safe harbor for person's engaged in CPO activities with respect to offshore commodity pools that take certain enumerated actions aimed at preventing U.S. persons from participating in such pools, and a provision permitting certain U.S. control affiliates of a non-U.S. CPO to contribute capital to such CPO's offshore pools as seed money without impacting the non-U.S. CPO's eligibility for the 3.10(c) Exemption. Taking a pause as opposed to rushing forward has afforded Commission staff additional time to tailor regulatory language so as to avoid confusion and inadvertent loss of longstanding Commission policy aimed at protecting U.S. customers.

While I have some questions and will be interested in hearing from commenters on the specific issues raised with regard to seed money and certain other aspects of the proposal that seem to permeate multiple policy-driven discussions of late, I believe today's proposal is reasonable, will reduce regulatory burdens without sacrificing key regulatory protections, and is drafted in observance of the high standards for exercising exemptive authority under section 4(c) of the Act. To that end, I am reassured that the exercise of such authority unequivocally preserves the Commission's authority outlined in section 4(d) of the Act to investigate a CPO's compliance with the requirements and conditions of the 3.10(c) Exemption, as proposed, and to bring an enforcement action for any violation of any provision of the CEA or Commission regulations caused by the failure to comply with or satisfy any of the Exemption's conditions or requirements.[4] This is in addition to the Commission's retained authority to take enforcement action against any non-U.S. CPO claiming the 3.10 Exemption based on their activities within the U.S. derivatives markets consistent with our authority regarding market participants generally.

Again, I would like to thank the staffs of DSIO, OGC and the rest of the Commissioners who worked to put forth this proposal.

## Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support the proposal to amend regulation 3.10(c)(3) addressing the exemption from registration for foreign persons who operate commodity pools for customers located outside of the United States (''Proposal''). The Commission should focus its limited resources on commodity pools in which U.S. persons participate, rather than commodity pools located outside the U.S. in which only non-U.S. persons participate. The Proposal addresses several specific scenarios in which the registration exemption would apply, and which previously created potential uncertainty for market participants.

I am concerned, however, that the provision in the Proposal that would enable controlling affiliates—U.S. entities with U.S. investors that provide capital to non-U.S. pools—to rely on the exemption could be used by CPOs who take funds directly from U.S. persons to evade the CPO registration and regulatory requirements. I look forward to reviewing comments on whether that provision is appropriate and whether additional conditions or limitations should apply to prevent such abuse.

*Non-U.S. Pools With no U.S. Customers*

It is longstanding CFTC policy that an entity that meets the CPO definition and trades commodity interests in our markets is not required to register as a CPO if the entity is located offshore and only operates pools for persons located outside of the United States.[1] In 2007, the Commission expressly codified the exemption in regulation 3.10(c)(3). Customer protection is a primary goal of the Commission's registration and regulatory requirements for CPOs.[2] The rationale for the exemption for foreign pools has been that the CFTC's customer protection regulations generally should focus on regulating activities that have an impact on U.S. customers and commerce.[3] To the extent the commodity pools that would be exempt from registration under the Proposal trade derivatives on U.S. exchanges, those activities are subject to oversight by the exchanges and through the Commission's exchange regulations.

Since the adoption of the regulation 3.10(c)(3) registration exemption, two developments have increased the need for greater clarity in the rule. First, changes to CFTC regulations since the 2008 financial crisis, particularly adding swap regulation and placing needed limits on other CPO registration exemptions, have led to a significant increase in the number of pool operators that are technically subject to registration. Second, the business of commodity investment management has become more global in nature, increasing the complexity of cross border activities by the firms that operate commodity pools.

The Proposal would exempt non-U.S. CPOs from registration and regulation with respect to individual commodity pools that do not solicit from U.S. persons or have U.S. investors.[4] The Proposal also provides that this exemption for some pools may be used with other exemptions or exclusions permitted under our regulations. These changes largely reflect the pre-existing policy that non-U.S. CPOs need not register their offshore pools.

The Proposal would provide a safe harbor to the non-U.S. CPOs in the event that U.S. persons become inadvertently invested in the offshore pools. The Proposal appears to provide adequate conditions on the safe harbor to prevent abuse thereof. I look forward to comments on whether the proposed conditions should be expanded, reduced, or otherwise modified.

Finally, the Proposal would permit a non-U.S. CPO to rely on the exemption even if a U.S. entity that controls the non-U.S. CPO contributes capital in the initial funding of the exempt offshore pools. This provision could be beneficial for U.S. fund managers seeking to compete in foreign markets and may be acceptable with appropriate limits.

I am concerned, however, that the controlling affiliate provision would enable persons in the U.S. to indirectly invest—either knowingly or unknowingly—in unregulated foreign commodity pools. Under this provision, partnerships and corporations could take in investment funds from U.S. persons and invest those funds in commodity pools operated by non-U.S. pool operators that they ''control.'' Neither the controlling

[1] Advisory No. 18–96, Offshore Commodity Pools Relief for Certain Registered CPOs from rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23 (Apr. 11, 1996), *https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm.*

[2] Rostin Behnam, Statement of Concurrence by CFTC Commissioner Rostin Behnam: Amendments to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, Nov. 25, 2019, *https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement112519.*

[3] Of note, today's proposal does not retract Staff-Advisory 18–96, remains available to U.S. CPOs and others who would not be in the position to rely on the revised 3.10(c) Exemption as proposed today.

[4] 7 U.S.C. 6(d).

[1] *See* CFTC Staff Interpretative Letter 76–21 (Aug. 15, 1976).

[2] The regulation of CPOs also facilitates the Commission's oversight of the derivative markets, management of systemic risks, and mandate to ensure safe trading practices. *See, e.g.,* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252, 11253, 11275 (Feb. 24, 2012); *upheld in Investment Company Institute* v. *CFTC,* 720 F.3d 370 (D.C. Cir. 2013).

[3] *See e.g.,* Commodity Exchange Act (''CEA'') section 2(i). In contrast to this focus on customers, a primary policy goal of swap dealer regulation is preventing systemic risk. This goal necessitates oversight of swap trading activity outside of the United States that can have a significant impact on U.S. commerce if risks from that activity come back into the U.S. financial system through regulated swap dealers. *See generally* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (July 26, 2013).

[4] The CPO would need to register and comply with CFTC regulations with regard to any other commodity pools it operates that do solicit funds from U.S. persons.

affiliates nor the pool operators would be regulated by the CFTC. The U.S. investors in the U.S. control affiliate would receive none of the CPO disclosures or other protections afforded by our laws and regulations. In fact, they may never know that the entity they are investing in is placing their funds in offshore commodity pools. There is no requirement to disclose this information to U.S. persons investing in the controlling affiliate.

Furthermore, the Proposal permits an unregistered non-U.S. CPO to accept ''initial capital contributions'' from a control affiliate that is a U.S. person, but does not provide any limitations on the duration or extent of such contributions. Arguably, under the proposed provision, the controlling affiliate could fund the *entire* pool investment with funds from U.S. persons and leave that amount in the pool with no time limitation, thus allowing a complete end-run around our CPO regulations.

The Proposal expressly acknowledges that evasion of our CPO rules is possible and says that such evasion would be unlawful. I want to thank the CFTC staff who drafted the Proposal for working with my office to add some conditions to the provision. However, I am still concerned there may be insufficient safeguards to prevent abuse. For these reasons, I requested that several questions be added to the Proposal to address which additional conditions could appropriately be added to achieve the purpose of the provision and still provide sufficient protections to the U.S. investors in the controlling affiliate. I look forward to the comments on this issue.

*Exercising Commodity Exchange Act Section 4(c) Authority*

Finally, the Proposal relies on authority provided to the Commission in CEA section 4(c) to adopt exemptions from regulatory requirements if certain public policy goals are better served and if certain conditions are satisfied. Generally, I am not in favor of using this authority unless no other direct legal authority exists and doing so clearly falls within the intent of Congress in giving the Commission that power. During the development of the draft Proposal, I raised a number of concerns regarding the use of section 4(c) and I want to commend the CFTC staff for their efforts to address my concerns by more fully explaining in the Proposal why the use of section 4(c) authority is appropriate in this instance.

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## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 1

**[REG–117589–18]**

**RIN 1545–BP02**

## Statutory Limitations on Like-Kind Exchanges

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** These proposed regulations provide guidance under the Internal Revenue Code (Code) to implement recent changes enacted in the Tax Cuts and Jobs Act. The proposed regulations amend the existing regulations to add a definition of real property to reflect statutory changes limiting section 1031 to exchanges of real property. The proposed regulations also provide a rule addressing a taxpayer's receipt of personal property that is incidental to real property the taxpayer receives in the exchange. The proposed regulations affect taxpayers that exchange business or investment property for other business or investment property and that must determine whether the exchanged properties are real property for purposes of section 1031.

**DATES:** Written or electronic comments and requests for a public hearing must be received by August 11, 2020. Requests for a public hearing must be submitted as prescribed in the ''Comments and Requests for a Public Hearing'' section.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–117589–18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send hard copy submissions to: CC:PA:LPD:PR (REG–117589–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Edward C. Schwartz, (202) 317–4740; concerning submissions of comments and outlines of topics, or requests for a public hearing, Regina L. Johnson, (202) 317–5177 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Background

*I. Overview*

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1, as revised April 1, 2019) under section 1031 of the Code (current regulations). The proposed amendments to the current regulations (proposed regulations) implement statutory amendments to section 1031 made by section 13303 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA). Section 13303(c) of the TCJA amended section 1031 to limit its application to exchanges of real property for exchanges completed after December 31, 2017, subject to a transition rule for certain exchanges in which property had been transferred before January 1, 2018. To implement these statutory changes, the proposed regulations would limit the application of the like-kind exchange rules under section 1031 to exchanges of real property and adapt an existing incidental property exception to apply to a taxpayer's receipt of personal property that is incidental to real property the taxpayer receives in the exchange.

*II. Section 1031 After the TCJA*

As amended by the TCJA, section 1031(a) provides that no gain or loss is recognized on the exchange of real property held for productive use in a trade or business or for investment (relinquished real property) if the relinquished real property is exchanged solely for real property of a like kind that is to be held either for productive use in a trade or business or for investment (replacement real property). However, left unchanged by the TCJA, section 1031(b) provides that a taxpayer must recognize gain on the receipt of money and non-like-kind property in an exchange.

*III. Current Regulations Regarding ''Like Kind''*

Although the TCJA removed personal and certain intangible property from eligibility for like-kind exchange treatment, the need to determine whether the relinquished real property

and the replacement real property are of a like kind continues to exist after the changes to section 1031 made by the TCJA. Current § 1.1031(a)–1(b) provides that ''like kind'' refers to the nature or character of the real property and not to its grade or quality. Real property of one kind or class may not, under section 1031, be exchanged for real property of a different kind or class. The fact that any real property involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the real property and not to its kind or class. Under current § 1.1031(a)–1(c), examples of exchanges of real property of a like kind include an exchange: By a non-dealer of city real estate for a farm or ranch; of improved real estate for unimproved real estate; and of a leasehold interest in a fee with 30 years or more to run for real estate.

*IV. Identification of Exchanged Properties*

Under section 1031(a)(3), unchanged by the TCJA, real property a taxpayer receives in an exchange is not like-kind property unless, within 45 days of the taxpayer's transfer of the relinquished real property, the real property is identified as replacement real property to be received in the exchange. Under current § 1.1031(k)–1(c)(4), the maximum number of properties a taxpayer may identify as replacement real property is three properties, without regard to the fair market value of the properties, or any number of properties as long as the aggregate fair market value of the properties does not exceed 200 percent of the aggregate fair market value of the relinquished real property. Current § 1.1031(k)–1(c)(5) provides that, for purposes of the identification rules, property that is incidental to a larger item of property is not treated as property separate from the larger item if, in standard commercial transactions, the property is typically transferred with the larger item of property, and the aggregate fair market value of all of the incidental property does not exceed 15 percent of the aggregate fair market value of the larger item of property.

*V. Recognition of Gain or Loss on Actual or Constructive Receipt of Non-Like-Kind Property*

Under current § 1.1031(k)–1(f)(1), if a taxpayer actually or constructively receives money or property that is not of a like kind to the taxpayer's relinquished real property (other property) before the taxpayer receives like-kind replacement real property, gain or loss may be recognized. In addition, if the money or other property the taxpayer receives is in the full amount of the consideration for the relinquished real property, the transaction is a sale and not a deferred exchange, even though the taxpayer may ultimately receive like-kind replacement real property.

Current § 1.1031(k)–1(g)(2) through (5) provides safe harbors, the use of which result in a taxpayer not being considered in actual or constructive receipt of money or other property. Under current § 1.1031(k)–1(g)(4)(i), in the case of a taxpayer's transfer of relinquished property involving a qualified intermediary, the qualified intermediary is not considered the agent of the taxpayer for purposes of section 1031(a) and the determination of whether the taxpayer is in actual or constructive receipt of money or other property is made as if the qualified intermediary is not the agent of the taxpayer. However, current § 1.1031(k)–1(g)(4)(i) applies only if, pursuant to the requirements of current § 1.1031(k)–1(g)(6)(i), the agreement between the taxpayer and the qualified intermediary expressly limits the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by the qualified intermediary.

Under current § 1.1031(k)–1(g)(7), in determining whether a taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property are expressly limited as provided in current § 1.1031(k)–1(g)(6), the taxpayer's receipt of or right to receive items that a seller may receive as a consequence of the disposition of property and that are not included in the amount realized from the disposition of property (for example, prorated rents) are disregarded. Also disregarded are transactional items that relate to the disposition of the relinquished property or to the acquisition of the replacement property and appear under local standards in the typical closing statements as the responsibility of a buyer or seller, such as commissions, prorated taxes, recording or transfer taxes, and title company fees.

**Explanation of Provisions**

*I. Definition of Real Property*

A. Approach of the Proposed Regulations

The determination of whether property is real property has taken on additional significance as a result of the TCJA amendments limiting like-kind exchange treatment under section 1031 to exchanges of real property. Prior to enactment of the TCJA, neither the Code nor the Income Tax Regulations provided a definition of the term ''real property'' for purposes of section 1031. The Treasury Department and the IRS have determined that regulations providing guidance on whether property is real property under section 1031 are needed because taxpayers need certainty regarding whether any part of the replacement property received in an exchange is non-like-kind property subject to the gain recognition rules of section 1031(b).

The legislative history to the TCJA provides that real property eligible for like-kind exchange treatment under pre-TCJA law should continue to be eligible for like-kind exchange treatment after the enactment of the TCJA. The legislative history further provides that real property under section 1031 includes shares in a mutual ditch, reservoir, or irrigation company described in section 501(c)(12)(A) of the Code if the state in which the company is organized views the shares of the company as real property. Similarly, improved real estate and unimproved real estate are generally considered to be property of a like kind. H. Rept. 115–466, at 396, fn. 726 (2017) (Conference Report). These proposed regulations define the term ''real property'' for purposes of section 1031 in a manner consistent with the scope described by Congress in the Conference Report.

Various Income Tax Regulations provide definitions of real property for purposes of applying Code sections other than section 1031. For example, § 1.263(a)–3(b) generally defines real property for purposes of the requirement to capitalize amounts paid to acquire, produce, or improve tangible property under section 263(a) by reference to §§ 1.48–1(c) and (d). Section 1.263A–8(c) provides a definition of real property for purposes of determining whether interest expense relating to the production of designated property must be capitalized under the rules in § 1.263A–8. Section 1.1250–1(e)(3) defines real property for purposes of determining depreciation or amortization recapture upon the disposition of certain property. Specifically, § 1.1250–1(e)(3) uses section 48 principles for the definition of real property through its reference to the rules in § 1.1245–3(c). Section 1.856–10 provides a definition of real property for determining whether a corporation qualifies as a real estate investment trust (REIT) under sections 856 through 859 of the Code. Section 1.897–1(b) defines real property for purposes of section 897, which treats gain or loss from a foreign person's disposition of a U.S. real property

interest as income effectively connected with a U.S. trade or business.

Although there are many similarities in the way various sections of the Code, and the regulations under those sections, define ''real property,'' there are also differences in those definitions that reflect the different purposes underlying those provisions. Certain sections of the Code and Income Tax Regulations apply broad definitions and sets of rules for the definition of real property, while others apply narrower definitions. For example, § 1.1250–1(e)(3) uses a narrow definition of real property, which is relied upon for purposes of applying section 168 and former section 38. Under section 168, a tangible asset that is personal property, as opposed to real property, generally is depreciated at a faster rate than real property is depreciated. *See* section 168(c) and (g)(2)(C). Under former section 38, the investment tax credit applied to qualified investment in depreciable property (section 38 property) described in former section 48(a), which primarily included tangible personal property and excluded real property. *See* §§ 1.48–1(c) and (d). In contrast, section 897 uses a broad definition of real property that includes items of personal property that are associated with the use of real property. *See* section 897(c)(6)(B) (real property includes movable walls, furnishings, and other personal property associated with the use of the real property). Under section 897, an item of property may be treated as a U.S. real property interest under the Foreign Investment in Real Property Act provisions, notwithstanding that it is characterized as personal property for other purposes of the Code. In the context of REITs under sections 856 through 859, the regulations defining real property set forth a broader definition for purposes of satisfying the REIT quarterly asset test. The regulations under section 856 were based in part on the particular policies underlying the REIT provisions, and apply only for purposes of the REIT provisions.

The Treasury Department and the IRS have concluded that it would not be appropriate to adopt wholesale as the definition of real property for purposes of section 1031 an existing definition of real property from another section of the Code or regulations due to the varying purposes of each of the provisions of the Code, and the intent of Congress that real property eligible for like-kind exchange treatment under pre-TCJA law should continue to be eligible for like-kind exchange treatment in years beginning after 2017. Using the definition of real property in § 1.263(a)–3(b), § 1.263A–8(c), § 1.1250–1(e), or other regulations discussed in this Explanation of Provisions, would be inappropriate because, for example, certain shares in a mutual ditch, reservoir, or irrigation company are real property eligible for like-kind exchange treatment under pre-TCJA law, but would not be real property under some of the other regulations. Similarly, § 1.856–10 provides that property having an active function such as producing, manufacturing, or creating a product is not real property under section 856, but nothing in pre-TCJA section 1031 law suggests that real property held for productive use in a trade or business or for investment should necessarily be excluded from the definition of real property because of an active rather than passive function.

Thus, instead of a wholesale adoption of an existing real property definition used in another Code or regulations section, these proposed regulations incorporate certain aspects from existing regulatory definitions of real property that are consistent with the legislative history underlying the TCJA amendment to section 1031 indicating that real property eligible for like-kind exchange treatment under pre-TCJA law should continue to be eligible for like-kind exchange treatment after the enactment of the TCJA. See, for example, §§ 1.263(a)–3(b)(3) and 1.856–10 defining the term ''real property'' to mean land and improvements to land such as buildings and other inherently permanent structures, and their structural components, and providing that local law is not controlling for purposes of determining whether property is real property under that section; § 1.263A–8(c) providing that real property includes unsevered natural products of land such as growing crops and plants, mines wells and other natural deposits; and § 1.856–10(c) providing, in relevant part, that the term ''land'' includes ''water and air space superjacent to land.

B. Proposed Definition of Real Property

Under the proposed regulations, real property includes land and improvements to land, unsevered crops and other natural products of land, and water and air space superjacent to land. Improvements to land include inherently permanent structures and the structural components of inherently permanent structures. The proposed regulations also provide that local law definitions generally are not controlling in determining the meaning of the term ''real property'' for purposes of section 1031. This real property definition language is very similar to the language in most of the other regulatory provisions previously mentioned, including the regulations under section 48, section 263(a), and section 263A. The definition under the proposed regulations, however, includes differences necessary for the proper application of section 1031.

These proposed regulations provide that each distinct asset must be analyzed separately from any other assets to which the asset relates to determine if the asset is real property, whether as land, an inherently permanent structure, or a structural component of an inherently permanent structure. Items that are specifically listed in these proposed regulations as buildings and other inherently permanent structures are distinct assets. Assets and systems specifically listed in these proposed regulations as types of structural components also are treated as distinct assets. Other distinct assets are identified using factors provided by these proposed regulations. All listed factors must be considered, and no one factor is determinative. These rules are based on similar rules concerning distinct assets in § 1.856–10(e).

The proposed regulations provide that inherently permanent structures include any building or other structure that is permanently affixed to real property and that will ordinarily remain affixed for an indefinite period of time. For this purpose, the proposed regulations define a ''building'' as any structure or edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display, or sales space. ''Buildings'' also include the following distinct assets if permanently affixed: Houses, apartments, hotels, motels, enclosed stadiums and arenas, enclosed shopping malls, factory and office buildings, warehouses, barns, enclosed garages, enclosed transportation stations and terminals, and stores. The definition of building and the examples of buildings in the proposed regulations are derived from § 1.48–1(e)(1) and § 1.856–10(d)(2)(ii)(B).

The proposed regulations also provide a list of structures that qualify as inherently permanent structures. If property is not included in the list of inherently permanent structures, the proposed regulations provide factors that must be used to determine whether the property is an inherently permanent structure for purposes of section 1031. These factors are similar to the factors in § 1.856–10(d)(2)(iv).

Under the proposed regulations, property that is in the nature of

machinery or is essentially an item of machinery or equipment is generally not an inherently permanent structure and not real property under section 1031. In the case, however, of a building or inherently permanent structure that includes property in the nature of machinery as a structural component, the machinery is real property if it serves the inherently permanent structure and does not produce or contribute to the production of income other than for the use or occupancy of space. These rules regarding machinery are very similar to the rules in § 1.263A–8(c)(4) and § 1.856–10(d)(3).

Under the proposed regulations, structural components of inherently permanent structures are improvements to land and thus real property for purposes of section 1031. A structural component is any distinct asset that is a constituent part of, and integrated into, an inherently permanent structure. If interconnected assets work together to serve an inherently permanent structure (for example, systems that provide a building with electricity, heat, or water), the assets are analyzed together as one distinct asset that may qualify as a structural component. For example, a gas line that provides fuel to a building's heating system comprises a part of the structural component that is the heating system, and therefore qualifies as real property for section 1031 purposes. However, if the purpose of a gas line is to provide fuel to business equipment in a building, such as fryers and ovens in a building utilized as a restaurant, the gas line is not a constituent part of an inherently permanent structure and therefore not real property for section 1031 purposes. Comments are requested on whether the function of a distinct asset that is not machinery is appropriate to use as the basis for determining whether the asset qualifies as real property for section 1031 purposes.

A structural component may qualify as real property only if the taxpayer holds its interest in the structural component together with a real property interest within the physical space of the inherently permanent structure served by the structural component. If a distinct asset is customized in connection with the rental of space in or on an inherently permanent structure to which the asset relates, the customization does not affect whether the distinct asset is a structural component.

The proposed regulations also contain a list of properties that are structural components for purposes of section 1031. For components not included in the list, the proposed regulations provide factors for determining whether the component is a structural component of a building or inherently permanent structure and thus real property for section 1031 purposes. The proposed regulations also address tenant improvements to a building that are inherently permanent or otherwise classified as real property and property produced for sale that is not real property in the hands of the producing taxpayer or a related person. The rules in the proposed regulations relating to structural components are similar to the rules in many of the other regulations discussed in this preamble.

The proposed regulations provide that unsevered natural products of land generally are treated as real property under section 1031. This includes growing crops, plants, and timber; mines; wells; and other natural deposits. Natural products and deposits, such as crops, timber, water, ores, and minerals, cease to be real property when they are severed, extracted, or removed from the land.

The proposed regulations also address instances in which intangible property is considered real property under section 1031. An intangible asset is real property or an interest in real property for purposes of section 1031 to the extent it derives its value from real property or an interest in real property, is inseparable from that real property or interest in real property, and does not produce or contribute to the production of income other than consideration for the use or occupancy of space. For instance, a license, permit, or other similar right that is solely for the use, enjoyment, or occupation of land or an inherently permanent structure, and that is in the nature of a leasehold, easement, or fee ownership, generally is an interest in real property for purposes of section 1031.

Under the proposed regulations, a license or permit to engage in or operate a business on real property is not real property or an interest in real property for purposes of section 1031 if the license or permit produces or contributes to the production of income other than consideration for the use and occupancy of space. The rules in the proposed regulations relating to intangible assets are similar to the rules in § 1.856–10(f) and are consistent with pre-TCJA law concerning whether an intangible asset is real property for section 1031 purposes. *See Commissioner* v. *Crichton,* 122 F.2d 181 (5th Cir. 1941), concluding that an interest in mineral rights is real property for section 1031 purposes, *Peabody Natural Resources Co.* v. *Commissioner,* 126 T.C. 261 (2006), holding that coal supply contracts were real property for section 1031 purposes, and Rev. Rul. 68–331, 1968–1 C.B. 352, holding that the interest of a lessee in a producing oil lease is an interest in real property for section 1031 purposes.

These proposed regulations define real property only for purposes of section 1031. Consequently, the proposed regulations provide that no inference should be drawn from the section 1031 definition of real property for any purpose outside of section 1031, including for the classification of property for depreciation, whether depreciation recapture applies, or defining an asset for disposition purposes under section 168 and the regulations under section 168.

The Treasury Department and the IRS request comments regarding the definition of real property set forth in these proposed regulations. In particular, the Treasury Department and the IRS request comments regarding the proposed relevant factors and analysis for determining the qualification of an item as real property.

*II. Incidental Personal Property*

The Treasury Department and the IRS are aware that taxpayers have questioned the effect of the receipt of personal property that is incidental to the taxpayer's replacement real property in an intended section 1031 exchange. For example, taxpayers have asked whether an exchange fails to meet the requirements of § 1.1031(k)–1(g)(6)(i) if funds from the transfer of relinquished property held by the qualified intermediary are used to acquire an office building, including the personal property in the office building. Taxpayers and qualified intermediaries are concerned that a taxpayer would be considered to be in constructive receipt of all of the exchange funds held by the qualified intermediary if the taxpayer is able to direct the qualified intermediary to use those funds to acquire property that is not of a like kind to the taxpayer's relinquished property. Under § 1.1031(k)–1(a), if a taxpayer actually or constructively receives the funds held by a qualified intermediary before receiving the replacement property, the transaction is a sale and not a section 1031 like-kind exchange.

In response to these inquiries, the proposed regulations add to the items in § 1.1031–1(g)(7) that are disregarded in determining whether the agreement between the taxpayer and the qualified intermediary expressly limits the taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by the qualified intermediary. The proposed

regulations provide that personal property that is incidental to replacement real property is disregarded in determining whether a taxpayer's rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by a qualified intermediary are expressly limited as provided in § 1.1031(k)–1(g)(6). Personal property is incidental to real property acquired in an exchange if, in standard commercial transactions, the personal property is typically transferred together with the real property, and the aggregate fair market value of the incidental personal property transferred with the real property does not exceed 15 percent of the aggregate fair market value of the replacement real property. This incidental property rule in the proposed regulations is based on the existing rule in § 1.1031(k)–1(c)(5), which provides that certain incidental property is ignored in determining whether a taxpayer has properly identified replacement property under section 1031(a)(3)(A) and § 1.1031(k)–1(c).

The Treasury Department and the IRS request comments regarding the proposed treatment of a taxpayer's receipt of personal property that is incidental to the taxpayer's replacement real property in an intended section 1031 exchange. In addition, the Treasury Department and the IRS request comments regarding the two-factor analysis for determining whether personal property is incidental to real property acquired in such an exchange. In particular, comments are requested with regard to the appropriateness of the proposed 15-percent fair market value limit set forth in that test for personal property transferred with real property.

*III. Outdated Regulations*

The Treasury Department and the IRS request comments regarding whether existing regulations under section 1031 that apply to tax years before the TCJA amendments to section 1031 limiting its application to exchanges of real property should be removed.

**Proposed Applicability Date**

These proposed regulations apply to exchanges beginning on or after the date the regulations are published as final regulations in the **Federal Register**. Pending issuance of the final regulations, a taxpayer may rely on these proposed regulations, if followed consistently and in their entirety, for exchanges of real property beginning after December 31, 2017, and before the final regulations are published.

**Special Analyses**

*I. Regulatory Planning and Review—Economic Analysis*

Executive Orders 12866, 13563 and 13771 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including (i) potential economic, environmental, and public health and safety effects, (ii) potential distributive impacts, and (iii) equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

These regulations have been designated as significant under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these regulations as significant under section 1(b) of the MOA. Accordingly, the OMB has reviewed these regulations.

*A. Background*

1. Like-Kind Exchange

Prior to the amendment of section 1031 by the TCJA, certain exchanges of personal, intangible, or real property held for use in a trade or business or for investment qualified for nonrecognition under section 1031. Section 13301 of the TCJA generally limits the application of like-kind exchange treatment to exchanges of real property after December 31, 2017, subject to a transition rule applicable to exchanges not completed by January 1, 2018. Specifically, section 1031 provides that no gain or loss is recognized on the exchange of real property held for productive use in a trade or business or for investment if the real property is exchanged solely for real property of a like kind that is to be held either for productive use in a trade or business or for investment.

2. Proposed Regulations

The proposed rules provide a definition of real property to distinguish it from personal property, as the TCJA limited the nonrecognition of gain or loss in the case of like-kind exchange to exchanges of real property. The legislative history to the TCJA provides that real property eligible for like-kind exchange treatment prior to the TCJA should continue to be eligible for like-kind exchange treatment. H. Rept. 115–466, at 396, fn. 726 (2017). Therefore, the Treasury Department and the IRS propose to extract certain portions of the definition of real property from various existing regulations that are consistent with the legislative history underlying the TCJA amendment to section 1031. See, for example, §§ 1.263(a)–3(b)(3) and 1.856–10 defining the term ''real property'' to mean land and improvements to land such as buildings and other inherently permanent structures, and their structural components, and providing that local law is not controlling for purposes of determining whether property is real property; § 1.263A–8(c) providing that real property includes unsevered natural products of land such as growing crops and plants, mines wells and other natural deposits; and § 1.856–10(c) providing, in relevant part, that the term ''land'' includes ''water and air space superjacent to land.'' Consistent with these existing regulations, the proposed regulations define real property to include land and improvements to land, unsevered crops and other natural products of land, and water and air space superjacent to land. Improvements to land include inherently permanent structures, and the structural components of inherently permanent structures.

The proposed regulations also include a separate rule relating to personal property in an exchange that is incidental to the real property exchanged. Under this rule, personal property is incidental to real property acquired in an exchange if, in standard commercial transactions, the personal property is typically transferred together with the real property, and the aggregate fair market value of the incidental personal property transferred with the real property does not exceed 15 percent of the aggregate fair market value of the replacement real property. This incidental property rule in the proposed regulations is based on an existing rule in the regulations under 1031, which provides that certain incidental property is ignored in determining whether a taxpayer has properly identified replacement property.

3. No-Action Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these proposed regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these proposed regulations.

4. Economic Analysis of Regulation

In general, the proposed regulations use existing definitions of real property

in the Income Tax Regulations to define real property under section 1031 so that like-kind exchanges of real property that took place prior to the TCJA would qualify for like-kind exchange treatment after the passage of the TCJA, which is consistent with the legislative history of the TCJA. In addition, taxpayers are familiar with the approach in the proposed regulations concerning incidental personal property, which is consistent with rules regarding identification of replacement property under existing section 1031 regulations.

The statutory changes made by the TCJA to section 1031 limit like-kind exchanges to real property. Consistent with longstanding regulations under section 1031, in determining whether a taxpayer has actual or constructive receipt of money or other property held by a qualified intermediary, the proposed regulations disregard certain incidental personal property. Specifically, the proposed regulations disregard incidental personal property that (1) in standard commercial transactions is typically transferred together with the real property, and (2) does not exceed 15 percent of the aggregate fair market value of the replacement real property. Nonetheless, under section 1031(b), a taxpayer must recognize gain on the receipt of the incidental personal property, which is non-like-kind property. The proposed 15-percent limitation is responsive to ordinary-course exchanges that often commingle personal property and real property as part of the aggregate exchanged property.

With regard to a limitation in excess of 15 percent, the Treasury Department determined that a higher limit might induce taxpayers to bundle more personal property with their exchanged property. Such a result would lead to increased amounts of personal property exchanged with real property under section 1031 and effectively unlock a class of personal property that would no longer be ''incidental'' to the real property. With regard to a lower limit, the Treasury Department has determined that the burden of accurately measuring the separate costs of comingled personal and real property would increase.

In addition, the proposed 15 percent incidental personal property limitation would reduce the cost of investing in real property, when compared to no exchanges for incidental personal property. Raising this limit, however, would further increase the tax incentives for investing in such property, although most taxpayers will be indifferent when exchanging incidental property, plants, and equipment with a depreciable life of 20 years or less that is eligible for 100 percent additional first year depreciation, commonly referred to as ''bonus depreciation.'' Under 100 percent bonus depreciation, gains from the sale of property can be offset by deductions for investment in other qualifying property. Qualifying property acquired after September 27, 2017, and placed in service after September 27, 2017, and generally before January 1, 2023, qualifies for full bonus depreciation. The bonus depreciation rate is phased down 20 percent a year for property placed in service after this date. In the absence of 100 percent bonus depreciation, expanding incentives for like-kind exchange through a higher incidental personal property limitation could also distort investment decisions within and across industries leading to over-investment in like-kind properties relative to consistent treatment across properties. The Treasury Department requests comments and information that would help further inform the analysis underlying the proposed 15-percent limitation for incidental personal property.

The Treasury Department and the IRS have determined that these rules will not have a significant effect on the market for like-kind exchanges of real property. Finally, these proposed regulations do not significantly affect compliance burdens as the regulations are substantially similar to existing regulations affecting like-kind exchanges for real property.

*II. Paperwork Reduction Act*

The collection of information in these proposed regulations is reflected in the collection of information for Form 8824, Like-Kind Exchanges, which has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)) under control numbers 1545–0074. The number of respondents to Form 8824 for tax year 2018 is estimated at 125,000–220,000. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545–0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for taxpayers who file Form 8824, which has not changed as a result of these proposed regulations, is shown below.

Recordkeeping—10 hr., 16 min.
Learning about the law or the form—1 hr., 59 min.
Preparing the form—2 hr., 14 min.

Form 8824 is used by taxpayers engaging in section 1031 like-kind exchanges. Beginning after December 31, 2017, section 1031 like-kind exchange treatment applies only to exchanges of real property held for use in a trade or business or for investment, other than real property held primarily for sale. Before the law change, section 1031 also applied to certain exchanges of personal or intangible property. These proposed regulations provide a definition of real property for purposes of section 1031 and a rule for the receipt of personal property that is incidental to real property received in an exchange, and makes conforming changes to the regulations. The law change reflected in the proposed regulations will result in fewer taxpayers engaging in section 1031 like-kind exchanges. This decrease in burden will be reflected in the updated burden estimates for the Form 8824. The requirement to maintain records to substantiate information on the Form 8824 is already contained in the burden associated with the control numbers for those forms and remains unchanged. For purposes of the Paperwork Reduction act, no burden estimates specific to the proposed regulations are currently available. The Treasury Department has not estimated the burden, including that of any new information collections, related to the requirements under the proposed regulations. Those estimates would capture both changes made by the TCJA and those that arise out of discretionary authority exercised in the proposed regulations.

The current status of the Paperwork Reduction Act submissions related to 1031 is provided in the following table. The 1031 provisions are included in aggregated burden estimates for OMB control number 1545–0074, which represents a total estimated burden time, including all related forms and schedules, of 1.784 billion hours and total estimated monetized costs of $31.764 billion ($2017). The burden estimates provided in the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include but not isolate the estimated burden of only the 1031 requirements. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. The Treasury Department and IRS urge readers to recognize that these numbers are duplicates and to guard against over-counting the burden that tax provisions imposed prior to the Act. The Treasury Department and the

IRS request comments on all aspects of information collection burdens related to the proposed regulations. In addition, when available, drafts of IRS forms are posted for comment at *www.irs.gov/draftforms*.

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|---|---|---|
| Form 8824 ..... | Individual (NEW Model) 1545–0074 ..... | Sixty-day notice published in the **Federal Register** on 9/30/19 (84 FR 51712). Public Comment period closed on 11/29/19. Thirty-day notice published in the **Federal Register** on 12/18/19 (84 FR 69458). Comment period closed on 1/17/20. Approved by OMB through 1/31/2021. |

Link: *https://www.federalregister.gov/documents/2019/12/18/2019-27285/agency-information-collection-activities-submission-for-omb-review-comment-request-us-individual*.

Form 8824 is also used by members of the executive branch of the Federal Government and judicial officers of the Federal Government to elect to defer gain under section 1043 on certain sales of property due to potential conflicts of interest arising from their status as government officials. These proposed regulations do not address or affect the deferral of gain on sales under section 1043.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

*III. Regulatory Flexibility Act*

It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

These proposed regulations update existing regulations under section 1031 to reflect statutory changes made to section 1031 by the TCJA. Section 1031 provides that a taxpayer exchanging investment property or property held for productive use in a trade or business for other investment or trade or business property recognizes gain only to the extent of money or other non-like-kind property received in the exchange, and recognizes no loss on the exchange. Under the TCJA amendments to section 1031, for years after 2017, section 1031 applies only to exchanges of real property and no longer applies to exchanges of personal property and certain intangible property. The proposed regulations provide a definition of real property to be used in determining whether a taxpayer has met the requirements of section 1031. In so doing, the proposed regulations follow the legislative history underlying the TCJA amendment to section 1031 providing that real property eligible for like-kind exchange treatment under pre-TCJA law continues to be eligible for like-kind exchange treatment in years beginning after 2017. Consequently, the proposed regulations use certain aspects from existing regulatory definitions of real property that are consistent with the legislative history underlying the TCJA amendment to section 1031 requiring that the definition of real property remain the same both before and after enactment of the TCJA. Taxpayers already are familiar with these rules, which provide that real property includes land, improvements to land, unsevered natural products of land, and water and air space superjacent to land. In addition, the proposed regulations provide a rule addressing a taxpayer's receipt of personal property that is incidental to the real property the taxpayer receives in the exchange that is based on an existing rule in § 1.1031(k)–1.

Individuals and business entities that own investment real property or real property held for productive use in a trade or business may engage in a section 1031 exchange. The provisions of section 1031 apply in the same manner to all taxpayers, so the effect of the proposed regulations is the same for taxpayers that are small entities and taxpayers that are not small entities. The small entities potentially impacted by these regulations are businesses organized as corporations (including S corporations), partnerships, and individuals that file a Form 1040 Schedule C for their respective trades or businesses or Form 1040 Schedule E for their rental real estate.

The number of small entities potentially affected by these proposed regulations is unknown but likely substantial because like-kind exchange are entered into by entities of all sizes. Although a substantial number of small entities is potentially affected by these proposed regulations, the Treasury Department and the IRS have concluded that the proposed regulations will not have a significant economic impact on a substantial number of small entities because the costs to comply with these proposed regulations are not significant. This is because for taxpayers still able to engage in section 1031 exchanges, there are no additional forms they are required to file, and there is no new recordkeeping required, to comply with section 1031 as amended by the TCJA and these proposed regulations. Thus, taxpayers that engage in like-kind exchanges of real property in 2018 and later years won't have any additional burden as compared to taxpayers engaging in like-kind exchanges in years before 2018. Accordingly, it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities.

Notwithstanding this certification, the Treasury Department and the IRS invite comments from the public about the impact of this proposed rule on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

*IV. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold is approximately $164 million. This proposed rule does not include any mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

*V. Executive Order 13132: Federalism*

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state

law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial, direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

**Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *http://www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be submitted electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, 2020–17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

**Drafting Information**

The principal author of these proposed regulations is Edward C. Schwartz of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

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

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

* * * * *

■ **Par. 2.** Section 1.168(i)–1 is amended by:

■ 1. In the last sentence in paragraph (e)(2)(viii)(A), removing ''does not apply.'' at the end of the sentence and adding ''and the distinct asset determination under § 1.1031(a)–3(a)(4) do not apply.'' in its place;

■ 2. In the first sentence in paragraph (m)(1), removing the word ''This'' at the beginning of the sentence and adding ''Except as provided in paragraph (m)(5) of this section, this'' in its place; and

■ 3. Redesignating paragraph (m)(5) as paragraph (m)(6) and adding new paragraph (m)(5).

The addition reads as follows:

**§ 1.168(i)–1 General asset accounts.**

* * * * *

(m) * * *

(5) *Application of paragraph (e)(2)(viii)(A).* The language ''and the distinct asset determination under § 1.1031(a)–3(a)(4) do not apply.'' in the last sentence of paragraph (e)(2)(viii)(A) of this section applies on or after [EFFECTIVE DATE OF THE FINAL RULE]. Paragraph (e)(2)(viii)(A) of this section as contained in 26 CFR part I edition revised as of April 1, 2019, applies before the effective date of the final rule.

■ **Par. 3.** Section 1.168(i)–8 is amended by:

■ 1. In the last sentence in paragraph (c)(4)(i), removing ''does not apply.'' at the end of the sentence and adding ''and the distinct asset determination under § 1.1031(a)–3(a)(4) do not apply.'' in its place;

■ 2. At the beginning of the sentence in paragraph (j)(1), removing the word ''This'' and adding ''Except as provided in paragraph (j)(5) of this section, this'' in its place;

■ 3. Redesignating paragraph (j)(5) as paragraph (j)(6) and adding new paragraph (j)(5).

The addition reads as follows:

**§ 1.168(i)–8 Dispositions of MACRS property.**

* * * * *

(j) * * *

(5) *Application of paragraph (c)(4)(i).* The language ''and the distinct asset determination under § 1.1031(a)–3(a)(4) do not apply.'' in the last sentence of paragraph (c)(4)(i) of this section applies on or after [EFFECTIVE DATE OF THE FINAL RULE]. Paragraph (c)(4)(i) of this section as contained in 26 CFR part I edition revised as of April 1, 2019, applies before the effective date of the final rule.

■ **Par. 4.** Section 1.1031–0 is amended by revising the entry for § 1.1031(a)–1(e) and adding entries for § 1.1031(a)–3 to read as follows:

**§ 1.1031–0 Table of contents.**

* * * * *

*§ 1.1031(a)–1 Property held for productive use in a trade or business or for investment.*

* * * * *

(e) Applicability dates.

* * * * *

§ 1.1031(a)–3 Definition of real property.

(a) Real property.

(b) Examples.

(c) Applicability date.

* * * * *

■ **Par. 5.** Section 1.1031(a)–1 is amended by adding paragraph (a)(3) and revising paragraph (e) to read as follows:

**§ 1.1031(a)–1 Property held for productive use in trade or business or for investment.**

(a) * * *

(3) *Exchanges after 2017.* Pursuant to section 13303 of Public Law 115–97 (131 Stat. 2054), for exchanges beginning after December 31, 2017, section 1031 and §§ 1.1031(a)–1, 1.1031(b)–2, 1.1031(d)–1T, 1.1031(d)–2, 1.1031(j)–1, 1.1031(k)–1, and references to section 1031 in §§ 1.1031(b)–1, 1.1031(c)–1, and 1.1031(d)–1, apply only to qualifying exchanges of real property (within the meaning of § 1.1031(a)–3) that is held for productive use in a trade or business, or for investment, and that is not held primarily for sale.

* * * * *

(e) *Applicability dates*—(1) *Exchanges of partnership interests.* The provisions of paragraph (a)(1) of this section relating to exchanges of partnership interests apply to transfers of property made by taxpayers on or after April 25, 1991.

(2) *Exchanges after 2017.* The provisions of paragraph (a)(3) of this section apply to exchanges beginning on or after [EFFECTIVE DATE OF THE FINAL RULE].

■ **Par. 6.** Section 1.1031(a)–3 is added to read as follows:

**§ 1.1031(a)–3 Definition of real property.**

(a) *Real property*—(1) *In general.* The term *real property* under section 1031 and §§ 1.1031(a)–1 through 1.1031(k)–1 means land and improvements to land, unsevered natural products of land, and water and air space superjacent to land. Under paragraph (a)(5) of this section, an interest in real property of a type described in this paragraph (a)(1), including fee ownership, co-ownership, a leasehold, an option to acquire real property, an easement, or a similar interest, is real property for purposes of section 1031 and this section. Except for a state's characterization of shares in a

mutual ditch, reservoir, or irrigation company described in paragraph (a)(5)(i) of this section, local law definitions are not controlling for purposes of determining the meaning of the term *real property* under this section.

(2) *Improvements to land*—(i) *In general.* The term *improvements to land* means inherently permanent structures and the structural components of inherently permanent structures.

(ii) *Inherently permanent structures*—(A) *In general.* The term *inherently permanent structures* means any building or other structure that is a distinct asset within the meaning of paragraph (a)(4) of this section and is permanently affixed to real property and that will ordinarily remain affixed for an indefinite period of time.

(B) *Building.* A building is any structure or edifice enclosing a space within its walls, and covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display, or sales space. Buildings include the following distinct assets if permanently affixed: Houses, apartments, hotels, motels, enclosed stadiums and arenas, enclosed shopping malls, factories and office buildings, warehouses, barns, enclosed garages, enclosed transportation stations and terminals, and stores.

(C) *Other inherently permanent structures.* Inherently permanent structures under this paragraph (a)(2)(ii) include the following distinct assets, if permanently affixed: In-ground swimming pools; roads; bridges; tunnels; paved parking areas, parking facilities, and other pavements; special foundations; stationary wharves and docks; fences; inherently permanent advertising displays for which an election under section 1033(g)(3) is in effect; inherently permanent outdoor lighting facilities; railroad tracks and signals; telephone poles; power generation and transmission facilities; permanently installed telecommunications cables; microwave transmission, cell, broadcasting, and electric transmission towers; oil and gas pipelines; offshore drilling platforms, derricks, oil and gas storage tanks; grain storage bins and silos; and enclosed transportation stations and terminals. Affixation to real property may be accomplished by weight alone. If property is not listed as an inherently permanent structure in this paragraph (a)(2)(ii)(C), the determination of whether the property is an inherently permanent structure under this paragraph (a)(2)(ii) is based on the following factors—

(*1*) The manner in which the distinct asset is affixed to real property;

(*2*) Whether the distinct asset is designed to be removed or to remain in place;

(*3*) The damage that removal of the distinct asset would cause to the item itself or to the real property to which it is affixed;

(*4*) Any circumstances that suggest the expected period of affixation is not indefinite; and

(*5*) The time and expense required to move the distinct asset.

(D) *Machinery.* Property that is in the nature of machinery or is essentially an item of machinery or equipment is generally not an inherently permanent structure and not real property for purposes of this section. In the case, however, of a building or inherently permanent structure that includes property in the nature of machinery as a structural component, the machinery is real property provided it serves the inherently permanent structure and does not produce or contribute to the production of income other than for the use or occupancy of space.

(iii) *Structural components*—(A) *In general.* The term *structural component* means any distinct asset, within the meaning of paragraph (a)(4) of this section, that is a constituent part of, and integrated into, an inherently permanent structure. If interconnected assets work together to serve an inherently permanent structure (for example, systems that provide a building with electricity, heat, or water), the assets are analyzed together as one distinct asset that may be a structural component. A structural component may qualify as real property only if the taxpayer holds its interest in the structural component together with a real property interest in the space in the inherently permanent structure served by the structural component. If a distinct asset is customized, the customization does not affect whether the distinct asset is a structural component. Tenant improvements to a building that are inherently permanent or otherwise classified as real property within the meaning of this paragraph (a)(2)(iii) are real property under this section. However, property produced for sale, such as bricks, nails, paint, and windowpanes, that is not real property in the hands of the producing taxpayer or a related person, as defined in section 1031(f)(3), but that may be incorporated into real property by an unrelated buyer, is not treated as real property by the producing taxpayer.

(B) *Examples of structural components.* Structural components include the following items, provided the item is a constituent part of, and integrated into, an inherently permanent structure: Walls; partitions; doors; wiring; plumbing systems; central air conditioning and heating systems; pipes and ducts; elevators and escalators; floors; ceilings; permanent coverings of walls, floors, and ceilings; insulation; chimneys; fire suppression systems, including sprinkler systems and fire alarms; fire escapes; security systems; humidity control systems; and other similar property. If a component of a building or inherently permanent structure is a distinct asset and is not listed as a structural component in this paragraph (a)(2)(iii)(B), the determination of whether the component is a structural component under this paragraph (a)(2)(iii) is based on the following factors—

(*1*) The manner, time, and expense of installing and removing the component;

(*2*) Whether the component is designed to be moved;

(*3*) The damage that removal of the component would cause to the item itself or to the inherently permanent structure to which it is affixed; and

(*4*) Whether the component is installed during construction of the inherently permanent structure.

(3) *Unsevered natural products of land.* Unsevered natural products of land, including growing crops, plants, and timber; mines; wells; and other natural deposits, generally are treated as real property for purposes of this section. Natural products and deposits, such as crops, timber, water, ores, and minerals, cease to be real property when they are severed, extracted, or removed from the land.

(4) *Distinct asset*—(i) *In general.* A distinct asset is analyzed separately from any other assets to which the asset relates to determine if the asset is real property, whether as land, an inherently permanent structure, or a structural component of an inherently permanent structure. Buildings and other inherently permanent structures are distinct assets. Assets and systems listed as a structural component in paragraph (a)(2)(iii)(B) of this section are treated as distinct assets.

(ii) *Facts and circumstances.* The determination of whether a particular separately identifiable item of property is a distinct asset is based on all the facts and circumstances. In particular, the following factors must be taken into account—

(A) Whether the item is customarily sold or acquired as a single unit rather than as a component part of a larger asset;

(B) Whether the item can be separated from a larger asset, and if so, the cost of separating the item from the larger asset;

(C) Whether the item is commonly viewed as serving a useful function independent of a larger asset of which it is a part; and

(D) Whether separating the item from a larger asset of which it is a part impairs the functionality of the larger asset.

(5) *Intangible assets*—(i) *In general.* To the extent an intangible asset derives its value from real property or an interest in real property, is inseparable from that real property or interest in real property, and does not produce or contribute to the production of income other than consideration for the use or occupancy of space, the intangible asset is real property or an interest in real property. Real property includes shares in a mutual ditch, reservoir, or irrigation company described in section 501(c)(12)(A) if, at the time of the exchange, the shares have been recognized by the highest court of the State in which the company was organized, or by a State statute, as constituting or representing real property or an interest in real property.

(ii) *Licenses and permits.* A license, permit, or other similar right that is solely for the use, enjoyment, or occupation of land or an inherently permanent structure and that is in the nature of a leasehold or easement generally is an interest in real property under this section. However, a license or permit to engage in or operate a business on real property is not real property or an interest in real property if the license or permit produces or contributes to the production of income other than consideration for the use and occupancy of space.

(6) *No inference outside of section 1031.* The rules provided in this section concerning the definition of real property apply only for purposes of section 1031. No inference is intended with respect to the classification or characterization of property for other purposes of the Code, such as depreciation and sections 1245 and 1250. For example, a structure or a portion of a structure may be section 1245 property for depreciation purposes and for determining gain under section 1245, notwithstanding that the structure or the portion of the structure is real property under this section. Also, a taxpayer transferring relinquished property that is section 1245 property in a section 1031 exchange is subject to the gain recognition rules under section 1245 and the regulations under section 1245, notwithstanding that the relinquished property or replacement property is real property under this section. In addition, the taxpayer must follow the rules of section 1245 and the regulations under section 1245, and section 1250 and the regulations under section 1250, based on the determination of the relinquished property and replacement property being, in whole or in part, section 1245 property or section 1250 property under those Code sections and not under this section.

(b) *Examples.* The following examples illustrate the provisions of this section.

(1) *Example 1: Natural products of land.* A owns land with perennial fruit-bearing plants that A harvests annually. The unsevered plants are natural products of the land within the meaning of paragraph (a)(3) of this section and thus are real property for purposes of section 1031. A annually harvests fruit from the plants. Upon severance from the land, the harvested fruit ceases to be part of the land and therefore is not real property. Storage of the harvested fruit upon or within real property does not cause the harvested fruit to be real property.

(2) *Example 2: Water space superjacent to land.* B owns a marina comprised of U-shaped boat slips and end ties. The U-shaped boat slips are spaces on the water that are surrounded by a dock on three sides. The end ties are spaces on the water at the end of a slip or on a long, straight dock. B rents the boat slips and end ties to boat owners. The boat slips and end ties are water space superjacent to land and thus are real property within the meaning of paragraph (a)(1) of this section.

(3) *Example 3: Indoor sculpture.* (i) C owns an office building and a large sculpture in the atrium of the building. The sculpture measures 30 feet tall by 18 feet wide and weighs five tons. The building was specifically designed to support the sculpture, which is permanently affixed to the building by supports embedded in the building's foundation. The sculpture was constructed within the building. Removal would be costly and time consuming and would destroy the sculpture. The sculpture is reasonably expected to remain in the building indefinitely.

(ii) The sculpture is not an inherently permanent structure listed in paragraph (a)(2)(ii)(C) of this section, and, therefore, C must use the factors provided in paragraphs (a)(2)(ii)(C)(*1*) through (*5*) of this section to determine whether the sculpture is an inherently permanent structure. The sculpture—

(A) Is permanently affixed to the building by supports embedded in the building's foundation;

(B) Is not designed to be removed and is designed to remain in place indefinitely;

(C) Would be damaged if removed and would damage the building to which it is affixed; and

(D) Is expected to remain in the building indefinitely; and

(E) Would require significant time and expense to move.

(iii) The factors described in paragraphs (a)(2)(ii)(C)(*1*) through (*5*) of this section all support the conclusion that the sculpture is an inherently permanent structure within the meaning of paragraph (a)(2)(ii)(A) of this section. Therefore, the sculpture is real property.

(4) *Example 4: Bus shelters.* (i) D owns 400 bus shelters, each of which consists of four posts, a roof, and panels enclosing two or three sides. D enters into a long-term lease with a local transit authority for use of the bus shelters. Each bus shelter is prefabricated from steel and is bolted to the sidewalk. Bus shelters are disassembled and moved when bus routes change. Moving a bus shelter takes less than a day and does not significantly damage either the bus shelter or the real property to which it was affixed.

(ii) The bus shelters are not permanently affixed enclosed transportation stations or terminals, are not buildings under paragraph (a)(2)(ii)(B) of this section, nor are they listed as types of other inherently permanent structures in paragraph (a)(2)(ii)(C) of this section. Therefore, the bus shelters must be analyzed to determine whether they are inherently permanent structures using the factors provided in paragraphs (a)(2)(ii)(C)(*1*) through (*5*) of this section. The bus shelters—

(A) Are not permanently affixed to the land or an inherently permanent structure;

(B) Are designed to be removed and not remain in place indefinitely;

(C) Would not be damaged if removed and would not damage the sidewalks to which they are affixed;

(D) Will not remain affixed indefinitely; and

(E) Would not require significant time and expense to move.

(iii) The factors described in paragraphs (a)(2)(ii)(C)(*1*) through (*5*) of this section all support the conclusion that the bus shelters are not inherently permanent structures within the meaning of paragraph (a)(2)(ii) of this section. Thus, the bus shelters are not inherently permanent structures within the meaning of paragraph (a)(2)(ii) of this section and, therefore, are not real property.

(5) *Example 5: Industrial 3D Printer.* (i) E owns a building that it uses in its trade or business of manufacturing airplane parts. The building includes an industrial 3D printer that can print airplane wings and an electrical generator that serves the building in a backup capacity. The 3D printer weighs 12 tons and is designed to remain in place indefinitely once installed in the building. The 3D printer was installed during the building's construction. The generator also was installed during construction and is designed to remain in place indefinitely once installed.

(ii) The 3D printer is machinery and, thus, generally not an inherently permanent structure and not real property under paragraph (a)(2)(ii)(D) of this section. In addition, although permanently affixed by virtue of its weight and installed during construction of E's building, the 3D printer produces income other than for the use or occupancy of space. Thus, the 3D printer is not property in the nature of machinery as a structural component within the meaning of paragraph (a)(2)(ii)(D) of this section and, therefore, is not real property.

(iii) The electrical generator serves the entire building and does not generate income

other than for the use or occupancy of the building. Thus, the electrical generator is property in the nature of machinery as a structural component within the meaning of paragraph (a)(2)(ii)(D) of this section and, therefore, is real property.

(6) *Example 6: Generator for Industrial 3D Printer.* The facts are the same as in paragraph (b)(5), *Example 5,* except that E installed the electrical generator for the purpose of keeping the industrial 3D printer operating in the event of a power outage. The generator, itself machinery, was installed to serve the operation of machinery and not the building. Thus, the electrical generator is not a structural component within the meaning of paragraphs (a)(2)(ii)(D) and (a)(2)(iii)(A) of this section and, therefore, is not real property.

(7) *Example 7: Raised flooring for Industrial 3D Printer.* (i) The facts are the same as in paragraph (b)(5), *Example 5,* except that E, when installing its 3D printer, also installed a raised flooring system for the purpose of facilitating the operation of the 3D printer. The raised flooring system is not designed or constructed to remain permanently in place. Rather, the raised flooring system can be removed, without any substantial damage to the system itself or to the building, and then reused. The raised flooring was installed during the building's construction.

(ii) The raised flooring system is not integrated into the building as required by paragraph (a)(2)(iii)(A) of this section and, therefore, is not listed in paragraph (a)(2)(iii)(B) of this section. Thus, the raised flooring must be analyzed to determine whether it is a structural component of E's building (within the meaning of paragraph (a)(2)(iii) of this section) using the factors provided in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section. The raised flooring—

(A) Is installed and removed quickly and with little expense;

(B) Is designed to be moved and is not designed specifically for the particular building of which it is a part;

(C) Is not damaged, and the building is not damaged, upon its removal; and

(D) Was installed during construction of the building.

(iii) The factors described in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section, considered in the aggregate, support the conclusion that the raised flooring is not a structural component of E's building within the meaning of paragraph (a)(2)(iii) of this section. Although the raised flooring was installed during construction of the building, that factor does not outweigh the factors supporting the conclusion that the flooring is not a structural component. Therefore, the raised flooring is not real property under this section.

(8) *Example 8: Steam Turbine.* (i) F owns a building with a large steam turbine attached as a fixture to the building. The steam turbine is a component of a system used for the commercial production of electricity for sale to customers in the ordinary course of F's business as an electric utility. The steam turbine also generates electricity for F's building. The steam turbine takes up a substantial portion of the building and is designed to remain in place indefinitely once installed in F's building. The steam turbine was installed during the construction of the building.

(ii) The steam turbine is machinery and, therefore, generally is not an inherently permanent structure and not real property under paragraph (a)(2)(ii)(D) of this section. Although the steam turbine has characteristics of a structural component because it is permanently affixed, installed during construction of F's building, and serves F's building, the steam turbine is machinery that produces income other than for the use or occupancy of space. Thus, the steam turbine is not an inherently permanent structure within the meaning of paragraph (a)(2)(ii)(D) of this section and, therefore, is not real property.

(9) *Example 9: Partitions.* (i) G owns an office building that it leases to tenants. The building includes partitions owned by G that are used to delineate space within the building. The office building has two types of interior, non-load-bearing drywall partition systems: a conventional drywall partition system (Conventional Partition System) and a modular drywall partition system (Modular Partition System). Neither the Conventional Partition System nor the Modular Partition System was installed during construction of the office building. Conventional Partition Systems are comprised of fully integrated gypsum board partitions, studs, joint tape, and covering joint compound. Modular Partition Systems are comprised of assembled panels, studs, tracks, and exposed joints. Both the Conventional Partition System and the Modular Partition System reach from the floor to the ceiling. In addition, both are distinct assets as described in paragraph (a)(4) of this section.

(ii) Depending on the needs of a new tenant, the Conventional Partition System may remain in place when a tenant vacates the premises. The Conventional Partition System is integrated into the office building and is designed and constructed to remain in areas not subject to reconfiguration or expansion. The Conventional Partition System can be removed only by demolition, and, once removed, neither the Conventional Partition System nor its components can be reused. Removal of the Conventional Partition System causes substantial damage to the Conventional Partition System itself, but does not cause substantial damage to the building.

(iii) Modular Partition Systems are typically removed when a tenant vacates the premises. Modular Partition Systems are not designed or constructed to remain permanently in place. Modular Partition Systems are designed and constructed to be movable. Each Modular Partition System can be readily removed, remains in substantially the same condition as before, and can be reused. Removal of a Modular Partition System does not cause any substantial damage to the Modular Partition System itself or to the building. The Modular Partition System may be moved to accommodate the reconfigurations of the interior space within the office building for various tenants that occupy the building.

(iv) The Conventional Partition System is comprised of walls that are integrated into an inherently permanent structure and are listed as structural components in paragraph (a)(2)(iii)(B) of this section. Thus, the Conventional Partition System is real property.

(v) The Modular Partition System is not integrated into the building as required by paragraph (a)(2)(iii)(A) of this section and, therefore, is not listed in paragraph (a)(2)(iii)(B) of this section. Thus, the Modular Partition System must be analyzed to determine whether it is a structural component using the factors provided in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section. The Modular Partition System—

(A) Is installed and removed quickly and with little expense;

(B) Is designed to be moved and is not designed specifically for the particular building of which it is a part;

(C) Is not damaged, and the building is not damaged, upon its removal; and

(D) Was not installed during construction of the building.

(vi) The factors described in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section support the conclusion that the Modular Partition System is not a structural component of G's building within the meaning of paragraph (a)(2)(iii) of this section. Therefore, the Modular Partition System is not real property.

(10) *Example 10: Pipeline transmission system.* (i) H owns a natural gas pipeline transmission system that provides a conduit to transport natural gas from unrelated third-party producers and gathering facilities to unrelated third-party distributors and end users. The pipeline transmission system is comprised of underground pipelines, isolation valves and vents, pressure control and relief valves, meters, and compressors. Each of these distinct assets was installed during construction of the pipeline transmission system and each was designed to remain permanently in place.

(ii) The pipelines are permanently affixed and are listed as other inherently permanent structures in paragraph (a)(2)(ii)(C) of this section. Thus, the pipelines are real property.

(iii) Isolation valves and vents are placed at regular intervals along the pipelines to isolate and evacuate sections of the pipelines in case there is need for a shut-down or maintenance of the pipelines. Pressure control and relief valves are installed at regular intervals along the pipelines to provide overpressure protection. The isolation valves and vents and pressure control and relief valves are not listed in paragraph (a)(2)(iii) of this section and, therefore, must be analyzed to determine whether they are structural components using the factors provided in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section. The isolation valves and vents and pressure control and relief valves—

(A) Are time consuming and expensive to install and remove from the pipelines;

(B) Are designed specifically for the particular pipelines for which they are a part;

(C) Will sustain damage and will damage the pipelines if removed; and

(D) Were installed during construction of the pipelines.

(iv) The factors in paragraphs (a)(2)(iii)(B)(*1*) through (*4*) of this section support the conclusion that the isolation valves and vents and pressure control and relief valves are structural components of H's pipelines within the meaning of paragraph (a)(2)(iii) of this section. Therefore, the isolation valves and vents and pressure control and relief valves are real property.

(v) Meters are used to measure the natural gas passing into or out of the pipeline transmission system for purposes of determining the end users' consumption. Over long distances, pressure is lost due to friction in the pipeline transmission system. Compressors are required to add pressure to transport natural gas through the entirety of the pipeline transmission system. Although the meters and compressors were installed during the construction of the pipelines, they are not time consuming and expensive to install and remove from the pipelines; are not designed specifically for the particular pipelines for which they are a part; and their removal does not cause damage to the asset or the pipelines if removed. Thus, the meters and compressors are not structural components within the meaning of paragraph (a)(2)(iii) of this section and, therefore, are not real property.

(11) *Example 11: Land use permit.* J receives a special use permit from the government to place a cell tower on Federal Government land that abuts a Federal highway. Government regulations provide that the permit is not a lease of the land, but is a permit to use the land for a cell tower. Under the permit, the government reserves the right to cancel the permit and compensate J if the site is needed for a higher public purpose. The permit is in the nature of a leasehold that allows J to place a cell tower in a specific location on government land. Therefore, the permit is an interest in real property under paragraph (a)(5) of this section.

(12) *Example 12: License to operate a business.* K owns a building and receives a license from State A to operate a casino in the building. The license applies only to K's building and cannot be transferred to another location. K's building is an inherently permanent structure under paragraph (a)(2)(ii)(A) of this section and, therefore, is real property. However, K's license to operate a casino is not a right for the use, enjoyment, or occupation of K's building, but is rather a license to engage in the business of operating a casino in the building for the production of income. Therefore, the casino license is not real property under paragraph (a)(5) of this section.

(c) *Applicability date.* This section applies to exchanges of real property beginning on or after [EFFECTIVE DATE OF THE FINAL RULE].

■ **Par. 7.** Section 1.1031(k)–1 is amended by:

■ 1. Removing ", and" at the end of paragraph (g)(7)(i) and adding a semicolon in its place;

■ 2. Removing the period at the end of paragraph (g)(7)(ii) and adding "; and" in its place;

■ 3. Adding paragraph (g)(7)(iii);

■ 4. In paragraph (g)(8), designating *Examples 1* through *5* as paragraphs (g)(8)(i) through (v), respectively;

■ 5. Further redesignating newly redesignated paragraphs (g)(8)(i)(i) and (ii) as paragraphs (g)(8)(i)(A) and (B);

■ 6. Further redesignating newly redesignated paragraphs (g)(8)(i)(A)(A) and (B) as paragraphs (g)(8)(i)(A)(*1*) and (*2*), respectively;

■ 7. Designating the undesignated paragraph immediately following newly redesignated paragraph (g)(8)(i)(A)(2) as paragraph (g)(8)(i)(A)(3);

■ 8. Further redesignating newly redesignated paragraphs (g)(8)(ii)(i) through (iii) as paragraphs (g)(8)(ii)(A) through (C);

■ 9. Further redesignating newly redesignated paragraphs (g)(8)(ii)(A)(A) through (C) as paragraphs (g)(8)(ii)(A)(*1*) through (*3*);

■ 10. Further redesignating newly redesignated paragraphs (g)(8)(ii)(A)(*1*)(*1*) and (*2*) as paragraphs (g)(8)(ii)(A)(*1*)(*i*) and (*ii*), respectively;

■ 11. In newly redesignated paragraph (g)(8)(ii)(A)(*1*)(*i*), removing ", or" at the end of the paragraph and adding "; or" in its place;

■ 12. Designating the undesignated paragraph immediately following newly redesignated paragraph (g)(8)(ii)(A)(*3*) as paragraph (g)(8)(ii)(A)(*4*); and

■ 13. Further redesignating newly redesignated paragraphs (g)(8)(iii)(i) through (v) as paragraphs (g)(8)(iii)(A) through (E), respectively;

■ 14. Further redesignating newly redesignated paragraphs (g)(8)(iv)(i) through (iii) as paragraphs (g)(8)(iv)(A) through (C), respectively;

■ 15. Further redesignating newly redesiganted paragraphs (g)(8)(v)(i) through (iii) as paragraphs (g)(8)(v)(A) through (C), respectively;

■ 16. In newly redesiganted paragraph (g)(8)(v)(B), removing "(g)(4))(i)" and adding "(g)(4)(i)" in its place; and

■ 17. Adding paragraphs (g)(8)(vi) and (g)(9).

The additions read as follows:

**§ 1.1031(k)–1 Treatment of deferred exchanges.**

* * * * *

(g) * * *

(7) * * *

(iii) Personal property that is incidental to real property acquired in an exchange. For purposes of this paragraph (g)(7), personal property is incidental to real property acquired in an exchange if—

(A) In standard commercial transactions, the personal property is typically transferred together with the real property; and

(B) The aggregate fair market value of the incidental personal property transferred with the real property does not exceed 15 percent of the aggregate fair market value of the replacement real property.

* * * * *

(8) * * *

* * * * *

(vi) *Example 6.* (A) In 2020, B transfers to C real property with a fair market value of $1,100,000 and an adjusted basis of $400,000. B's replacement property is an office building and, as a part of the exchange, B also will acquire certain office furniture in the building that is not real property, which is industry practice in a transaction of this type. The fair market value of the real property B will acquire is $1,000,000 and the fair market value of the personal property is $100,000.

(B) In a standard commercial transaction, the buyer of an office building typically also acquires some or all of the office furniture in the building. The fair market value of the personal property B will acquire does not exceed 15 percent of the fair market value of the office building B will acquire. Accordingly, under paragraph (g)(7)(iii) of this section, the personal property is incidental to the real property in the exchange and is disregarded in determining whether the taxpayer's rights to receive, pledge, borrow or otherwise obtain the benefits of money or other property are expressly limited as provided in paragraph (g)(6) of this section. Upon the receipt of the personal property, B recognizes gain of $100,000 under section 1031(b), the lesser of the realized gain on the disposition of the relinquished property, $700,000, and the fair market value of the non-like-kind property B acquired in the exchange, $100,000.

(9) *Applicability date.* Paragraphs (g)(7)(iii) and (g)(8)(vi) of this section apply to exchanges beginning on or after [EFFECTIVE DATE OF THE FINAL RULE].

* * * * *

**Sunita Lough,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2020–11530 Filed 6–11–20; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Department of the Army

### 32 CFR Part 507

**RIN 0702–AA70**

**[Docket No. USA–2018–HQ–0016]**

## Manufacture, Sale, Wear, and Quality Control of Heraldic Items

**AGENCY:** Department of the Army, DOD.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Department of the Army proposes to revise its regulation on the Manufacturing, Sale, Wear, and Quality Control of Heraldic Items which prescribes the Army Heraldic Quality Control Program and the certification process for manufacturers in order to make Military Insignia. The rule also establishes procedures governing the manufacture, commercial sale, reproduction, possession, and wear of military decorations, medals, badges, insignia and their components and appurtenances. The proposed revisions include the addition of a five-year renewal period for manufacturer certification and insignia authorizations and changes to the procedure for authorizing the use of insignia on commercial items.

**DATES:** Submit comments on or before August 11, 2020.

**ADDRESSES:** You may submit comments, identified by 32 CFR part 507, Docket No. USA–2018–HQ–0016 and or RIN 0702–AA70, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas L. Casciaro, 571–515–0335.

**SUPPLEMENTARY INFORMATION:**

## Background

The Department of the Army is proposing revisions to the Army Heraldic Quality Control Program and the certification process for manufacturers to follow in order to make Military Insignia. The purpose of this program is to manage the procedures for the manufacture and sale of Military Insignia made in the United States using government owned hubs, dies, manufacturing drawings and cartoons. This regulation was last published in the **Federal Register** on May 18, 1998 (63 FR 27208.)

*Legal Basis for This Rulemaking*

The legal authorities for this regulatory action are: 10 U.S.C. 4594; 15 U.S.C. 1051 *et seq.;* 10 U.S.C. 2260; 18 U.S.C 701, 704; 36 U.S.C. 901. Title 10 U.S.C. 4594 grants the Secretary of the Army the authority to design flags, insignia, badges, medals, seals, decorations, guidons, streamers, finial pieces for flagstaffs, buttons, buckles, awards, trophies, marks, emblems, rosettes, scrolls, braids, ribbons, knots, tabs, cords and similar items for other military departments and agencies of the United States. Title 15 U.S.C. 1051 *et seq*. is the statutory basis for the ownership and control of trademarks, service marks, certification marks, and collective marks. Title 10 U.S.C. 2260 grants the Secretary of the Army the authority to license trademarks, service marks, certification marks, and collective marks owned or controlled by the Secretary of the Army. Title 18 U.S.C. 701 states manufacturing, selling and possession of any badge, identification card or insignia prescribed by the head of any department or agency of the United States is not authorized unless authorized by regulations pursuant to law. Title 18 U.S.C. 704, also known as the ''Stolen Valor Act'' makes it illegal for a person to fraudulently claim having received a valor award specified in the Act, with the intention of obtaining money, property, or other tangible benefit by convincing another that he or she received the award. Title 36 U.S.C. 901 grants authority to the Secretary of Defense to approve a service flag and lapel button for display by members of the immediate family of an individual serving in the Armed Forces of the United States. Persons must apply to the Secretary of Defense for a license to manufacture and sell the approved service flag. That authority was delegated by DoD policy 1348.33M to the Secretary of the Army.

*Summary of the Changes Proposed by the Rule:* This rule discusses the Department of the Army policy governing the manufacture, commercial sale, reproduction, possession, and wear of military decorations, medals, badges, insignia and their components and appurtenances. It also establishes the Heraldic Quality Control Program to improve the appearance of the Army by controlling the quality of heraldic items purchased from commercial sources.

These functions are managed though The Institute of Heraldry (TIOH). Its mission is to furnish heraldic services to the Executive Office of the President, the Department of Defense, and all other Federal agencies. The work of TIOH encompasses research, design, development, standardization, quality control, and other services which are fundamental to the creation and custody of official heraldic items. Such items include coats of arms, decorations, flags, streamers, agency seals, badges, and other types of insignia that are approved for use and/or display. TIOH also provides the general public with limited research and information services concerning heraldic insignia.

TIOH is proposing revisions given the age of the current regulation and some procedural changes they are instituting. For example, TIOH is adding a five-year renewal period for manufacturer certification and insignia authorizations which consists of a review of the manufacturer in three key areas:

(1) Are they still in business;

(2) have they produced military insignia; and,

(3) have there been any major quality control issues?

If there are no issues, the company's certification is renewed.

The second change is the approving authority for the use of insignia images in commercial items. Pursuant to Title 10 U.S.C 2260, Licensing of intellectual property: Retention of fees, the Secretary of the Army established the Army Trademark Licensing Program in 2006, formalizing the process for the licensing of marks owned by the Department of the Army, including heraldic insignia and other collective marks. This policy changed The Institute of Heraldry's role from an approving authority to advisory and assistance to the Army Trademark Licensing Program.

## Expected Impact of the Proposed Rule

This rule facilitates the Department of the Army Heraldic Quality Control Program and the manufacturing of all military decorations, medals, badges, insignia and their components and appurtenances. The manufacturer certification process requires the manufacturer to submit four samples of insignia to show they have the capability to make insignia in accordance with government specifications. The submitted samples have a negligible value, under ten dollars, and less than five manufactures apply each year. The recertification process consists of a review of a manufacturer's performance during the certification period. There is no cost to the manufacturer for the review and recertification process.

## C. Regulatory Flexibility Act

The Department of the Army does not expect this proposed rule to have a

significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements for manufacturers of military insignia.

The Department of the Army is revising the internal policies that require a five-year review of manufacturer certifications, insignia authorizations and changes to the procedure for authorizing the use of insignia on commercial items.

The objective of the proposed revisions establish procedures governing the manufacture, commercial sale, reproduction, possession, and wear of military decorations, medals, badges, insignia and their components and appurtenances. These revisions supports a recommendation from the DoD Regulatory Reform Task Force, under E.O. 13777, enforcing the Regulatory Reform Agenda.

The Department of the Army does not collect data on the number of small businesses that manufactures jewelry, lapel buttons, medallions, recognition awards or trophies. Instead, Army subject matter work with those companies wishing to be certified to manufacture and sell Military Insignia made in the United States using government owned hubs, dies, manufacturing drawings and cartoons. There are currently 15 active certified manufactures of Military Insignia. Based on the information available, the Army does not anticipate that this rule will significantly impact small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. Manufacturers wanting to be certified provide general information already available to the public, such as company name, address, points of contact and the type of insignia they want to produce. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternative to the rule that will meet the stated objectives or minimize the impact on of the rule on small entities.

The Department of the Army invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. The Department of the Army will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (32 CFR part 507 RIN 0702–AA70) in correspondence.

**D. Unfunded Mandates Reform Act**

The Department of the Army certifies that this action does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate or the private sector of $100 million or more.

**E. National Environmental Policy Act**

The Department of the Army has determined that this action is not covered under the National Environmental Policy Act because the rule is not a major Federal action that significantly affects the quality of the human environment.

**F. Paperwork Reduction Act**

The Department of the Army has determined that the Paperwork Reduction Act does not apply. Manufacturers wanting to be certified provide general information already available to the public about the company such as name, address, points of contact, contact information and the type of insignia they want to produce. Annually, fewer than five manufacturers request certification.

**G. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)**

The Department of the Army has determined that Executive Order 12630 does not apply because the rule does not impair private property rights.

**H. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

The Department of the Army has determined that according to the criteria defined in Executive Order 12866 and Executive Order 13563 this rule is not a significant regulatory action. As such, the proposed rule is not subject to Office of Management and Budget review under section 6(a)(3) of the Executive Order 12866.

**I. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)**

The Department of the Army has determined that Executive Order 13045 does not apply because this substantive action in rulemaking is neither economically significant nor does the action concern environment health or safety risks that may disproportionally affect children.

**J. Executive Order 13132 (Federalism)**

The Department of the Army has determined that Executive Order 13132 does not apply because this rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

**K. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)**

This proposed rule is not expected to be subject to E.O. 13771 as this rule is not significant under E.O. 12866.

**List of Subjects in 32 CFR Part 507**

Decoration, Service Medal, Service Ribbon, Badge, Lapel Button, Insignia, Special Skill, Qualification Badges, Identification Badges, Bars, Shoulder Sleeve Insignia, Distinctive Unit Insignia.

For reasons discussed in the preamble the Department of the Army proposes to revise 32 CFR part 507 as follows:

## PART 507—MANUFACTURE, SALE, WEAR, AND QUALITY CONTROL OF HERALDIC ITEMS

**Subpart A—Introduction**



**Subpart B—Manufacture and Sale of Decorations, Badges, and Insignia**



**Subpart C—Heraldic Quality Control Program**



**Subpart D—License and Manufacture of the Service Flag and Service Lapel Button**



**Authority:** 10 U.S.C. 4594; 18 U.S.C 701, 704; 36 U.S.C. 901.

### Subpart A—Introduction

#### § 507.1 Purpose.

This regulation prescribes the Department of the Army policy governing the manufacture, commercial

sale, reproduction, possession, and wear of military decorations, medals, badges, insignia, and their components and appurtenances. It also establishes the Heraldic Quality Control Program to improve the appearance of the Army by controlling the quality of heraldic items purchased from commercial sources.

**§ 507.2 References.**

Related publications are listed in paragraphs (a) through (d) of this section. (A related publication is merely a source of additional information. The user does not have to read it to understand this part).

(a) Department of Defense Manual 1348.33, Volume 3, Manual of Military Awards and Decorations. (Available at *https://www.esd.whs.mil/Directives/issuances/dodm/*)

(b) Army Regulation 360–1, Army Public Affairs Program. (Available at *https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx*)

(c) Army Regulation 670–1, Wear and Appearance of Army Uniforms and Insignia. (Available at *https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx*)

(d) Army Regulation 840–1, Department of the Army Seal, and Department of the Army Emblem and Branch of Service Plaques. (Available at *https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx*)

(e) Army Regulation 27–60, Intellectual Property. (Available at *https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx*)

**§ 507.3 Explanation of abbreviations and terms.**

(a) *Abbreviations.*

(1) CFR—Code of Federal Regulations.

(2) DA—Department of the Army.

(3) DAASA—Deputy Administrative Assistant to the Secretary of the Army

(4) DLA—Defense Logistics Agency.

(5) DUI—Distinctive unit insignia.

(6) ID—Identification

(7) IOH—Institute of Heraldry

(8) MCS—Military Clothing Store.

(9) RDI—Regimental Distinctive Insignia.

(10) ROTC—Reserve Officers' Training Corps.

(11) SSI—Shoulder sleeve insignia.

(12) TIOH—The Institute of Heraldry.

(13) U.S.C.—United States Code.

(b) *Terms.*

(1) *Appurtenances.* Devices such as stars, letters, numerals, or clasps worn on the suspension ribbon of the medal, or on the ribbon bar that indicate additional awards, participation in specific events, or other distinguishing characteristics of the award.

(2) *Awards.* An all-inclusive term that consists of any decoration, medal, badge, ribbon, or appurtenance bestowed on an individual or unit.

(3) *Badge.* An award given to an individual for identification purposes or that is awarded for attaining a special skill or proficiency. Certain badges are available in full, miniature, and dress miniature sizes.

(4) *Cartoon.* A drawing, six times actual size, showing placement of stitches, color of yarn and number of stitches.

(5) *Certified manufacturer.* A manufacturer who demonstrated the capability to manufacture controlled heraldic items according to government standards.

(6) *Certificate of authority to manufacture.* A certificate assigning manufacturers a hallmark and authorizing manufacture of heraldic items.

(7) *Decoration.* An award given to an individual as a distinctively designed mark of honor denoting heroism, or meritorious or outstanding service or achievement.

(8) *Hallmark.* A distinguishing mark consisting of a letter and numbers assigned to certified manufacturers for use in identifying manufacturers of insignia.

(9) *Heraldic items.* All items worn on the uniform to indicate unit, skill, branch, award or identification and for which a design has been established by TIOH on an official drawing.

(10) *Heraldic Quality Control Program.* A program that improves the appearance of the Army by controlling the quality of insignia purchased from commercial sources.

(11) *Lapel button.* A miniature enameled replica of an award, which is worn only on civilian clothing.

(12) *Letter of agreement.* A letter signed by manufacturers before certification, stating that the manufacturer agrees to produce heraldic items in accordance with specific requirements.

(13) *Letter of authorization.* A letter issued by TIOH that authorizes the manufacture of a specific heraldic item after quality assurance inspection of a preproduction sample.

(14) *Medal.* An award issued to an individual for the performance of certain duties, acts, or services, consisting of a suspension ribbon made in distinctive colors and from which hangs a medallion.

(15) *Rosette.* A lapel device created from gathering the suspension ribbon of a medal into a circular shape. The device is worn on the lapel of civilian clothing.

(16) *Service medal.* An award made to personnel who participated in designated wars, campaigns, or expeditions or who have fulfilled specified service requirements in a creditable manner.

(17) *Tools.* Hubs, dies, cartoons, and drawings used in the manufacture of heraldic items.

(18) *Unit award.* An award made to an operating unit, which is worn by members of that unit who participated in the cited action (permanent unit award).

**§ 507.4 Responsibilities.**

*Director, The Institute of Heraldry (TIOH).* The Director, TIOH, will—

(a) Monitor the overall operation of the Heraldic Quality Control Program.

(b) Establish policy and procedures to:

(1) Certify manufacturers of insignia and plaques.

(2) Control the manufacture and quality assurance of military decorations, the DA seal and emblem, Branch of Service plaques, and other heraldic items.

(3) Grant certificates of authority for the manufacture and commercial sale of Service flags and Service lapel buttons.

(4) Provide heraldic services to the Executive Branch, Department of Defense, and other Federal agencies on a reimbursable basis.

(5) Provide advisory opinions on the use of Army heraldic items for licensing or other commercial purposes (for example, the Army Emblem, Army Flag, unit insignia, and items approved for wear on uniforms), at the request of the Army Trademark Licensing Program.

**§ 507.5 Statutory authority.**

(a) The manufacture, commercial sale, possession, and reproduction of badges, identification cards, insignia, or other designs prescribed by the head of a U.S. department or agency, or colorable imitations of them, are governed by Title 18, United States Code, section 701 (18 U.S.C. 701).

(b) The wear, manufacture, and commercial sale of military decorations, medals, badges, and their components and appurtenances, or colorable imitations thereof, are governed by 18 U.S.C. 704.

(c) The furnishing of heraldic services to other Military departments and Federal agencies is governed by 10 U.S.C. 4594.

(d) The display of and license to manufacture and sell the approved service flag or service lapel button is governed by 36 U.S.C. 901.

(e) The ownership and licensing of trademarks, service marks, and collective marks such as DUI, RDI, SSI, and other Army-owned heraldic insignia are governed by 15 U.S.C. 1051 *et seq.,* and 10 U.S.C. 2260.

## Subpart B—Manufacture and Sale of Decorations, Badges, and Insignia

### § 507.6 Authority to manufacture.

(a) Only manufacturers that TIOH has certified and issued a certificate of authority may produce heraldic items.

(1) TIOH will issue a certificate of authority to manufacturers who can demonstrate they have the capability to manufacture controlled heraldic items according to Government specifications or purchase descriptions through the certification process.

(2) The certificate of authority to manufacture is applicable only for the individual, firm, or corporation indicated and will be valid for 5 years.

(3) TIOH will assign a hallmark to each certified manufacturer. All controlled heraldic items manufactured for commercial sale will bear the manufacturer's hallmark.

(4) TIOH exclusively uses the ''IOH'' hallmark for the development of new controlled heraldic items; it is not authorized for use on items for commercial sale.

(b) A certificate of authority to manufacture may be revoked or suspended under the procedures prescribed in § 507.16.

(c) A list of certified manufacturers is on the TIOH web page at *https://tioh.army.mil/Catalog/VendorList.aspx.*

### § 507.7 Certification of controlled heraldic items.

(a) The manufacture and commercial sale of controlled heraldic items are not authorized until the certified manufacturer receives a letter of authorization from TIOH. Manufacturers who want to manufacture and sell controlled heraldic items must submit four production samples of each item to TIOH for authorization. If TIOH approves the production samples, it will provide a letter of authorization to manufacture along with one certified production sample to the manufacturer. Letters of authorization for certified heraldic items are valid for 5 years.

(b) The Director, TIOH may revoke or suspend a letter of authorization for failure to manufacture the heraldic item in accordance with applicable Government specifications.

### § 507.8 Authority to sell.

No certificate of authority to manufacture is required for selling controlled heraldic items listed in § 507.13. However, all sellers must ensure that all articles they sell bear hallmarks assigned by TIOH and are manufactured by certified manufacturers in conformance with applicable Government specifications.

### § 507.9 Reproduction of designs.

(a) The photographing or printing of any decoration, service medal, service ribbon, badge, lapel button, insignia, or other device of a design the Secretary of the Army has prescribed for members of the Army to use is authorized, provided that such reproduction does not discredit the U.S. Army and is not used to defraud or misrepresent the identification or status of an individual, organization, society, or other group of persons.

(b) The making or executing in any manner of any engraving, impression, or colorable imitation in the likeness of any decoration, service medal, service ribbon, badge, lapel button, insignia, or other device of a design the Secretary of the Army has prescribed for members of the Army to use is prohibited without prior approval in writing from the Army Trademark Licensing Program.

(c) Except when used to illustrate a particular article that is offered for commercial sale, AR 360–1, paragraph 8–9e prohibits the use of Army themes, material, uniforms, or insignia in advertisements and promotions for entertainment-oriented products that could imply Army endorsement of the product. Direct requests to the Chief, Public Affairs (SAPA–ZA), 1500 Army Pentagon, Washington, DC 20310–1500.

### § 507.10 Incorporation of designs or likenesses of approved designs in commercial articles.

(a) Federal law and Army policy restrict the use of military designs. The manufacture of articles for commercial sale that incorporate designs or likenesses of decorations, service medals, service ribbons, and lapel buttons is prohibited. Certain designs or likenesses of insignia, such as badges or organizational insignia, may be incorporated in articles manufactured for commercial sale, provided that the Army Trademark Licensing Program has granted permission in writing as specified in § 507.10(b).

(b) The Army Trademark Licensing Program is responsible for reviewing requests for permission to incorporate certain insignia and other Army-owned marks in articles manufactured for commercial sale. Requests should be directed to the Director, Army Trademark Licensing Program, 2530 Crystal Drive, Suite 4150, Arlington, VA 22202–3934.

### § 507.11 Possession and wear.

(a) The wearing of any decoration, service medal, badge, service ribbon, lapel button, or insignia that the Army has prescribed or authorized by any person not properly authorized to wear such device or the use of any decoration, service medal, badge, service ribbon, lapel button, or insignia to misrepresent the identification or status of the person by whom such is worn is prohibited. Any person who violates this provision is subject to punishment as prescribed in the statutes referred to in § 507.5.

(b) Mere possession by a person of any of the articles prescribed in § 507.13 (except identification cards) is authorized, provided that such possession is not used to defraud or misrepresent the identification or status of the individual concerned.

(c) Articles specified in § 507.13, or any distinctive parts (including suspension ribbons and service ribbons) or colorable imitations thereof, will not be used by any organization, society, or other group of persons without prior approval in writing by the Army Trademark Licensing Program as specified in § 507.10(b).

## Subpart C—Heraldic Quality Control Program

### § 507.12 General.

The Heraldic Quality Control Program provides a method for ensuring that controlled heraldic items are manufactured by certified manufacturers in accordance with Government specifications. The design of metal insignia will be an exact duplicate of the design of the Government die or loaned hub from which the certified manufacturer's working die is extracted. The design of textile insignia will be embroidered in accordance with Government-furnished specification and cartoon.

### § 507.13 Controlled heraldic items.

(a) Controlled heraldic items will be manufactured in accordance with Government specifications, using Government loaned hubs, dies, or cartoons, by TIOH-certified manufacturers.

(b) The heraldic items listed below are controlled and authorized for manufacture and commercial sale under the Heraldic Quality Control Program when specifically authorized by TIOH.

(1) All authorized appurtenances and devices for decorations, medals and ribbons such as oak leaf clusters, service stars, arrowheads, ''V'' device, and clasps.

(2) Combat, special skill, and qualification badges and bars.

(3) Identification badges.

(4) All approved Shoulder Sleeve Insignia.

(5) All approved Distinctive Unit Insignia.

(6) All approved Regimental Distinctive Insignia.

(7) All approved Combat Service Identification Badges.

(8) Fourragères and lanyards.

(9) Lapel buttons.

(10) Decorations, service medals, and ribbons, except for the Medal of Honor.

(11) Replicas of decorations and service medals for grave markers. Replicas are to be at least twice the size prescribed for decorations and service medals.

(12) Service ribbons and unit awards.

(13) Rosettes, except for the Medal of Honor.

(c) Deviations from the prescribed specifications for these items are not permitted without prior approval, in writing, by TIOH.

(d) Hubs, Dies and cartoons are not provided to manufacturers for the following items. However, manufacturing will be in accordance with the Government-furnished drawing.

(1) Shoulder Loop Insignia, Reserve Officers' Training Corps (ROTC), U.S. Army.

(2) Institutional SSI, ROTC, U.S. Army.

(3) Background trimming/flashes, U.S. Army.

(4) Hand-embroidered bullion insignia.

**§ 507.14 Articles not authorized for manufacture or commercial sale.**

The following articles are not authorized for manufacture and commercial sale, except under contract with the Defense Logistics Agency, Troop Support (DLA Troop Support):

(a) The Medal of Honor.

(b) Service ribbon for the Medal of Honor.

(c) Medal of Honor Rosette.

(d) Medal of Honor Flag.

(e) Military Department Service flags (prescribed in Army Regulation 840–10).

(f) Articles for commercial sale that incorporate designs or likenesses of insignia listed in § 507.13, except when authorized in writing by the Army Trademark Licensing Program as specified in § 507.10(b).

**§ 507.15 Violations and penalties.**

(a) TIOH will revoke a certificate of authority to manufacture when the holder intentionally violates any of the provisions of this regulation or does not comply with the agreement the manufacturer signed to receive a certificate.

(b) Violations are also subject to penalties as prescribed in the statutes referred to in § 507.5.

(c) Repetition or continuation of violations after official notice will be deemed as corroborating evidence of intentional violation.

**§ 507.16 Processing complaints of alleged breach of policies.**

(a) TIOH may suspend or revoke a certificate of authority to manufacture if the manufacturer breaches quality control policies. The term ''quality control policies'' includes the obligation of a manufacturer to produce insignia in accordance with all applicable government specifications, manufacturing drawings and cartoons and other applicable instructions TIOH provided. Breaches of quality control policies may be identified by TIOH through the Quality Control Inspection Program or through registered complaints to TIOH.

(b) Complaints and reports of an alleged breach of quality control policies will be forwarded to the Director, The Institute of Heraldry, 9325 Gunston Road, Room S113, Fort Belvoir, VA 22060–5579.

(c) The Director may decide to suspend or revoke a certificate of authority to a manufacture based on evidence gathered during a TIOH heraldic quality control inspection or from a registered complaint. The Director may initiate an informal investigation of an allegation of breach(es) of the heraldic quality control policy.

(d) *Heraldic Quality Control Inspection Program.*

(1) TIOH will conduct periodic quality control inspections of on hand stocks of heraldic items maintained by:

(i) Exchange military clothing stores.

(ii) Certified manufacturers.

(2) Upon completion of quality control inspections, TIOH will provide a report of deficiencies to the appropriate retail outlet or Commander, DLA Troop Support and the certified manufacturer responsible for the production of the item. The notification to the manufacturer will require assurances of compliance with quality control policies. The report of deficiencies will be reviewed upon recertification of the manufacturer. Any recurrence of the same breach will be considered a refusal to perform, and the Director will take further action to suspend or revoke certification.

(e) *Complaint of alleged breach of quality control policy.*

(1) If an investigation is initiated, the appointed investigator will impartially ascertain facts and gather appropriate evidence to substantiate or invalidate allegations of impropriety. The investigator will submit a report containing a summarized record of the investigation with findings of each allegation and supporting evidence to the Director.

(2) If the investigation substantiates allegation(s) of a breach of quality control, the Director will notify the manufacturer in writing that the Director is contemplating suspending or revoking the certificate. The notification will include:

(i) The specific allegations and findings of the investigator;

(ii) All evidence provided to the Director in the investigation;

(iii) A citation to this regulation as the authority under which the Director may suspend or revoke the certificate of authority if the situation warrants after the manufacturer has had an opportunity to reply;

(iv) What actions, if the allegations are undisputed, are required to provide adequate assurance that future performance will conform to quality control policies;

(v) The right to reply within 45 days of receipt of the notification in order to submit additional materials and evidence for consideration, to refute the allegations, or provide assurances that future performance will conform to quality control policies; and

(vi) That a failure to reply within 45 days, or if there is any recurrence of the same breach will be considered a refusal to perform, and the Director will take further action to suspend or revoke certification.

(f) Refusal to perform.

(1) If the manufacturer fails to reply within a reasonable time to the letter authorized by paragraph e above, refuses to give adequate assurances that future performance will conform to quality control policies, indicates by subsequent conduct that the breach is continuous or repetitive, or disputes the allegations of breach, the Director will direct that a public hearing be conducted on the allegations.

(2) A hearing examiner will be appointed by appropriate orders. The examiner may be either a commissioned officer or a civilian employee above the grade of GS–7.

(3) The specific written allegations, together with other pertinent material, will be transmitted to the hearing examiner for introduction as evidence at the hearing.

(4) For failure to return a loaned tool, manufacturers may be suspended without referral to a hearing specified above; however, the manufacturer will be advised, in writing, that tools are overdue and suspension will take effect if tools are not returned within the specified time.

(g) Notification to the manufacturer by examiner. Within a 7-day period following the receipt by the examiner of the allegations and other pertinent material, the examiner will transmit a registered letter of notification to the manufacturer informing him or her of the—

(1) Specific allegations.

(2) Directive of the Director requiring the holding of a public hearing on the allegations.

(3) Examiner's decision to hold the public hearing at a specific time, date, and place that will be not earlier than 30 days from the date of the letter of notification.

(4) Ultimate authority of the Director to suspend or revoke the certificate of authority if the record developed at the hearing so warrants.

(5) Right to—

(i) A full and fair public hearing.

(ii) Be represented by counsel at the hearing.

(iii) Request a change in the date, time, or place of the hearing, for purposes of having reasonable time in which to prepare the case.

(iv) Submit evidence and present witnesses in his or her own behalf.

(v) Obtain at no cost a verbatim transcript of the proceedings, upon written request filed before the commencement of the hearing.

(h) Public hearing by examiner.

(1) At the time, date, and place designated in accordance with g(3) of this section, the examiner will conduct the public hearing.

(i) A verbatim record of the proceedings will be maintained.

(ii) All previous material received by the examiner will be introduced into evidence and made part of the record.

(iii) The Government may be represented by counsel at the hearing.

(2) Subsequent to the conclusion of the hearing, the examiner will make specific findings on the record before him or her concerning each allegation.

(3) The complete record of the case will be forwarded to the Director.

(i) Action by the Director.

(1) The Director will review the record of the hearing and either approve or disapprove the findings.

(2) Upon arrival of a finding of breach of quality control policies, the manufacturer will be so advised.

(3) After review of the findings, the certificate of authority may be revoked or suspended. If the certificate of authority is revoked or suspended, the Director will—

(i) Notify the manufacturer of the revocation or suspension.

(ii) Remove the manufacturer from the list of certified manufacturers.

(iii) Inform the AAFES and the Defense Logistics Agency-Troop Support of the action.

(j) Reinstatement of certificate of authority. Upon receipt of adequate assurance that the manufacturer will comply with quality control policies, the Director may reinstate a certificate of authority that has been suspended or revoked.

## Subpart D—License and Manufacture of the Service Flag and Service Lapel Button

### § 507.17 Authority to manufacture.

(a) The Secretary of Defense has designated the Secretary of the Army to grant certificates of authority for the manufacture and commercial sale of Service flags and Service lapel buttons.

(b) Any person, firm, or corporation that wishes to manufacture the Service flag or lapel button must apply for a certificate of authority to manufacture from TIOH.

### § 507.18 Application for licensing.

(a) Applicants who want to manufacture and sell Service flags or Service lapel buttons should contact the Director, The Institute of Heraldry, 9325 Gunston Road, Suite 113, Fort Belvoir, VA 22060–5576 to obtain an agreement to manufacture, drawings, and instructions for manufacturing the Service flag and Service lapel button.

(b) Certificates of authority to manufacture Service flags and Service lapel buttons will be valid for 5 years from the date of issuance, at which time applicants must reapply for a new certificate of authority.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 2020–12176 Filed 6–11–20; 8:45 am]

**BILLING CODE 5061–AP–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R03–OAR–2020–0157; FRL–10010–42–Region 3]**

## Air Plan Approval; Pennsylvania; Allegheny County Area Attainment Plan for the 2012 Fine Particulate Matter National Ambient Air Quality Standard

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve elements of a state implementation plan (SIP) revision submitted by the Pennsylvania Department of Environmental Protection (PADEP) on behalf of the Allegheny County Health Department (ACHD) to address Clean Air Act (CAA or ''the Act'') requirements for the 2012 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards'') in the Allegheny County Moderate $PM_{2.5}$ nonattainment area (''Allegheny County area''). The SIP revision contains the ''Attainment Demonstration for the Allegheny County, PA $PM_{2.5}$ Nonattainment Area, 2012 NAAQS,'' submitted on September 30, 2019 (also referred to as ''the Allegheny County $PM_{2.5}$ Plan'' or simply ''the plan''). EPA is proposing to fully approve the following elements of the Allegheny County $PM_{2.5}$ Plan: The base year emissions inventory, the particulate matter precursor contribution demonstration, the reasonably available control measures/reasonably available control technology (RACM/RACT) demonstration, the attainment demonstration, the air quality modeling demonstration supporting attainment by the attainment deadline, the reasonable further progress (RFP) demonstration, and the a demonstration of interim quantitative milestones to ensure timely attainment. EPA is proposing to conditionally approve the following elements of this Allegheny County $PM_{2.5}$ Plan SIP revision: The contingency measures and the motor vehicle emission budget (MVEB) elements of the plan. PADEP commits, on behalf of ACHD, to submit a supplemental SIP revision to remedy those portions of the plan for which EPA is proposing conditional approval within twelve months of EPA's final conditional approval action. This action is being taken under the CAA.

**DATES:** Written comments must be received on or before July 13, 2020.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R03–OAR–2020–0157 at *https://www.regulations.gov,* or via email to *spielberger.susan@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, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment.

The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, 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.*

**FOR FURTHER INFORMATION CONTACT:** Brian Rehn, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2176. Mr. Rehn can also be reached via electronic mail at *rehn.brian@epa.gov.*

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

## Table of Contents



## I. Background

Under section 109 of the CAA, EPA has established NAAQS for certain pervasive air pollutants (referred to as ''criteria pollutants'') and conducts periodic reviews of the NAAQS to determine whether they should be revised or whether new NAAQS should be established. EPA sets the NAAQS for criteria pollutants at levels required to protect public health and welfare. ''Primary'' NAAQS are those determined by EPA as requisite to protect human health, while ''secondary'' NAAQS are those determined by EPA as requisite to protect the public welfare from any known or anticipated adverse effects of the NAAQS pollutant.[1] Particulate matter is one of the criteria pollutants for which EPA has established health-based standards. The CAA requires states to submit regulations that control particulate matter emissions.

Particulate matter includes particles with diameters that are generally 2.5 microns or smaller (referred to as $PM_{2.5}$) and particles with diameters that are generally 10 microns or smaller (or $PM_{10}$). Particulate matter has deleterious effects on the environment, both to human health and to plants and wildlife. The effects on human health include premature mortality, aggravation of respiratory and cardiovascular disease, and decreased lung function. Some individuals, such as older adults and people with lung or heart disease, are particularly sensitive to $PM_{2.5}$ exposure. Impacts on the environment include impairment of visibility, as well as damage to vegetation and ecosystems.[2] Sources can directly emit $PM_{2.5}$ into the atmosphere, in the form of a solid or a liquid particle (*i.e.,* ''direct $PM_{2.5}$'' or ''primary $PM_{2.5}$''). $PM_{2.5}$ can also form as a result of chemical reactions in the atmosphere of precursor pollutants emitted from sources (*i.e.* ''secondary $PM_{2.5}$''). Such secondary $PM_{2.5}$ precursor pollutants include nitrogen oxides ($NO_X$), sulfur dioxide ($SO_2$), volatile organic compounds (VOC), and ammonia.[3]

On July 18, 1997, EPA revised the particulate matter NAAQS to establish new primary and secondary annual and 24-hour standards for $PM_{2.5}$.[4] The annual standard was set at 15.0 micrograms per cubic meter ($\mu g/m^3$), based on a 3-year average of annual mean $PM_{2.5}$ concentrations. The 24-hour (daily) standard was set at 65 $\mu g/m^3$ based on the 3-year average of the annual 98th percentile values of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area.[5]

On October 17, 2006,[6] EPA revisited the particulate matter NAAQS, retaining the annual average $PM_{2.5}$ NAAQS at 15 $\mu g/m^3$, but revising the 24-hour $PM_{2.5}$ NAAQS to 35 $\mu g/m^3$ (based on a 3-year average of the annual 98th percentile values of 24-hour concentrations).[7] On January 15, 2013, EPA finalized the 2012 $PM_{2.5}$ NAAQS, which revised the annual standard to 12.0 $\mu g/m^3$ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, but retained the current 24-hour standard of 35 $\mu g/m^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations.[8]

[1] *See* CAA section 109(b).

[2] *See* 78 FR 3086, 3088 (January 15, 2013).

[3] *See* EPA, Air Quality Criteria for Particulate Matter, No. EPA/600/P–99/002aF and EPA/600/P–99/002bF, October 2004.

[4] 62 FR 38652 (July 18, 1997).

[5] In this action, EPA set primary and secondary standards at the same level for both the 24-hour and the annual $PM_{2.5}$ standards.

[6] *See* 71 FR 61144.

[7] Under 40 CFR part 50, the primary and secondary 2006 24-hour $PM_{2.5}$ NAAQS are attained when the annual arithmetic mean concentration (as determined in accordance with 40 CFR part 50, appendix N) is less than or equal to 35 $\mu g/m^3$ at all relevant monitoring sites in the subject area, averaged over a 3-year period.

[8] *See* 78 FR 3086.

Following promulgation of a new or revised NAAQS, EPA is required by CAA section 107(d) to designate areas throughout the nation as attaining or not attaining the NAAQS. EPA designated and classified the Allegheny County area as ''Moderate'' nonattainment for the 2012 annual $PM_{2.5}$ standards based on ambient monitoring data that showed the area was above 12.0 μg/m$^3$ for the 2011–2013 monitoring period.[9] Based on monitoring data for the 2011–2013 period, the $PM_{2.5}$ annual design values for the Liberty monitor [AIRS ID 42–00300064] were 13.4 μg/m$^3$.

The Allegheny County 2012 $PM_{2.5}$ nonattainment area lies in southwestern Pennsylvania and in 2018 had a population of 1,218,452 persons. Pittsburgh is the largest city in Allegheny County, which also contains the Cities of Clairton, Duquesne, and McKeesport. In total, the County has 130 self-governing municipalities. Allegheny County has complex, mountainous terrain cut by numerous river valleys, which can work to trap locally generated air pollutants. Within the County, some river valleys lie at less than 720 feet in elevation above mean sea level (MSL), while adjacent hilltops can be greater than 1250 feet—with frequently large temperature differences between the hilltop and valley floor (*e.g.* 2 to 7 °F) during clear, light-wind, nighttime conditions. The combination of higher elevation mountainous terrain and river valleys, in conjunction with cool weather, traps locally generated pollution and makes the area prone to atmospheric inversions that impair $PM_{2.5}$ dispersion, sometimes for multiple days, particularly during winter. The Liberty monitor sits above the east bank of the Monongahela River at an elevation of 1,100 feet, immediately downwind of the highest emitting $PM_{2.5}$ stationary source in the area, the U.S. Steel Clairton Coke Works, which lies in the river valley at an elevation 300 feet below the monitor. As a result, the monitored $PM_{2.5}$ values at the Liberty monitor are sometimes far higher than those of other monitors in the surrounding region.

ACHD has the primary responsibility for developing a plan to attain the 2012 annual $PM_{2.5}$ NAAQS in this area, working in conjunction with the PADEP in preparing the Allegheny County $PM_{2.5}$ Plan. Under Pennsylvania law, authority for regulating sources in the area is split between the County and Pennsylvania, with ACHD having primary responsibility for regulating stationary sources in the area.

[9] *See* 80 FR 2206 (January 15, 2015).

## II. Clean Air Act Plan Requirements for Areas Designated Moderate Nonattainment for the $PM_{2.5}$ NAAQS

A January 4, 2013, U.S. Court of Appeals for the District of Columbia Circuit decision [10] stated that EPA must implement $PM_{2.5}$ NAAQS pursuant to title I, part D, subpart 4 of the CAA, which contains provisions specifically concerning $PM_{10}$ nonattainment areas. With respect to the statutory requirements for attainment plans for the 2012 annual $PM_{2.5}$ NAAQS, general CAA nonattainment area planning requirements are found in part D, subpart 1, and planning requirements specific to areas designated Moderate for particulate matter are found in subpart 4 of part D.

EPA has a longstanding general guidance document interpreting the 1990 amendments to the CAA, referred to as the General Preamble for the Implementation of title I of the Clean Air Act of 1990 (or the ''General Preamble'').[11] The General Preamble addresses the relationship between the requirements of CAA part D, subpart 1 and subpart 4, and provides recommendations to states for meeting certain statutory requirements for particulate matter attainment plans. As explained in the General Preamble, requirements specific to Moderate area attainment plan SIP submissions for particulate matter NAAQS are set forth in subpart 4 of part D, title I of the CAA. However, such SIP submissions must also meet the general attainment planning provisions in subpart 1 of part D, title I of the CAA, to the extent these provisions ''are not otherwise subsumed by, or integrally related to,'' the more specific subpart 4 requirements.[12]

To implement the $PM_{2.5}$ NAAQS, EPA also promulgated the ''Fine Particulate Matter National Ambient Air Quality Standard: State Implementation Plan Requirements; Final Rule'' (or the ''$PM_{2.5}$ SIP Requirements Rule'').[13] The $PM_{2.5}$ SIP Requirements Rule provides additional regulatory requirements and guidance applicable to attainment plan submissions for the $PM_{2.5}$ NAAQS, including the 2012 annual $PM_{2.5}$ NAAQS that is the subject of this action. The $PM_{2.5}$ SIP Requirements Rule also clarifies how states should meet the statutory SIP requirements that apply to areas designated nonattainment for any $PM_{2.5}$ NAAQS under both subparts 1 and 4.

The CAA subpart 1 statutory requirements for attainment plans include: (i) The section 172(c)(1) requirements for RACM/RACT and attainment demonstrations; (ii) the section 172(c)(2) requirement to demonstrate RFP; (iii) the section 172(c)(3) requirement for preparation of emissions inventories; (iv) the section 172(c)(5) requirements for adoption of a nonattainment new source review (NNSR) permitting program; and (v) the section 172(c)(9) requirement to adopt contingency measures.

Requirements specific to Moderate $PM_{2.5}$ nonattainment areas under CAA subpart 4 include: (i) The section 189(a)(1)(A) and 189(e) NNSR permit program requirements; (ii) the section 189(a)(1)(B) requirements for attainment demonstrations; (iii) the section 189(a)(1)(C) requirements for RACM; and (iv) the section 189(c) requirements for RFP and QMs. Under CAA subpart 4, states with Moderate $PM_{2.5}$ nonattainment areas must provide for attainment in the area as expeditiously as practicable (but no later than December 31, 2021) for the 2012 $PM_{2.5}$ annual NAAQS. In addition, under CAA subpart 4, direct $PM_{2.5}$ (and all precursors to the formation of $PM_{2.5}$) are subject to control unless EPA approves a demonstration from the state establishing that a given precursor does not contribute significantly to $PM_{2.5}$ levels that exceed the $PM_{2.5}$ NAAQS in the area.[14]

## III. Review of the Allegheny County $PM_{2.5}$ Plan

### *A. Emissions Inventories for the Base Year and Attainment Year*

#### 1. Requirements for Emissions Inventories

CAA section 172(c)(3) requires that each SIP include a ''comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in [the] area . . .'' By requiring an accounting of actual emissions from all sources of the relevant pollutants in the area, this section provides for the base year inventory to include all emissions that contribute to the formation of a particular NAAQS pollutant. For the 2012 $PM_{2.5}$ NAAQS, this includes emissions of direct $PM_{2.5}$ as well as the main chemical precursors to the formation of secondary $PM_{2.5,}$ including $NO_X$, $SO_2$, VOCs, and ammonia ($NH_3$). Primary $PM_{2.5}$ is comprised of both

[10] *Natural Resources Defense Council* v. *EPA,* 706 F. 3d 428 (D.C. Cir. 2013).

[11] *See* General Preamble, 57 FR 13498 (April 16, 1992).

[12] *See* 57 FR 13538, April 16, 1992.

[13] *See* 81 FR 58010, August 24, 2016.

[14] *See* 40 CFR 51.1006 and 51.1009.

condensable and filterable particulate matter components.

EPA $PM_{2.5}$ requirements rule establishes that ''the base year inventory for the nonattainment area: (a) Be required to represent one of the 3 years used for designations or another technically appropriate year; (b) include actual emissions of all sources within the nonattainment area; (c) be annual total or average-season-day emissions in accordance with the NAAQS violation; (d) include direct $PM_{2.5}$ (filterable and condensable) as well as all scientific $PM_{2.5}$ precursors . . .'' [15]

A state must include in its SIP submission documentation explaining how the emissions data were calculated. In estimating mobile source emissions, a state should use the latest emissions models and planning assumptions available at the time it develops the SIP submission.[16] States are also required to use EPA's ''Compilation of Air Pollutant Emission Factors'' (AP–42) [17] road dust method for calculating re-entrained road dust emissions from paved roads.[18] MOVES is EPA's state-of-the-art tool for estimating emissions from on-road mobile sources. At the time ACHD prepared the SIP, MOVES2014a was the latest available version of the MOVES model, which included new data, emission standards, and functional improvements and features over prior versions of the model.[19] EPA subsequently released an updated MOVES model (MOVES2014b) in August 2018, which better estimates non-road mobile emissions compared to MOVES2014a. However, MOVES2014b was not available at the time ACHD began working on emission inventories in support of this plan, and EPA does not consider MOVES2014b a new model for SIP and transportation conformity purposes.[20]

In addition to the base year inventory submitted to meet the requirements of CAA section 172(c)(3), the State must also submit future ''baseline inventories'' for the projected attainment year and each RFP milestone year, and any other year of significance for meeting applicable CAA requirements.[21] By ''baseline inventories'' (also referred to as ''projected baseline inventories''), we mean projected emissions inventories for future years that account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements. The SIP submission should include documentation to explain how the state calculated the emissions projections.

2. Emissions Inventories in the Allegheny County $PM_{2.5}$ Plan

The Allegheny County $PM_{2.5}$ nonattainment area emissions inventory has both small and medium city typical emission sources and is home to several large industrial sources of $PM_{2.5}$ pollution. The Monongahela River Valley contains the U.S. Steel Corporation's Mon Valley Works, which includes the largest coke manufacturing plant in the United States (the U.S. Steel Clairton Coke Works) as well as the Irvin and Edgar Thomson steel works. The area is also home (or nearby to) to several steel manufacturing facilities, coal fired electric generating facilities, and other manufacturing and industrial facilities.

As specified by EPA's $PM_{2.5}$ Implementation Rule, pollutants inventoried for the Allegheny County $PM_{2.5}$ area include primary (direct) $PM_{2.5}$ along with precursors $SO_2$, $NO_X$, VOC, and $NH_3$. Particulate emissions are also transported into the Allegheny County area from surrounding counties in southwestern Pennsylvania, as well as surrounding, upwind states. EPA's Emissions Inventory Guidance for $PM_{2.5}$ specifies that $PM_{10}$ should also be included because $PM_{10}$ emissions are often used as the basis for calculating $PM_{2.5}$.[22]

The 2021 inventory is a projection of the 2011 base year inventory, which accounts for expected growth trends for each source category, as well as emission reductions from adopted and implemented control measures. This projection inventory also factors in stationary source shutdowns occurring since the base year. Local projections were focused on $PM_{2.5}$ and precursor reductions from stationary point source emissions, while regional projections were based on reductions from all sectors as incorporated into the Mid-Atlantic Regional Air Management Association (MARAMA) inventories. ACHD staff worked with PADEP to develop the base year and projection emissions inventories for the Allegheny County $PM_{2.5}$ nonattainment area.

The base 2011 and future projection 2021 emissions inventories for the Allegheny County $PM_{2.5}$ area used in this demonstration are found in Section 4 (Emissions Inventories) of the Commonwealth's September 30, 2019 SIP revision, with detailed emissions inventories found in Appendix D (Emissions Inventories) of the SIP revision. Documentation of the regional inventory development is included in Appendix E (Emissions Inventory Documentation) of the SIP revision, and emissions inputs used for the modeling are described in Section 5 (Modeling Demonstration) and Appendix F (Modeling Protocols). Table 1 provides a summary of the 2011 base year emission inventory for the Allegheny County area in tons per year (tpy) of direct $PM_{2.5}$ and $PM_{2.5}$ precursors and also a summary of the 2021 projected emissions inventory.

[15] 81 FR 58027–58033, August 24, 2016.

[16] *See* EPA's ''Policy Guidance on the Use of MOVES2014 for State Implementation Plan Development, Transportation Conformity, and Other Purposes,'' (EPA–420–B–14–008; July 2014), p. 6.

[17] EPA released an update to AP–42 in January 2011 that revised the equation for estimating paved road dust emissions based on an updated data regression that included new emission tests results.

[18] *See* 76 FR 6328 (February 4, 2011).

[19] *See* EPA guidance document ''Policy Guidance on the Use of MOVES2014 for State Implementation Plan Development, Transportation Conformity, and Other Purposes'' (EPA–420–B–14–008; July 2014).

[20] *See* EPA guidance document ''EPA Releases MOVES2014b Mobile Source Emissions Model: Questions and Answers,'' (EPA–420–F–18–014; August 2018), available at: *https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V7H1.pdf.*

[21] *See* 40 CFR 51.1007(a), 51.1008(b), and 51.1009(f). *See also* U.S. EPA, ''Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter] National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' available at: *https://www.epa.gov/sites/production/files/2017-07/documents/ei_guidance_may_2017_final_rev.pdf.*

[22] *See* U.S. EPA, ''Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter] National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' available at: *https://www.epa.gov/sites/production/files/2017-07/documents/ei_guidance_may_2017_final_rev.pdf*

TABLE 1—BASE YEAR AND PROJECTED ATTAINMENT YEAR EMISSION INVENTORIES FOR ALLEGHENY COUNTY

[Tons per year]

| Allegheny County | $PM_{2.5}$ (total) | $PM_{2.5}$ (filterable) | $PM_{2.5}$ (condensable) | $PM_{10}$ | $SO_2$ | $NO_X$ | VOC | $NH_3$ |
|---|---|---|---|---|---|---|---|---|
| **2011 Base Year Emission Inventory for Allegheny County, by Sector (Tons per Year)** | | | | | | | | |
| Point Sources | 2,503 | 1,338 | 1,164 | 2,987 | 13,460 | 11,128 | 1,169 | 207 |
| Area Sources | 2,491 | 2,011 | 480 | 4,683 | 1,528 | 6,979 | 11,200 | 621 |
| Non-road Mobile Sources | 361 | 361 | 0 | 378 | 11 | 3,921 | 3,780 | 5 |
| Highway Mobile Sources | 450 | 450 | 0 | 984 | 78 | 13,259 | 7,383 | 304 |
| Fires | 24 | 24 | 0 | 29 | 2 | 5 | 64 | 4 |
| Biogenic Sources | 0 | 0 | 0 | 0 | 0 | 166 | 5,876 | 0 |
| Total | 5,829 | 4,185 | 1,644 | 9,061 | 15,080 | 35,460 | 29,972 | 1,141 |
| Point Sources | 2,256 | 1,256 | 999 | 2,722 | 5,921 | 7,928 | 1,534 | 202 |
| Area Sources | 2,708 | 2,226 | 472 | 5,486 | 1,079 | 6,664 | 10,221 | 615 |
| Non-road Mobile Sources | 234 | 234 | 0 | 248 | 5 | 2,212 | 2,752 | 6 |
| Highway Mobile Sources | 266 | 266 | 0 | 722 | 31 | 5,708 | 3,479 | 209 |
| Fires | 24 | 24 | 0 | 29 | 2 | 5 | 64 | 4 |
| Biogenic Sources | 0 | 0 | 0 | 0 | 0 | 168 | 5,876 | 0 |
| Total | 5,488 | 4,007 | 1,471 | 9,207 | 7,039 | 22,684 | 23,926 | 1,037 |

3. EPA's Evaluation and Proposed Action on the Emission Inventories

The emission inventories in the Allegheny County area $PM_{2.5}$ plan are based on the most current and accurate information available to PADEP and ACHD at the time the attainment plan was developed and used the most recently available tools and planning assumptions. The emission inventories in the attainment plan comprehensively address all source categories in the Allegheny County $PM_{2.5}$ nonattainment area and were developed consistent with EPA's emission inventory preparation guidance. The selection of 2011 for use as a base year emissions inventory is one of the three years (2011–2013) used for purposes of designation of the area and the 2021 projection emissions inventory corresponds to the moderate area attainment deadline, in accordance with EPA's SIP requirements rule. The inventories model direct $PM_{2.5}$ (including the filterable and condensable components), as well as $PM_{2.5}$ precursor emissions. For these reasons, we are proposing to approve the 2011 base year emissions inventory in the Allegheny County $PM_{2.5}$ Plan as meeting the requirements of CAA section 172(c)(3). We are also proposing to find that the 2021 projected inventory in the plan is an adequate basis for the determination of RACM, RFP, and for demonstrating attainment in the Allegheny County $PM_{2.5}$ Plan. For further information on our review of the emission inventories supporting this plan, refer to EPA's Technical Support Document (TSD) for Emission Inventories prepared in support of this action, which is available in the docket.

*B. Particulate Matter Precursor Demonstration*

1. $PM_{2.5}$ Precursor Requirements

The provisions of subpart 4 of part D, title I of the CAA do not define the term ''precursor'' for purposes of $PM_{2.5}$, nor does subpart 4 explicitly require the control of any specifically identified PM precursor. However, the definition of ''air pollutant'' in CAA section 302(g) ''includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.''

In the $PM_{2.5}$ SIP Requirements Rule, EPA recognized that treatment of $PM_{2.5}$ precursors is an important issue in developing a $PM_{2.5}$ attainment plan.[23] Therein, EPA identified $SO_2$, $NO_X$, VOC, and $NH_3$ as precursors to formation of $PM_{2.5}$. Accordingly, the attainment plan requirements of subpart 4 apply to emissions of all four precursor pollutants and direct $PM_{2.5}$ from all types of stationary, area, and mobile sources, except as otherwise provided in the Act (*e.g.,* in CAA section 189(e)).

Section 189(e) of the CAA requires that the control requirements for major stationary sources of direct $PM_{10}$ (which includes $PM_{2.5}$) also apply to major stationary sources of $PM_{10}$ precursors, except where the Administrator determines that such sources do not contribute significantly to $PM_{10}$ levels that exceed the standard in the area. Section 189(e) contains the only expressed exception to the control requirements under subpart 4 for sources of $PM_{2.5}$ precursor emissions. Although section 189(e) explicitly addresses only major stationary sources, EPA interprets the Act as authorizing it to also determine, under appropriate circumstances, that regulation of specific $PM_{2.5}$ precursors from other sources in a given nonattainment area is not necessary.

Under the $PM_{2.5}$ SIP Requirements Rule, a state may elect to submit to EPA a ''comprehensive precursor demonstration'' for a specific nonattainment area to show that emissions of a particular precursor from all existing sources located in the nonattainment area do not contribute significantly to $PM_{2.5}$ levels that exceed the standard in the area.[24] Such a comprehensive precursor demonstration must include a concentration-based contribution analysis (*i.e.,* evaluation of the contribution of a particular precursor to $PM_{2.5}$ levels in the area) and may also include a sensitivity-based contribution analysis (*i.e.,* evaluation of the sensitivity of $PM_{2.5}$ levels in the area to a decrease in emissions of the precursor). If EPA determines that the contribution of the precursor to $PM_{2.5}$ levels in the area is not significant and approves the demonstration, the state is not required to control emissions of the relevant precursor from existing sources in the current attainment plan.[25]

EPA issued $PM_{2.5}$ Precursor Demonstration Guidance (''Precursor

[23] *See* section III of EPA's $PM_{2.5}$ SIP Requirements Rule (81 FR 58017, August 24, 2016).

[24] *See* 40 CFR 51.1006(a)(1).

[25] Id.

Guidance'') to provide recommendations to states for conducting an optional, comprehensive precursor demonstration as part of an attainment plan SIP submission.[26] Section 1.1.1 of the Precursor Guidance describes the steps for performing a precursor demonstration. First, a concentration-based analysis should be performed to determine whether all emissions of the relevant precursor contribute significantly to total $PM_{2.5}$ concentrations. If the concentration-based analysis does not support a finding of insignificant contribution, then a sensitivity analysis may be conducted to evaluate, through air quality modeling, the effect of reducing emissions of the precursor (by a certain percentage) from either all existing emission sources of the precursor or only existing major stationary sources of the precursor, on $PM_{2.5}$ levels in the area.

Section 2.2 of the Precursor Guidance recommends the use of 0.2 μg/m$^3$ for the annual $PM_{2.5}$ NAAQS and 1.5 μg/m$^3$ for the 24-hour $PM_{2.5}$ NAAQS as thresholds below which ambient air quality impacts could be considered ''insignificant'' (*i.e.,* impacts that do not ''contribute'' to $PM_{2.5}$ concentrations that exceed the NAAQS). When considering whether a precursor contributes significantly to $PM_{2.5}$ levels which exceed the NAAQS in the area, a state may also consider additional factors based on the specific circumstances of the area. As to air quality impacts that exceed the 0.2 μg/m$^3$ annual or 1.5 μg/m$^3$ 24-hour contribution thresholds, states may provide additional support for a conclusion that a particular precursor does not contribute significantly to ambient $PM_{2.5}$ levels that exceed the NAAQS. States may consider other information, such as the amount by which the impacts exceed the recommended contribution threshold; the severity of nonattainment at relevant monitors and/or grid cell locations in the area; anticipated growth or loss of sources; analyses of speciation data and precursor emission inventories; and air quality trends.[27]

2. Precursor Demonstration in the Allegheny County $PM_{2.5}$ Plan

The Allegheny County $PM_{2.5}$ Plan includes a comprehensive precursor demonstration, which evaluates the impact of the precursors VOC and $NH_3$ to nonattainment of the $PM_{2.5}$ NAAQS in Allegheny County. The concentration-based analysis indicates that all precursors show ambient monitored levels above the thresholds for significant contribution.[28] Therefore, a sensitivity analysis was performed using Comprehensive Air Quality Model with extensions (CAMx).[29] CAMx is a Eulerian photochemical grid model that simulates a wide variety of inert and chemically active pollutants, including ozone, particulate matter, inorganic and organic $PM_{2.5}/PM_{10}$, and mercury and other toxics. For the sensitivity analysis, a total of three CAMx runs were used to evaluate $PM_{2.5}$ sensitivity to reductions of $NH_3$ and VOC emissions in Allegheny County: A base case and two sensitivity-case runs. For one sensitivity-case run, anthropogenic emissions of VOC in Allegheny County were reduced by 50%. For the other sensitivity-case run, anthropogenic emissions of $NH_3$ were reduced by 50%. For both runs, the 50% reductions were applied to both point and area source anthropogenic emissions with all other emissions held constant. EPA's Modeled Attainment Test Software (MATS) was then used to model design values at monitoring sites in Allegheny County with and without the 50% reduction in VOC and $NH_3$. Table 2 shows the projected annual and 24-hour reductions in $PM_{2.5}$ design values (DVs) at the monitoring sites in the nonattainment area based on the reductions for VOC and $NH_3$. Additional information regarding the sensitivity analysis can be found in Appendix I.4 (Precursor Insignificance Demonstration) of the Allegheny County $PM_{2.5}$ Plan.

TABLE 2—SENSITIVITY TEST REDUCTIONS IN DESIGN VALUES (DVS) AT ALLEGHENY COUNTY AREA MONITORS

| Monitoring Site | AQS ID | Annual basis | | 24-hour basis | |
|---|---|---|---|---|---|
| | | Reduction in DV with 50% less VOC (μg/m$^3$) | Reduction in DV with 50% less $NH_3$ (μg/m$^3$) | Reduction in DV with 50% less VOC (μg/m$^3$) | Reduction in DV with 50% less $NH_3$ (μg/m$^3$) |
| Avalon | 42–003–0002 | 0.01 | 0.20 | 0.0 | 0.1 |
| Lawrenceville | 42–003–0008 | 0.00 | 0.23 | 0.0 | 0.0 |
| Liberty | 42–003–0064 | 0.00 | 0.15 | 0.0 | 0.8 |
| South Fayette | 42–003–0067 | 0.00 | 0.10 | 0.0 | 0.1 |
| North Park | 42–003–0093 | 0.00 | 0.17 | 0.1 | 0.9 |
| Harrison | 42–003–1008 | 0.00 | 0.13 | 0.0 | 0.0 |
| North Braddock | 42–003–1301 | 0.00 | 0.21 | 0.0 | 0.4 |
| Clairton | 42–003–3007 | 0.00 | 0.13 | 0.0 | 0.0 |

As can be seen in Table 2, the modeled decreases in design values due to a 50% reduction in VOC and $NH_3$ at the Liberty monitor are both below the significance thresholds of 0.2 μg/m$^3$ for the annual $PM_{2.5}$ NAAQS and 1.5 μg/m$^3$ for the 24-hour $PM_{2.5}$ NAAQS. Therefore, ACHD determined that VOC and $NH_3$ are both insignificant contributors to nonattainment in Allegheny County and excluded both precursors from additional analysis in the Allegheny County $PM_{2.5}$ Plan.

3. EPA's Evaluation and Proposed Action on the Precursor Demonstration

EPA has reviewed the comprehensive precursor demonstration included in the Allegheny County $PM_{2.5}$ Plan and is proposing to find that it meets the requirements of the $PM_{2.5}$ SIP Requirements Rule and EPA's Precursor Guidance. The comprehensive precursor demonstration includes a sensitivity analysis that indicates that the estimated impacts of a 50% reduction in point and area source anthropogenic

[26] *See* EPA Office of Air Quality Planning and Standards, ''Fine Particulate Matter ($PM_{2.5}$) Precursor Demonstration Guidance,'' [EPA–454/R–19–004, May 30, 2019] *https://www.epa.gov/pm-pollution/pm25-precursor-demonstration-guidance.*

[27] Id. at p. 17.

[28] For additional information on the concentration-based analysis, see Appendix C of the Allegheny County $PM_{2.5}$ Plan.

[29] CAMx is a photochemical grid model that simulates a wide variety of inert and chemically active pollutants, including ozone, particulate matter, inorganic and organic $PM_{2.5}/PM_{10}$, and mercury and other toxics.

emissions of VOC and $NH_3$ are below the significance thresholds of 0.2 μg/m$^3$ for the annual $PM_{2.5}$ NAAQS and 1.5 μg/m$^3$ for the 24-hour $PM_{2.5}$ NAAQS at the Liberty monitor, which has consistently been the highest reading $PM_{2.5}$ monitor in Allegheny County and the only monitor in the County not meeting the 2012 annual $PM_{2.5}$ NAAQS. Since the estimated impacts at the Liberty monitor are below the significance threshold, it can be concluded, for purposes of the precursor demonstration, that the precursors VOC and $NH_3$ do not significantly contribute to nonattainment of the $PM_{2.5}$ NAAQS in Allegheny County. Therefore, pursuant to 40 CFR 51.1006, EPA is proposing to find that Allegheny County is not required to control emissions of VOC or $NH_3$ from existing sources in the Allegheny County $PM_{2.5}$ Plan.

*C. Reasonably Available Control Measures (RACM)/Reasonably Available Control Technology (RACT)*

1. Requirements for RACM/RACT

CAA section 172(c)(1) requires that each attainment plan ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national ambient air quality standards.'' Section 189(a)(1)(C) of the CAA requires that states with areas classified as moderate nonattainment for $PM_{2.5}$ have attainment plan provisions to assure that RACM and RACT are implemented no later than four years after designation of the area. EPA reads CAA sections 172(c)(1) and 189(a)(1)(C) together to require that attainment plans for moderate nonattainment areas must provide for the implementation of RACM and RACT for existing sources of $PM_{2.5}$ and $PM_{2.5}$ precursors in the nonattainment area as expeditiously as practicable but no later than four years after designation.[30]

The preamble to the $PM_{2.5}$ SIP Requirements Rule defines RACM as ''any technologically and economically feasible measure that can be implemented in whole or in part within four years after the effective date of designation of a $PM_{2.5}$ nonattainment area,'' including RACT.[31] The preamble also recommends steps for evaluating control measures as part of a RACM/RACT analysis.[32] In short, a RACM/RACT analysis is a process for states to identify emission sources, evaluate potential emission controls, and impose those control measures and technologies that are reasonable and necessary to bring the area into attainment as expeditiously as practicable, but no later than the statutory attainment date for the area.

Pursuant to the preamble of the $PM_{2.5}$ SIP Requirements Rule, in the case of a moderate area that can demonstrate it can attain by the statutory attainment date without implementing all reasonably available control measures (*i.e.* RACM/RACT and additional reasonable measures), the state would not be required to adopt certain otherwise reasonable measures if the state demonstrates that collectively such measures would not enable the area to attain the standard at least one year earlier (*i.e.* ''advance the attainment date'' by one year).[33] The attainment date for the Allegheny County nonattainment area is December 31, 2021.

2. RACM Analysis in the Allegheny County $PM_{2.5}$ Plan

A summary of ACHD's RACM analysis is provided in Section 6 of the Allegheny County $PM_{2.5}$ Plan and a detailed analysis is provided in Appendix J. Based on the insignificance findings for VOC and $NH_3$, ACHD did not evaluate options for the control of VOC and $NH_3$ in their RACM analysis. ACHD's RACM analysis examines options for the control of primary $PM_{2.5}$ and precursors $SO_2$ and $NO_X$ in the Allegheny County nonattainment area for the following source categories: Area sources, non-road mobile sources, on-road mobile sources, and some small point sources.

For each source category, ACHD evaluated RACM alternatives through the following process: (1) Examine source category emissions in the nonattainment area; (2) determine technologically feasible control technologies or measures for each source category; and, (3) for each technologically feasible control technology or measure, examine the control efficiency by pollutant, the estimated emission reductions by pollutant, the estimated cost per ton of pollutant reduced, and the date by which the technology or measure could be reasonably implemented.

a. RACM Measures Evaluation

Table 3 lists the RACM measures in the Allegheny County $PM_{2.5}$ Plan. These measures are discussed in more detail in Appendix J of the Allegheny County $PM_{2.5}$ Plan, which is located in the docket for this rulemaking.

TABLE 3—SUMMARY OF RACM ALTERNATIVES EVALUATED FOR ALLEGHENY COUNTY

| Source category group | Existing controls/programs | RACM alternative(s) | Notes |
|---|---|---|---|
| Agriculture | None | None identified | Small source of emissions; mostly $NH_3$ emissions, $NH_3$ is an insignificant precursor in the nonattainment area. |
| Commercial Cooking | None | 1. Charbroiler catalytic oxidizers for chain-driven broilers.. | 1. Small emission reductions county-wide. |
| | | 2. HEPA filters for under-fired boilers. | 2. Full implementation could take five years from promulgation. |
| Cremation | None | None identified | Small source of emissions county-wide; permit restrictions are BACT. |
| Fuel Combustion (Industrial and Commercial). | Federal standards for boilers and engines. | Low-$NO_X$ burners | Full implementation could take five years from promulgation. |
| Fuel Combustion (Residential) | Sulfur limit for home heating oil | None identified | Small source of emissions compared to commercial and industrial fuel combustion. |

[30] *See* 81 FR 58010 and 58034, August 24, 2016.

[31] See 81 FR 58010–58035 and 58043, August 24, 2016, as well as 40 CFR 51.1009(a)(4)(i)(A).

[32] *See* 81 FR 58010–58035 and 58046, August 24, 2016.

[33] *See* 81 FR 58018, August 24, 2016.

TABLE 3—SUMMARY OF RACM ALTERNATIVES EVALUATED FOR ALLEGHENY COUNTY—Continued

| Source category group | Existing controls/programs | RACM alternative(s) | Notes |
|---|---|---|---|
| Fuel Combustion (Residential Wood). | 1. Fireplace insert program.<br>2. Prohibition of non-phase 2 outdoor wood-fired boilers (OWBs).<br>3. No outdoor burning when Air Quality Action Days are predicted.<br>4. Wood stove change-out program. | 1. Additional wood stove change-out program.<br>2. Education and outreach on clean burning.<br>3. Replacement of old stoves when homes are sold.<br>4. OWB compliance for pre-2011 units. | 1. Insignificant emission reductions.<br>2. Reductions difficult to quantify.<br>3. Reductions and costs difficult to quantify; Significant $PM_{2.5}$ emission reductions unlikely within short to medium timeframe.<br>4. Insignificant emission reductions. |
| Fugitive Dust | Use of dust suppressants | Paving of all unpaved roads countywide. | Small emission reductions countywide. |
| Oil and Gas Exploration and Production. | None | No feasible, cost effective options were identified. | None. |
| Petroleum Storage | None | None identified | VOC emissions only, VOC is an insignificant precursor in the nonattainment area. |
| Solvent Utilization | ACHD regulations | None identified | VOC emissions only, VOC is an insignificant precursor in the nonattainment area. |
| Surface Coatings | ACHD regulations | None identified | VOC emissions only, VOC is an insignificant precursor in the nonattainment area. |
| Marine | Federal standards; towboat repowering project. | 1. Vessel repowering from Tier 0 to newer engines.<br>2. Retrofit tugboats with diesel particulate filters.<br>3. Control idling.<br>4. Pleasure craft controls. | 1. High costs.<br>2. Small emission reductions.<br>3. Emission reductions not quantified, potential insignificant emission reductions.<br>4. Emission reductions not quantified, potential insignificant emission reductions that are not cost effective. |
| Railroad | Federal standards | Replacement of older engines to newer engines. | High costs relative to emission reductions. |
| Off-Highway Equipment (Gasoline) | Rebate program for gasoline-fueled equipment exchange. | Additional gas-for electric exchange programs. | Emission reductions not quantified, potential insignificant emission reductions. |
| Off-Highway Equipment (Diesel) | Federal Standards; idling restrictions. | Retrofit construction equipment with a diesel particulate filter (DPF). | Small emission reductions countywide. |
| Off-Highway Equipment (Other) | None | None identified | None. |
| Gasoline Refueling | Stage II vapor recovery systems | None identified | VOC emissions only, VOC is an insignificant precursor in the nonattainment area. |
| Gasoline Vehicles (Light-Duty) | Federal emission standards; Inspection/Maintenance (I/M) program. | Ridesharing program | Reductions not quantified; light duty gasoline vehicles show large reductions through 2021 with current controls. |
| Gasoline Vehicles (Heavy-Duty) | Federal emission standards; idling restrictions. | None | Small portion of the on-road mobile source inventory. |
| Diesel Refueling | None | None identified | VOC emissions only, VOC is an insignificant precursor in the nonattainment area. |
| Diesel Vehicles (Light-Duty) | Federal emission standards; idling restrictions. | None identified | Small portion of the on-road mobile source inventory. |
| Diesel Vehicles (Heavy Duty) | Federal emission standards; idling restrictions. | (1) Additional diesel engine retrofits.<br>(2) Replacement of public or private fleets ahead of normal schedule.<br>(3) Additional diesel idling requirements. | (1) Small emission reductions county-wide.<br>(2) Small emission reductions county-wide.<br>(3) Reductions not quantified. |
| Compressed Natural Gas (CNG) Vehicles (Heavy Duty). | None | None identified | Small portion of the on-road mobile source inventory. |
| Ethanol E–85 Vehicles (Light-duty gasoline, capable of burning 85% ethanol 15% gasoline blend). | None | None identified | Small portion of the on-road mobile source inventory. |
| Aggregate Processing | Rules in effect for stone, sand, and gravel operations. | Require water sprays, dust suppressants, telescopic chutes, and baghouse/cyclone dust collectors. | None. |

3. RACT Analysis in the Allegheny County $PM_{2.5}$ Plan

Section 6 of the Allegheny County $PM_{2.5}$ Plan also includes a summary of ACHD's RACT analysis. ACHD's detailed analysis is provided in Appendix J of the Allegheny County $PM_{2.5}$ Plan.

ACHD used the following methodology for their RACT analysis: (1) Identify all current major stationary point sources of $PM_{2.5}$, $SO_2$, or $NO_X$ in the Allegheny County nonattainment area; (2) identify the different processes, or process groups, for the applicable major source facilities and the current controls for the processes; (3) identify potential RACT alternatives for the process groups; and (4) evaluate the technological and economic feasibility of any potential RACT alternatives.[34]

a. RACT Measures Evaluation

Table 4 summarizes the identified facilities and corresponding findings from ACHD's RACT analysis for the Allegheny County $PM_{2.5}$ Plan. ACHD's complete RACT analysis is provided in Appendix J of the Allegheny County $PM_{2.5}$ Plan.

TABLE 4—SUMMARY OF RACT ANALYSIS IN ALLEGHENY COUNTY $PM_{2.5}$ PLAN

| Facility | Major pollutants | Summary of facility | Controls | RACT Findings |
|---|---|---|---|---|
| Allegheny Energy Springdale (now Springdale Energy) | PM, $NO_X$ | Combined-cycle turbine EGU, natural gas (NG) or fuel oil. | Low $NO_X$ burners (LNB), selective catalytic reduction (SCR). | Meets RACT requirements. |
| ATI Allegheny Ludlum | PM, $SO_2$, $NO_X$ | Specialty steel facility | Baghouses, ultra-low $NO_X$ burners (ULNB), mist eliminators. | Meets RACT requirements. |
| Bay Valley (now Riverbend) | $NO_X$ | Food manufacturing facility | LNB, flue gas recirculation (FGR); switched from coal to natural gas as fuel for all units. | Meets RACT requirements. |
| Bellefield Boiler | $NO_X$ | Steam generation facility | LNB, FGR | Meets RACT requirements. |
| Energy Center Pittsburgh (North Shore). | $NO_X$ | District heating and cooling plant. | LNB, drift eliminators | Meets RACT requirements. |
| GenOn Brunot Island | PM, $SO_2$, $NO_X$ | Combined-cycle turbine EGU, NG or fuel oil. | Water injection with SCR, mist eliminators. | Meets RACT requirements. |
| GenOn Cheswick | PM, $SO_2$, $NO_X$ | Coal-fired EGU | FGD, LNB with overfire air (OFA), SCR, ESP. | Meets RACT requirements. |
| Pittsburgh Allegheny County Thermal (PACT). | $NO_X$ | Steam generation facility | $NO_X$ limits | Meets RACT requirements. |
| Universal Stainless | $NO_X$ | Specialty steel facility | LNB, baghouses | Meets RACT requirements. |
| University of Pittsburgh—Main Campus. | $NO_X$ | Public university | ULNB, FGR, low sulfur fuel oil | Meets RACT requirements. |
| U.S. Steel Clairton | PM, $SO_2$, $NO_X$ | Metallurgical coke and by-products facility. | Baghouses, baffles (quench towers), coke oven gas (COG) grain limits, afterburners, visible emission (VE) restrictions. | Meets RACT requirements. |
| USS Edgar Thomson | PM, $SO_2$, $NO_X$ | Iron and steel making facility | Baghouses, COG grain limits, scrubbers, drift eliminators. | Meets RACT requirements. |
| USS Irvin | PM, $SO_2$, $NO_X$ | Secondary steel processing facility. | COG grain limits, scrubbers, mist eliminators. | Meets RACT requirements. |

4. EPA's Evaluation and Proposed Action on RACM and RACT

ACHD has found that no economically or technologically feasible controls (or combination thereof) in Allegheny County are needed to show attainment by the attainment date of December 31, 2021 and that no feasible controls (or combination thereof) will advance the attainment date by one year or more (*i.e.* to December 31, 2020). The Allegheny County $PM_{2.5}$ Plan includes a modeling demonstration showing that Allegheny County can attain the 2012 $PM_{2.5}$ NAAQS by the December 31, 2021 attainment date through the control strategy described in the plan.

EPA is proposing to approve ACHD's evaluation of RACM/RACT control measures in the Allegheny County $PM_{2.5}$ Plan. ACHD has demonstrated in the plan that Allegheny County can attain the $PM_{2.5}$ NAAQS by the attainment date without implementing RACM/RACT. Also, according to the Allegheny County $PM_{2.5}$ Plan, the implementation of additional control measures will not advance the attainment date in Allegheny County by one year or more. Therefore, EPA is proposing to find that the Allegheny County $PM_{2.5}$ Plan satisfies the RACM/RACT requirements of title I, part D, subpart 1 and subpart 4 of the CAA.

*D. Air Quality Modeling*

1. Requirements for Air Quality Modeling

Section 189(a)(1)(B) of the CAA requires that a plan for a Moderate $PM_{2.5}$ nonattainment area include a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date, or a demonstration that attainment by such date is impracticable. An attainment demonstration must show that the control measures in the plan are sufficient to attain the NAAQS by the attainment date. The attainment demonstration predicts future ambient concentrations for comparison to the NAAQS, making use of available

[34] An explanation of sources that were excluded from ACHD's RACT analysis as well as the control technologies that were analyzed are provided in Appendix J of the Allegheny County $PM_{2.5}$ Plan.

information on ambient concentrations, meteorology, and current and projected emissions inventories, including the effect of control measures in the plan. This information is typically used in conjunction with a computer model of the atmosphere.

EPA has provided additional modeling requirements and guidance for modeling analyses in the ''Guideline on Air Quality Models'' (''Guideline'').[35] Per the $PM_{2.5}$ SIP Requirements Rule, the attainment demonstration modeling guidance provides recommendations that include: Developing a conceptual description of the problem to be addressed; developing a modeling/analysis protocol; selecting an appropriate model to support the demonstration; selecting appropriate meteorological episodes or time periods to model; choosing an appropriate area to model with appropriate horizontal/vertical resolution; generating meteorological and air quality inputs to the air quality model; generating emissions inputs to the air quality model; and, evaluating performance of the air quality model. After these steps are completed, the state can apply a model to simulate effects of future year emissions and candidate control strategies.

2. Air Quality Modeling in the Allegheny County $PM_{2.5}$ Plan

ACHD's September 30, 2019 $PM_{2.5}$ SIP revision includes a modeling demonstration showing that monitors in Allegheny County will comply with both the 24-hour and the annual 2012 $PM_{2.5}$ standards by December 31, 2021. The demonstration is based, in part, on results from the CAMx analysis. The modeling analysis also includes a local area analysis using the US EPA's AERMOD Gaussian dispersion model to analyze the direct $PM_{2.5}$ component for the Liberty monitor, which has consistently been the highest reading $PM_{2.5}$ monitor in Allegheny County.

The highest PM monitor readings in Allegheny County are generally attributed to a combination of high localized industrial source emissions with strong temperature inversions, which trap those locally generated emissions within the major river valleys. Elevation differences between the valley floors and surrounding terrain can be on the order of 500 feet. Under ideal meteorological conditions (*i.e.* light winds and clear night-time skies), Allegheny County has observed temperature differences between hilltop and valley floor in the range of 2 to 7 degrees Fahrenheit along with strong channeled flow within the Monongahela River valley (''Mon Valley''). Strong temperature inversions inhibit vertical mixing, trapping emissions emitted at near ground-level within the valleys, contributing to episodes of poor air quality.

Given the topography of the area, which is marked by low mountains and river valleys, and the resulting influence of that topography on localized meteorological conditions and a propensity for atmospheric inversions, ACHD developed their modeling analysis to consider these localized conditions. Further, the modeling analysis needed to properly account for both regional emission sources, and more importantly the specific, localized impacts of several large industrial source emissions that strongly contribute to episodes of poor air quality. Further details related to development of the baseline and projected year inventories can be found in appendices D and E of the Commonwealth's September 30, 2019 SIP revision, which are available in the docket for this rulemaking. The modeling protocols used for the Commonwealth's analysis are found in Appendix F of the September 2019 SIP revision.

Modeling for the Allegheny County area assesses regional impacts from $PM_{2.5}$ precursors and localized impacts from primary $PM_{2.5}$ sources. CAMx was utilized at fine grid resolution to model both long-range transport and near-field impacts of most sources. EPA's AERMOD Gaussian dispersion model was used for simulating localized primary $PM_{2.5}$ impacts at the Liberty monitor, which has consistently recorded the highest monitor concentrations since $PM_{2.5}$ monitoring began in the area in the late 1990s.

ACHD provided an extensive review of meteorological conditions in Allegheny County over a five-year period from 2009 through 2013.[36] The ACHD analysis involved a general review of inversions, winds, temperature, and precipitation in general and its appropriateness for the modeling demonstration. The modeling demonstration is indicative of these meteorological conditions and the use of 2011 base year emissions data is suitable to represent typical conditions over the five-year (2009–2013) period examined—with the exception of one month (October 2011) that recorded severe inversions.

CAMx-ready emissions were prepared for the 2011 modeling base year and projected 2021 attainment year and pre-processed for input to CAMx using the Sparse Matrix Operator Kernel Emissions (SMOKE) model.[37] CAMx was evaluated using ambient observational data from three monitoring networks: EPA's Air Quality System (AQS) database; Federal Reference Method (FRM) total $PM_{2.5}$ mass; and the Chemical Speciation Network (CSN) speciated $PM_{2.5}$. The Atmospheric Model Evaluation Tool (or AMET) was the primary software tool used to compare observations and modeled values from the 1.333 kilometer (km) domain in Allegheny County.[38] ACHD found good agreement between modeled and observed $PM_{2.5}$ concentrations across Allegheny County. The results of the model performance evaluations can be referenced in Appendix G of the Commonwealth's September 30, 2019 SIP.

ACHD used MATS with the CAMx 2011 and 2021 modeling results to obtain 2021 projected attainment year design value concentrations at all of the FRM monitoring sites within the modeling domain. This included some monitoring sites outside the Allegheny County $PM_{2.5}$ nonattainment area. Allegheny County's projected 2021 $PM_{2.5}$ concentrations are summarized in Table 5 and include a breakdown of each modeled $PM_{2.5}$ component (2021 projected value is the sum of all the $PM_{2.5}$ components).

[35] 40 CFR part 51 appendix W, ''Guideline on Air Quality Models,'' 82 FR 5182, January 17, 2017; available at *https://www.epa.gov/scram/clean-air-act-permit-modeling-guidance.*

[36] *See* Appendix B of the September 30, 2019 SIP submittal ''*Meteorological Analysis.*''

[37] *See* SMOKE model, at *https://www.cmascenter.org/smoke/.*

[38] *See* AMET software at: *https://www.cmascenter.org/amet/.*

TABLE 5—PROJECTED 2021 CAMx MODELED VALUES FOR THE 2012 $PM_{2.5}$ NAAQS FOR ALLEGHENY COUNTY AREA MONITORS

[Based on a 1.33 km grid]

| Monitoring Site | CAMx projected design value and $PM_{2.5}$ modeled components (1.333 km grid) | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Actual 2016–18 DV | Projected 2021 DV | OPP | ED | $NH_4$ | OCmb | $SO_4$ | $NO_3$ | NaCl |
| **Allegheny County Area 24-Hour Design Values** ** | | | | | | | | | |
| Avalon | 20.2 | 21.4 | 0.606 | 0.965 | 2.191 | 9.064 | 3.258 | 3.564 | 0.150 |
| Clairton | 18.7 | 21.4 | 0.869 | 3.542 | 1.882 | 7.753 | 4.464 | 0.828 | 0.038 |
| Harrison | 20.0 | 20.7 | 0.870 | 1.348 | 1.809 | 8.807 | 4.917 | 0.862 | 0.055 |
| Lawrenceville | 18.4 | 20.4 | 1.000 | 0.996 | 1.855 | 8.723 | 4.334 | 1.480 | 0.087 |
| Liberty | 34.9 | 38.6 | 1.248 | 3.910 | 2.520 | 21.634 | 4.978 | 2.253 | 0.060 |
| North Braddock | 24.5 | 23.4 | 1.178 | 2.564 | 2.353 | 8.304 | 4.577 | 2.403 | 0.096 |
| North Park | 15.6 | 17.3 | 1.280 | 0.948 | 1.537 | 6.783 | 4.272 | 0.585 | 0.047 |
| South Fayette | 18.3 | 18.4 | 1.188 | 1.480 | 1.613 | 6.952 | 4.552 | 0.700 | 0.039 |
| **Allegheny County Area Annual Design Values** | | | | | | | | | |
| Avalon | 9.7 | 10.0 | 0.398 | 0.508 | 0.772 | 4.727 | 1.926 | 0.566 | 0.028 |
| Clairton | 9.3 | 9.2 | 0.508 | 1.266 | 0.843 | 2.703 | 2.205 | 0.734 | 0.014 |
| Harrison | 9.6 | 9.4 | 0.495 | 0.633 | 0.856 | 3.470 | 2.219 | 0.689 | 0.026 |
| Lawrenceville | 9.1 | 9.0 | 0.483 | 0.530 | 0.810 | 3.395 | 1.999 | 0.614 | 0.032 |
| Liberty | 12.6 | 12.5 | 0.618 | 1.509 | 1.058 | 4.637 | 2.795 | 0.937 | 0.017 |
| North Braddock | 10.7 | 10.0 | 0.608 | 0.989 | 0.951 | 3.192 | 2.463 | 0.797 | 0.023 |
| North Park | 7.8 | 7.6 | 0.593 | 0.478 | 0.743 | 2.219 | 1.908 | 0.560 | 0.026 |
| South Fayette | 8.3 | 8.5 | 0.579 | 0.636 | 0.774 | 2.844 | 2.071 | 0.592 | 0.020 |

** 24-Hour Design values are rounded to nearest whole number so Avalon's projected 2021 24-hour design value is 21 $\mu g/m^3$

Blank = Salt and passive component held constant from base to future case, OPP = other primary $PM_{2.5}$, EC = elemental carbon, $NH_4$ = ammonium, OCmb = organic carbon mass (by) mass balance, $SO_4$ = sulfate, $NO_3$ = Nitrate, NaCl = "salt".

Modeled 2021 $PM_{2.5}$ design values for all monitors except the Liberty monitor meet the revised 2012 $PM_{2.5}$ NAAQS. All monitors in Allegheny County meet the 24-hour $PM_{2.5}$ NAAQS using 2018 design values. Only the Liberty monitor is projected to exceed the revised 2012 annual $PM_{2.5}$ NAAQS in 2021, based on the CAMx developed design values. Therefore, in accordance with EPA's modeling guidance, ACHD undertook a more refined local area analysis to better gauge emission control impacts for sources nearby the Liberty monitor in southern Allegheny County and the effect of controlling those sources on projected $PM_{2.5}$ concentrations in the Liberty monitor area. The Liberty monitor's location on elevated terrain several miles downwind of the U.S. Steel Clairton Coke Works complicates this analysis.

As stated in EPA's ''Modeling Guidance for Demonstrating Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze'' (''Modeling Guidance''), ''. . . there are numerous cases where local source contributions may not be dominant but are a sizable contributor to total annual average $PM_{2.5}$ at this monitor. In these cases, a more refined analysis of the contribution of local primary $PM_{2.5}$ sources to $PM_{2.5}$ at the monitor(s) will help explain the causes of nonattainment at and near the monitor and may lead to more efficient ways to attain the NAAQS by controlling emissions from local sources which may be important contributors to the violating area.'' [39] ACHD has done analysis of regional monitor concentrations and demonstrated unique industrial source influences using source apportionment modeling [40] and concluded that the Liberty monitor, ''shows a large contribution from carbon-rich industrial sources, not present at the other sites, that contribute carbons as well as primary sulfate and several trace elements.''

EPA's Modeling Guidance allows the use of several tools to evaluate contributions of local $PM_{2.5}$ sources, such as Gaussian dispersion modeling. While dispersion models may not be an appropriate tool for determining secondary $PM_{2.5}$ or ozone concentrations, they work well for use in determining local primary $PM_{2.5}$ impacts.[41] ACHD utilized EPA's AERMOD model to conduct a local area analysis of the Liberty monitor area. The refined Liberty local analysis modeling used AERMOD to further resolve the impact of local area sources and meteorology beyond the CAMx analysis, to generate the final modeled design values at the Liberty monitor. This local area analysis shows that the Liberty monitor will attain by attainment deadline.

Finally, ACHD included additional information in its September 30, 2019 SIP revision constituting a ''weight of evidence'' demonstration to support its modeling analysis, per EPA's Modeling guidance.[42] ACHD's weight of evidence demonstration includes analysis of downward $PM_{2.5}$ monitoring trends at Allegheny County monitors, a listing of permanent stationary source shutdowns (not reflected in the modeling analysis), $PM_{2.5}$ precursor reductions of $SO_2$ resulting from reductions in neighboring areas, emission reductions due to population decrease projections, and emission reductions due to voluntary programs (not included in the SIP). Also, additional EGU deactivations in Pennsylvania and surrounding states were announced after EGU forecasting was performed (based on 2015 data). These deactivations, which were not included in the air quality modeling for this plan, will lead to further reductions of $PM_{2.5}$ precursor emissions that

[39] EPA policy memo, *Modeling Guidance for Demonstrating Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze,* from Richard Wayland, dated November 29, 2018. See p. 134. Available at: *https://epa.gov/ttn/scram/guidance/guide/O3-PM-RH-Modeling_Guidance-2018.pdf.*

[40] *See* Appendix C of the September 30, 2019 SIP Revision, ''Speciation and Source Apportionment Analysis.''

[41] *Modeling Guidance for Demonstrating Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze,* from Richard Wayland, dated November 29, 2018, at p. 134.

[42] See pp. 169–171 of EPA's *Modeling Guidance for Demonstrating Air Quality Goals for Ozone, $PM_{2.5}$ and Regional Haze,* which outlines several other analyses that could be included in any attainment demonstration to help bolster results from the primary modeling analysis. These could include additional modeling analyses, analyses of trends in ambient air quality and emissions, and additional emissions controls/reductions.

potentially contribute $PM_{2.5}$ emissions to Allegheny County. Further information on recent planned EGU deactivations can be found in Section 11.4 of the Allegheny County $PM_{2.5}$ Plan.

3. EPA's Evaluation and Proposed Action on Modeling

EPA has reviewed the modeling demonstration prepared by ACHD for the Allegheny County $PM_{2.5}$ nonattainment area. EPA also reviewed the supporting local area AERMOD dispersion model analysis prepared by ACHD to assess the impact of sources closest to the Liberty monitor. ACHD modeling protocols covering the Weather Research and Forecasting (WRF) prognostic meteorological model, the CAMx modeling domains and the AERMOD local area analysis all comport with EPA's Modeling Guidance.[43]

With the exception of the Liberty monitor, the CAMx model projected 2021 $PM_{2.5}$ design values for all monitors in Allegheny County are projected to be below the NAAQS by the attainment deadline. ACHD elected to conduct a refined local area assessment to further assess the impact of several large nearby sources beyond the scope of the CAMx modeling. The Allegheny County Plan contains ACHD's arguments supporting its contention that the CAMx 1.333 km modeling analysis could be overestimating projected 2021 $PM_{2.5}$ concentrations at the Liberty monitor.[44] These CAMx modeling limitations cited include: Limitations in CAMx's ability to properly characterize concentration gradients across the 1.333 km grid cells, failure to use the most up to date available stack test emissions data and stack test emission calculations for several key sources in the area, improper CAMx source characterizations, and improper source apportionment by CAMx.

EPA proposes to agree with ACHD's assessment that these are reasonable arguments to support use of a supplemental local area analysis using AERMOD dispersion modeling to refine projected 2021 model concentrations at the Liberty monitor. Final projected 2021 values at the Liberty monitor using the local area analysis were 35 $\mu g/m^3$ (24-hour) and 12.0 $\mu g/m^3$ (annual), which demonstrate attainment with the 2012 $PM_{2.5}$ NAAQS.

Given that the projected 2021 $PM_{2.5}$ concentrations at the Liberty monitor just meet the 2012 $PM_{2.5}$ NAAQS, ACHD's use of additional supporting information via a weight of evidence demonstration is warranted. The Allegheny County Plan contains a monitor value trends analysis showing statistically significant downward trends at all of its $PM_{2.5}$ monitoring sites, including the Liberty monitor. EPA agrees with ACHD's contention that the Pennsylvania Jersey Maryland Power Pool (PJM Interconnection, or simply PJM) forecasts of electric generation for the last few years have overestimated the actual amount of electric generation needed, and as a result the projected regional $PM_{2.5}$ precursor emissions from the electric generation sector are likely overestimated.[45] Electricity generation and demand reports from PJM indicate a decline in coal-fired power plant operations and an increase in power generation share from a rise in number and capacity of lower emission producing, more efficient combined-cycle natural gas plants. This trend is leading to significant reductions in regional emissions of $SO_2$, a precursor to $PM_{2.5}$.[46] It also appears that the CAMx model overestimates projections for some monitor locations in Allegheny County, as shown by the fact that actual measured 2018 $PM_{2.5}$ design values are already below forecast 2021 model projections. Allegheny County also documented additional local emission reductions and source shutdowns which were not accounted for in the projected emission inventories, along with other voluntary programs that could lead to additional emission reductions. The combination of these weight of evidence impacts should lead to continued reductions in $PM_{2.5}$ monitor concentrations in Allegheny County.

EPA believes ACHD's modeling demonstration shows that its projected 2021 $PM_{2.5}$ design values will likely comply with the 2012 $PM_{2.5}$ NAAQS—particularly since the actual 2018 $PM_{2.5}$ design values at all monitoring sites in Allegheny County (except the Liberty monitor) meet the 2012 $PM_{2.5}$ NAAQS. Allegheny County's unmonitored area analysis attempts to more accurately ensure attainment over the entire county and not just those portions covered by the monitoring network. Given the results of ACHD's CAMx modeling for the area, the refined AERMOD local area assessment, and the additional emission reductions and other supporting arguments from ACHD's weight of evidence demonstration, EPA supports ACHD's finding that $PM_{2.5}$ design values at the Liberty monitor will meet the 2012 $PM_{2.5}$ NAAQS by the December 31, 2021 attainment date.

*E. Attainment Demonstration*

1. Requirements for an Attainment Demonstration

CAA section 189(a)(1)(B) requires that each state in which a Moderate $PM_{2.5}$ nonattainment area is located submit an attainment plan that includes, among other things, either a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date, or a demonstration that attainment by such date is impracticable. In addition, CAA section 172(c)(1) generally requires, for each nonattainment area, a plan that provides for the implementation of all RACM and RACT as expeditiously as practicable and provides for attainment of the NAAQS. EPA interprets these two provisions together to require that an attainment demonstration for a Moderate $PM_{2.5}$ nonattainment area meet the following criteria: (1) The attainment demonstration must show the projected attainment date for the area that is as expeditious as practicable; (2) the attainment demonstration must meet the requirements of 40 CFR part 51, appendix W and must include inventory data, modeling results, and emission reduction analyses on which the state has based its projected attainment date; (3) the base year for the emissions inventory required for the attainment demonstration must be one of the three years used for designations or another technically appropriate inventory year; and (4) the control strategies modeled as part of the attainment demonstration must be consistent with the control strategy requirements under 40 CFR 51.1009(a), including the requirements for RACM/RACT and additional reasonable measures.[47]

In addition, the attainment demonstration must provide for the implementation of all control measures needed for attainment as expeditiously as practicable, but no later than the beginning of the year containing the applicable attainment date.[48]

2. Attainment Demonstration in the Allegheny County $PM_{2.5}$ Plan

As explained in section III.D of this document, ACHD's $PM_{2.5}$ SIP includes a modeling demonstration, based on

[43] Ibid.

[44] *See* Appendix F.3 of the September 30, 2019 SIP revision.

[45] *See* Appendix K of the September 30, 2019 SIP revision.

[46] *See* Section 3, page 104, *http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2018.shtml.*

[47] *See* EPA's $PM_{2.5}$ Implementation Rule, at 40 CFR 51.1011(a).

[48] Id.

modeling using currently implemented emission control measures, that shows that monitors in Allegheny County, Pennsylvania will comply with both the 24-hour and the annual $PM_{2.5}$ standards by December 31, 2021. The modeling for the Allegheny County $PM_{2.5}$ nonattainment area focuses on regional impacts from $PM_{2.5}$ precursors and localized impacts from primary $PM_{2.5}$ sources. ACHD also conducted an unmonitored area analysis to better refine those areas of Allegheny County further from the air monitor sites, as was discussed earlier in section III.D of this document pertaining to the modeling.

The attainment plan includes a weight of evidence analysis to further bolster the attainment demonstration. The plan shows reductions in $PM_{2.5}$ emissions and $PM_{2.5}$ precursor emission inventories between 2011 and 2021 as a result of implementation of RACT/RACM, stationary source shutdowns (not reflected in the 2011 inventory), and from implemented state, local, and Federal emission controls.

ACHD contends that the results from their modeling analysis, as well as its weight of evidence supplemental analysis, demonstrate that all monitors in Allegheny County will attain the revised 2012 24-hour and annual $PM_{2.5}$ NAAQS by the statutory date (December 31, 2021).

3. EPA's Evaluation of ACHD's $PM_{2.5}$ Attainment Demonstration

EPA evaluated whether ACHD has adequately demonstrated that the Allegheny County Area meets EPA requirements for demonstration of attainment, as described here:

a. The attainment demonstration must show the projected attainment date for the area that is as expeditious as practicable.

As discussed in section III.D of this preamble, EPA proposes to find that the modeling demonstration and additional analysis in the attainment plan show that the area will achieve the 2012 $PM_{2.5}$ NAAQS by the attainment date. In its review of RACM measures, ACHD found no additional measures that, if enacted, would advance the attainment deadline earlier than the December 31, 2021 attainment deadline. Currently, 2018 $PM_{2.5}$ design values at all monitoring sites in Allegheny County except Liberty meet the 2012 $PM_{2.5}$ NAAQS. Allegheny County's unmonitored area analysis predicts attainment over the entire County. Given the results of the refined local area analysis, ACHD's analysis of potential model overestimations, and additional emission reductions identified as part of the weight of evidence demonstration (that are not included in the modeling demonstration), EPA concludes that attainment demonstration modeling reasonably projects that all the monitors in the area will meet the 2012 $PM_{2.5}$ NAAQS by the 2021 projected attainment date and that attainment prior to that date is not practicable.

b. The attainment demonstration must meet the requirements of 40 CFR part 51, appendix W and must include inventory data, modeling results, and emission reduction analyses on which the state has based its projected attainment date;

Based on our analysis of the attainment modeling demonstration in section III.D of this document, EPA also proposes to conclude that the attainment demonstration modeling includes appropriate modeling analysis information complying with the requirements of 40 CFR part 51, appendix W. Based on EPA's review of the supporting $PM_{2.5}$ and $PM_{2.5}$ precursor emission inventories (as described in the emission inventory section of this action), EPA also proposes to conclude that the plan includes appropriate emission inventory data to meet the related EPA emission inventory requirements.

c. The base year for the emissions inventory required for the attainment demonstration must be one of the three years used for designations or another technically appropriate inventory year; and

ACHD selected 2011 as its base year for the emissions inventory used for the attainment demonstration. Since 2011 is one of the three years (*i.e.,* 2011–2013) used for designation purposes, EPA finds that this choice of base year for the attainment demonstration meets EPA requirements.

d. The control strategies modeled as part of the attainment demonstration must be consistent with the control strategy requirements under 40 CFR 51.1009(a), including the requirements for RACM/RACT and additional reasonable measures.

Based on our review of ACHD's attainment demonstration modeling, EPA proposes to find that the air quality modeling meets the requirements of 40 CFR 51.1011(a) and accounts for all technically and economically feasible control measures for direct $PM_{2.5}$ (as well as $PM_{2.5}$ precursor) emissions sources upon which PADEP and ACHD have based their projected attainment date for the area. 40 CFR 51.1009(a) and 40 CFR 51.1011.

As part of the RACT/RACM determination (in conjunction with the accompanying weight of evidence demonstration emission reductions), EPA proposes to conclude that the control strategies modeled as part of the attainment demonstration are consistent with the control strategy requirements under 40 CFR 51.1009(a), including the requirements for RACM/RACT and additional reasonable measures. Based on the RACT/RACM analysis and the additional weight of evidence demonstration for $PM_{2.5}$ and $PM_{2.5}$ precursor emission reductions, EPA believes the attainment modeling analysis shows that the projected December 31, 2021 attainment date for the area is as expeditious as practicable.

e. The attainment demonstration must provide for the implementation of all control measures needed for attainment as expeditiously as practicable, but no later than the beginning of the year containing the applicable attainment date.

In Section 3 (Control Strategy) of the Allegheny County $PM_{2.5}$ Plan, ACHD sets out its attainment control strategy. ACHD incorporated the controls described in Section 3 in the future case 2021 emissions and modeling inventories for the attainment demonstration. These controls include local source modifications, local source shutdowns, and regional controls. ACHD states that the local source modifications are Federally enforceable through ACHD installation permits and operating permits. These local source modifications are fully implemented, and the shutdowns all occurred after the 2011 base year, but prior to the submittal of the plan. The regional controls include various Federal control measures as well as two Pennsylvania statewide measures related to sulfur limits for commercial fuel oil and VOC limits for adhesives and sealants. These regional measures are also fully implemented.

EPA has evaluated ACHD's control strategy for attainment and found that all control measures needed for attainment have been implemented has expeditiously as practicable. The attainment date is December 31, 2021. These controls were all implemented prior to PADEP submitting the September 30, 2019 SIP revision. Therefore, EPA concludes that the control measures were implemented well before the beginning of the year containing the applicable attainment date, 2021.

4. EPA's Proposed Action on the $PM_{2.5}$ Attainment Demonstration

EPA proposes to conclude that the attainment demonstration for the Allegheny County $PM_{2.5}$ Plan meets the requirements for a moderate area plan under CAA section 189(a)(1)(B), and

that this plan contains an approvable demonstration (including air quality modeling) showing that the plan provides for attainment by the applicable attainment date. EPA also proposes to conclude that this plan meets CAA section 172(c)(1) requirements to provide for the implementation of RACM and RACT as expeditiously as practicable and provides for attainment of the NAAQS. By meeting these requirements, EPA proposes to conclude that ACHD's plan for the Allegheny County $PM_{2.5}$ area meets applicable requirements for an approvable attainment demonstration for a Moderate $PM_{2.5}$ nonattainment area.

*F. Reasonable Further Progress (RFP)*

1. Requirements for Ensuring Reasonable Further Progress

CAA section 172(c)(2) states that all nonattainment area plans shall demonstrate reasonable progress towards attainment. In addition, CAA section 189(c) requires that all $PM_{2.5}$ nonattainment area SIPs include a QM demonstration, to be achieved every three years until the area is redesignated to attainment and which demonstrate RFP, as defined in CAA section 171(l). Section 171(l) defines RFP as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by part D or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.'' Neither subpart 1 nor subpart 4 of part D, title I of the Act requires that a set percentage of emissions reductions be achieved in any given year for purposes of satisfying the RFP requirement. EPA's SIP requirements rule does not require a specific RFP related inventory, but the attainment projected inventory for the nonattainment area also may serve a purpose for evaluation of RFP.[49]

For purposes of the $PM_{2.5}$ NAAQS, EPA has interpreted the RFP requirement to require that nonattainment area plans show annual incremental emission reductions sufficient to maintain generally linear progress toward attainment by the applicable deadline.[50] As discussed in EPA guidance in the Addendum to the General Preamble (or ''the Addendum''),[51] requiring linear progress in reductions of direct $PM_{2.5}$ and any individual precursor in a $PM_{2.5}$ plan may be appropriate in situations where: The pollutant is emitted by a large number and range of sources; the relationship between any individual source or source category and overall air quality is not well known; a chemical transformation is involved (*e.g.,* secondary particulate significantly contributes to $PM_{2.5}$ levels over the standard); and/or the emission reductions necessary to attain the $PM_{2.5}$ standard are inventory-wide.[52]

The Addendum indicates that requiring linear progress may be less appropriate in other situations, such as: Where there are a limited number of sources of direct $PM_{2.5}$ or a precursor; where the relationships between individual sources and air quality are relatively well defined; and/or where the emission control systems utilized will result in swift and dramatic emission reductions.

In nonattainment areas characterized by any of these latter conditions, RFP may be better represented as stepwise progress as controls are implemented and achieve significant reductions soon thereafter. For example, if an area's nonattainment problem can be attributed to a few major sources, EPA guidance indicates that ''RFP should be met by adherence to an ambitious compliance schedule, which is likely to periodically yield significant emission reductions of direct $PM_{2.5}$ or a $PM_{2.5}$ precursor.'' [53] This latter case is applicable to the Allegheny County Area, as the violating monitor is impacted heavily by nearby major emission sources, which are implementing controls in a stepwise fashion between the base year and attainment deadline.

Where attainment is driven by regulatory compliance, the $PM_{2.5}$ attainment plan should include a detailed schedule for compliance with regulations in the area and provide corresponding annual emission reductions to be realized from each milestone in the schedule.[54] In reviewing an attainment plan under CAA subpart 4, EPA considers whether the annual incremental emission reductions to be achieved are reasonable in light of the statutory objective of timely attainment. States should consider both cost-effectiveness and pollution reduction effectiveness when developing implementation schedules for its control measures and may implement measures that are more effective at reducing $PM_{2.5}$ earlier to provide greater public health benefits.[55]

The $PM_{2.5}$ SIP Requirements Rule establishes specific regulatory requirements for purposes of satisfying the Act's RFP requirements and provides related guidance in the preamble to the rule. Specifically, under the $PM_{2.5}$ SIP Requirements Rule, each $PM_{2.5}$ attainment plan must contain an RFP analysis that includes, at minimum: (1) An implementation schedule for control measures; (2) RFP projected emissions for direct $PM_{2.5}$ and all $PM_{2.5}$ plan precursors for each applicable milestone year, based on the anticipated control measure implementation schedule; (3) a demonstration that the control strategy and implementation schedule will achieve reasonable progress toward attainment between the base year and the attainment year; and (4) a demonstration that by the end of the calendar year for each milestone date for the area, pollutant emissions will be at levels that reflect either generally linear progress or stepwise progress in reducing emissions on an annual basis between the base year and the attainment year.[56] States should estimate the RFP projected emissions for each milestone year by sector on a pollutant-by-pollutant basis.[57]

2. RFP Demonstration in the Allegheny County $PM_{2.5}$ Plan

The RFP demonstration and QM demonstration methodology are detailed in Section 7 of the Allegheny County $PM_{2.5}$ Plan. ACHD elected to try to show that nonattainment area emissions of direct $PM_{2.5}$ pollutants (and significant $PM_{2.5}$ precursor pollutants) decline from the base year to the attainment year, in a generally linear manner.

The Allegheny County Plan estimates that emissions of direct $PM_{2.5}$ will decline steadily from 2011 through 2021 and that emissions of direct $PM_{2.5}$ will generally remain below the levels needed to show incremental, continuing progress toward attainment. ACHD compiled RFP emissions inventories for the milestone years of 2019 and 2022 using the base and projected inventories used in the attainment demonstration. Milestone years are based on a schedule of 4.5 and 7.5 years after designation (years 2019 and 2022, respectively), as outlined in the $PM_{2.5}$ Implementation Rule for a moderate $PM_{2.5}$ nonattainment area.[58] Year 2019

[49] *See* EPA $PM_{2.5}$ Implementation Rule. 81 FR 58029, August 24, 2016.

[50] Addendum to the General Preamble at p. 42015. 59 FR 41998, August 16, 1994.

[51] Id.

[52] Id.

[53] Id at p. 42015.

[54] Id. at p. 42016.

[55] Id.

[56] 40 CFR 51.1012(a).

[57] *See* 81 FR 58010, 58056 (August 24, 2016).

[58] RFP milestones occur every three years, starting from the due date of the SIP (*i.e.,* 18 months after designation), or 4.5 years and 7.5 after

Continued

emissions were calculated by linearly interpolating base year 2011 and projected case 2021 emissions. Year 2022 emissions were held constant from the projected 2021 case, as a conservative approach beyond the expected attainment timeframe. In addition to direct $PM_{2.5}$ emissions, the RFP demonstration includes $PM_{2.5}$ precursor emissions of $SO_2$ and $NO_X$. However, it does not include VOC and $NH_3$ emissions as $PM_{2.5}$ precursors because those emissions were shown to be insignificant for purposes of the Allegheny County Plan. The direct $PM_{2.5}$ emissions for the baseline, milestone, and attainment years are shown in Table 6 (with $PM_{2.5}$ broken down into filterable and condensable components).[59] The precursor emissions are shown in Tables 7 and 8.

TABLE 6—DIRECT $PM_{2.5}$ RFP EMISSIONS INVENTORY FOR ALLEGHENY COUNTY, BY MILESTONE YEAR

[Tons/year]

| Year | Base year 2011 | | | Milestone year 2019 | | | Projected attainment 2021 | | | Milestone year 2022 | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | $PM_{2.5}$ | $PM_{2.5}$ (filter) | $PM_{2.5}$ (cond) | $PM_{2.5}$ | $PM_{2.5}$ (filter) | $PM_{2.5}$ (cond) | $PM_{2.5}$ | $PM_{2.5}$ (filter) | $PM_{2.5}$ (cond) | $PM_{2.5}$ | $PM_{2.5}$ (filter) | $PM_{2.5}$ (cond) |
| Point Sources | 2,503 | 1,338 | 1,164 | 2,305 | 1,272 | 1,032 | 2,256 | 1,256 | 999 | 2,256 | 1,256 | 999 |
| Area Sources | 2,491 | 2,011 | 480 | 2,665 | 2,183 | 473 | 2,708 | 2,226 | 472 | 2,708 | 2,226 | 472 |
| Non-road Mobile Sources | 361 | 361 | 0 | 259 | 259 | 0 | 234 | 234 | 0 | 234 | 234 | 0 |
| On-road Mobile Sources | 450 | 450 | 0 | 303 | 303 | 0 | 266 | 266 | 0 | 266 | 266 | 0 |
| Fires | 24 | 24 | 0 | 24 | 24 | 0 | 24 | 24 | 0 | 24 | 24 | 0 |
| Biogenic | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Total | 5,829 | 4,185 | 1,644 | 5,556 | 4,042 | 1,505 | 5,488 | 4,007 | 1,471 | 5,488 | 4,007 | 1,471 |

TABLE 7—ALLEGHENY COUNTY $SO_2$ PRECURSOR RFP EMISSIONS INVENTORY, BY MILESTONE YEAR

[Tons/year]

| | Baseline 2011 | Milestone 2019 | Projected attainment 2021 | Milestone 2022 |
|---|---|---|---|---|
| Stationary Point Sources | 13,460 | 7,429 | 5,921 | 5,921 |
| Area Sources | 1,528 | 1,169 | 1,079 | 1,079 |
| Non-road Mobile Sources | 11 | 6 | 5 | 5 |
| On-road Mobile Sources | 78 | 41 | 31 | 31 |
| Fires | 2 | 2 | 2 | 2 |
| Biogenic Sources | 0 | 0 | 0 | 0 |
| Total | 15,080 | 8,647 | 7,039 | 7,039 |

TABLE 8—ALLEGHENY COUNTY $NO_X$ PRECURSOR RFP EMISSIONS INVENTORY

[Tons/year]

| | Baseline 2011 | Milestone 2019 | Projected 2021 | Milestone 2022 |
|---|---|---|---|---|
| Stationary Point Sources | 11,128 | 8,568 | 7,928 | 7,928 |
| Area Sources | 6,979 | 6,727 | 6,664 | 6,664 |
| Non-road Mobile Sources | 3,921 | 2,554 | 2,212 | 2,212 |
| On-road Mobile Sources | 13,259 | 7,218 | 5,708 | 5,708 |
| Fires | 5 | 5 | 5 | 5 |
| Biogenic Sources | 166 | 166 | 166 | 166 |
| Total | 35,460 | 25,239 | 22,684 | 22,684 |

Allegheny County then compared these RFP inventory projections against the most currently available National Emissions Inventory (NEI) data (*i.e.,* 2017 for stationary point source and 2014 for mobile and area emissions) to track the progress of their actual emissions against their 2019 milestone year shown in Table 9.[60]

designation in 2015. The second milestone of 7.5 years, although beyond the attainment date for a moderate area, is included in the event the area (at a future date) is reclassified from moderate to serious nonattainment.

[59] *See* corresponding Tables 7.1, 7.2, and 7.3 of Pennsylvania's September 30, 2019 SIP revision.

[60] *See* Table 7.4 of the September 30, 2019 SIP revision.

TABLE 9—ALLEGHENY COUNTY COMPOSITE EMISSIONS INVENTORY, BASED ON MOST RECENT AVAILABLE NEI DATA

[Tons/year]

| | $PM_{2.5}$ | $PM_{2.5}$ (filter) | $PM_{2.5}$ (cond) | $SO_2$ | $NO_X$ |
|---|---|---|---|---|---|
| Point Sources (2017 NEI) | 1,305 | 775 | 530 | 4,712 | 6,148 |
| Area Sources (2014 NEI) | 2,646 | 2,174 | 473 | 481 | 8,687 |
| Non-road Mobile Sources (2014 NEI) | 315 | 315 | 0 | 8 | 3,183 |
| On-road Mobile Sources (2014 NEI) | 389 | 389 | 0 | 76 | 11,754 |
| Fires (2011 NEI) | 24 | 24 | 0 | 2 | 5 |
| Biogenic Sources (2011 NEI) | 0 | 0 | 0 | 0 | 166 |
| Total | 4,679 | 3,677 | 1,003 | 5,279 | 29,943 |

While the NEI dates do not directly correspond to the 2019 RFP milestone year, the composite inventory shows that Allegheny County is already meeting their projected $PM_{2.5}$ and $SO_2$ emissions. While $NO_X$ was not yet meeting the 2019 milestone based on actual emissions data, additional $NO_X$ reductions from mobile sources that occur after 2014 are expected to close the gap between 2014 (when the latest mobile NEI data was available) and the 2019 projected $NO_X$ milestone.

ACHD attempted to show that linear progress towards attainment is being made by examining its monitoring data and its point source emissions data for the period between the base and attainment years, achieved by performing a linear regression on this data to show yearly progress. Monitored concentrations are presented in Tables 10 and 11, showing the annual and 24-hour $PM_{2.5}$ design values, respectively, for each Allegheny County site for years 2011 through 2018.[61]

TABLE 10—MONITORED ANNUAL $PM_{2.5}$ DESIGN VALUES ($\mu g/m^3$) FOR ALLEGHENY COUNTY MONITOR SITES, WITH LINEAR PROGRESS RATES

| Monitor site | Monitored annual design value ($\mu g/m^3$) | | | | | | | | Yearly rate of linear progress |
|---|---|---|---|---|---|---|---|---|---|
| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | |
| Liberty | 15.0 | 14.8 | 13.4 | 13.0 | 12.6 | 12.8 | 13.0 | 12.6 | −0.33 |
| Avalon | 14.7 | 13.4 | 11.4 | 10.6 | 10.6 | 10.4 | 10.2 | 9.7 | −0.64 |
| North Braddock | 12.7 | 12.5 | 11.7 | 11.4 | 11.2 | 11.0 | 10.8 | 10.7 | −0.30 |
| Harrison | 12.4 | 11.7 | 10.6 | 10.0 | 9.8 | 9.8 | 9.8 | 9.6 | −0.38 |
| Lawrenceville | 11.6 | 11.1 | 10.3 | 10.0 | 9.7 | 9.5 | 9.2 | 9.1 | −0.35 |
| Clairton | 11.5 | 10.9 | 9.8 | 9.5 | 9.9 | 9.8 | 9.8 | 9.3 | −0.24 |
| South Fayette | 11.0 | 10.5 | 9.6 | 9.0 | 8.8 | 8.5 | 8.4 | 8.3 | −0.39 |
| North Park | 9.7 | 9.4 | 8.8 | 8.5 | 8.5 | 8.2 | 8.2 | 7.8 | −0.25 |

TABLE 11—MONITORED 24-HOUR $PM_{2.5}$ DESIGN VALUES, WITH LINEAR PROGRESS RATES

[$\mu g/m^3$]

| Allegheny county monitor site | Monitored 24-hour design value ($\mu g/m^3$) | | | | | | | | Linear progress yearly rate |
|---|---|---|---|---|---|---|---|---|---|
| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | |
| Liberty | 44 | 43 | 37 | 35 | 33 | 36 | 37 | 35 | −1.2 |
| Avalon | 34 | 29 | 25 | 22 | 23 | 22 | 21 | 20 | −1.7 |
| North Braddock | 34 | 33 | 29 | 26 | 25 | 25 | 24 | 24 | −1.5 |
| Harrison | 30 | 28 | 25 | 22 | 22 | 21 | 21 | 20 | −1.4 |
| Clairton | 28 | 26 | 22 | 23 | 25 | 26 | 22 | 19 | −0.8 |
| Lawrenceville | 27 | 26 | 23 | 21 | 21 | 20 | 19 | 18 | −1.3 |
| South Fayette | 27 | 26 | 24 | 20 | 21 | 19 | 19 | 18 | −1.3 |
| North Park | 25 | 23 | 19 | 17 | 18 | 18 | 17 | 16 | −1.1 |

ACHD's analysis of historical monitored $PM_{2.5}$ design values shows that all sites in Allegheny County are achieving roughly linear reductions from baseline case through the most recently available monitor data. All sites are already below the NAAQS on both annual and 24-hour bases, with the exception of the Liberty monitor (for the annual $PM_{2.5}$ NAAQS). Based on the linear annual rate of 0.33 $\mu g/m^3$ improvement (for annual design values), ACHD expects the Liberty monitor to achieve the annual NAAQS by 2021. Based on the linear yearly rate of 1.2 $\mu g/m^3$ for 24-hour design values, ACHD expects that the Liberty monitor will continue to achieve the 24-hour standard.

EPA's Implementation Rule requires attainment plans to provide an

[61] See Tables 7.5 and 7.6 in the September 30, 2019 SIP revision.

implementation schedule containing regulatory implementation timeframes showing progress towards attainment. However, ACHD did not present a schedule, contending that because all control measures identified for the Allegheny County Plan have already been implemented, and there are no identified RACM/RACT or ''additional control measures'' to be implemented, a schedule for implementation of controls is not applicable to this SIP.

3. EPA's Evaluation of and Proposed Action on RFP

For direct $PM_{2.5}$, EPA agrees that ACHD has shown steady progress towards measuring RFP for the 2012 $PM_{2.5}$ NAAQS in the Allegheny County area. ACHD has shown that the measures being implemented in the area show ongoing progress towards achieving the NAAQS.

ACHD has established milestones for comparison of emissions and monitored values corresponding to the milestone compliance demonstration timeframes discussed in the QM and has demonstrated that it has achieved its RFP related milestone requirements for the area. Monitored ambient values in the area are trending downward at a steady, if not linear rate, and ACHD has demonstrated that both emission reductions and monitor values (for both the annual and 24-hour $PM_{2.5}$ NAAQS) are expected to continue to decrease through the 2019 milestone deadline and the 2021 attainment deadline.

As discussed in the precursors section of this proposed document (section III.B), EPA is proposing to determine that $SO_2$ and $NO_X$ are significant precursors in the Allegheny County area, but that VOCs and $NH_3$ are insignificant $PM_{2.5}$ precursors that do not contribute significantly to ambient $PM_{2.5}$ levels in the area.

The Allegheny County $PM_{2.5}$ Plan documents ACHD's assertion that they are implementing all reasonable RACM and RACT and additional reasonable measures for direct $PM_{2.5}$ as expeditiously as practicable. The plan projects levels of direct $PM_{2.5}$ emissions in 2019 and 2022 that reflect full implementation of the Commonwealth's and ACHD's attainment control strategy for direct $PM_{2.5}$ and $PM_{2.5}$ precursors. ACHD's comparison of the most recently available NEI emissions data with the projections for 2019 and 2022 in the plan show that emissions are falling at expected rates to achieve RFP, and (with the exception of $NO_X$), most emissions are at or below 2021 projected levels (and are expected to continue to drop with continued implementation of control measures identified in the plan).[62] Stationary source controls in the area include controls at the U.S. Steel Clairton Coke Works (the largest modeled emission source of $PM_{2.5}$ in the area), including installation of new low-emission quench towers in 2013, replacement of an older coking battery in 2012, and new baffle washing requirements implemented in 2012. Other stationary source controls in the area include addition of flue gas desulfurization at the GenOn Cheswick coal fired EGU, arc furnace improvements and replacements at several area steel manufacturing facilities, etc. Further, a number of facilities in the area have been permanently shut down and have surrendered their permits, including: The Shenango Coke facility, the Guardian and GE Bridgeville glass plants, Bakerstown Container, and Allegheny Aggregates, among others.[63] In addition, new mobile source $NO_X$ controls and the replacement of older, higher emitting mobile sources with new, lower-emitting mobile sources due to fleet turnover are expected to continue to reduce $NO_X$ emissions between the 2014 NEI and the 2019 and 2022 future milestone cases.

In the case of an RFP demonstration based solely on linear reductions in emissions through the attainment deadline, EPA expects that, so long as the attainment date is as expeditious as practicable, then generally linear progress toward attainment by that date would satisfy the RFP requirement.[64]

Thus, EPA proposes to find that the Allegheny County $PM_{2.5}$ Plan demonstrates that emissions of direct $PM_{2.5}$ will be reduced at rates representing generally linear progress towards attainment. EPA also proposes to find that the plan demonstrates that all reasonable measures that provide the bases for the direct $PM_{2.5}$ emissions projections in the RFP analysis are being implemented as expeditiously as practicable. Accordingly, we propose to determine that the plan requires the annual incremental reductions in emissions of direct $PM_{2.5}$ (and significant precursors of $PM_{2.5}$) that are necessary to ensure RFP towards attainment of the 2012 annual $PM_{2.5}$ NAAQS by 2021, in accordance with the requirements of CAA sections 171(1) and 172(c)(2).

*G. Quantitative Milestone (QM) Demonstration*

1. Requirements for a QM Demonstration

Section 189(c) requires that attainment plans include milestones to demonstrate that RFP is being achieved on a timely basis. The purpose of the QM demonstration is to allow for periodic evaluation of the area's progress towards attainment of the NAAQS consistent with RFP requirements. Because RFP is an annual emission reduction requirement while the QMs are to be achieved every three years, when a state demonstrates compliance with the QM, it demonstrates that RFP has been achieved during each of the relevant three years. QMs provide an objective means to evaluate progress toward attainment, *e.g.,* through imposition of emission controls in the attainment plan and the requirement to quantify those required emission reductions.

The CAA does not specify the starting point for counting the three-year periods for QMs under CAA section 189(c). In the General Preamble and Addendum, EPA interpreted the CAA to require that the starting point for the first three-year period be the due date for the Moderate area plan submission.[65] Consistent with this longstanding interpretation of the Act, the $PM_{2.5}$ SIP Requirements Rule requires that each plan for a Moderate $PM_{2.5}$ nonattainment area contain QMs to be achieved no later than milestone dates 4.5 years and 7.5 years from the date of designation of the area.[66] Because EPA designated the Allegheny County area nonattainment for the 2012 annual $PM_{2.5}$ NAAQS effective April 15, 2015, the applicable QM dates for purposes of the Allegheny County $PM_{2.5}$ Plan are October 15, 2019 and October 15, 2022.[67]

The CAA requires states to submit QM reports (due 90 days after each milestone). Under EPA's $PM_{2.5}$ implementation rule,[68] a submitted QM report must include, at minimum: (1) A certification by the Governor (or Governor's designee) that the SIP control strategy is being implemented consistent with the RFP plan, as described in the applicable attainment plan; (2) technical support, including

[62] *See* section 3.0 of this document for a list of current control measures in the Allegheny County area, including new stationary source controls and source shutdowns in the area.

[63] *See* Section 3 of ACHD's plan in the September 30, 2019 SIP revision for a complete listing of implemented $PM_{2.5}$ and $PM_{2.5}$ precursor control strategies.

[64] *See* EPA's $PM_{2.5}$ Requirements Rule at 81 FR 58056, August 24, 2016.

[65] General Preamble, 57 FR 13539 (April 16, 1992); and Addendum, 59 FR 42016 (August 16, 1994).

[66] 40 CFR 51.1013(a)(1).

[67] 80 FR 2206 (January 15, 2015).

[68] 81 FR 58010 (August 24, 2016) (codified at 40 CFR part 51, subpart Z).

calculations, sufficient to document completion statistics for appropriate milestones and to demonstrate that the QM has been satisfied and how the emissions reductions achieved to date compare to those required or scheduled to meet RFP; and (3) a discussion of whether the area will attain the applicable $PM_{2.5}$ NAAQS by the projected attainment date for the area.[69] These reports should include calculations and any assumptions made by the state concerning how RFP has been met, *e.g.,* through quantification of emission reductions to date.[70]

2. QM Demonstration in the Allegheny County $PM_{2.5}$ Plan and 2019 QM Report

a. Allegheny County Area QM Demonstration

The September 30, 2019 SIP revision describes ACHD's approach to demonstrating compliance with the QM requirements of CAA section 189, in which measured air quality concentrations, as well as future projected air quality concentrations, are used to satisfy the milestone reporting requirement. For the Allegheny County moderate $PM_{2.5}$ nonattainment area, these QMs must to be reported to EPA for the milestone years 2019 and (if applicable) 2022. The QM report for year 2019 was due January 14, 2020 (*i.e.,* 90 days after the first milestone date of October 15, 2019). The second report for the 2022 milestone would be required only if the area failed to attain the NAAQS by its 2021 attainment date and were to be reclassified to a serious area. In that case, a 2022 milestone report would be due by January 14, 2023.

Because the Liberty monitor was the only monitor in the Allegheny County area not meeting the 2012 annual $PM_{2.5}$ NAAQS when EPA designated the area nonattainment and is currently not meeting the NAAQS, ACHD based its QMs on the design values for the Liberty monitor. For the 2019 QM demonstration in the September 20, 2019 SIP, ACHD calculated the expected design values at the Liberty monitor based on a linear regression over a 10-year timeframe (from 2011 to the 2021 attainment year). The air quality modeling in the Allegheny County Plan predicts that the area will attain the 2012 annual $PM_{2.5}$ NAAQS by its December 31, 2021 attainment deadline. ACHD assumed that the 2019–2021 design value at the Liberty monitor would be equal to the level of the 2012 annual $PM_{2.5}$ NAAQS, or 12 $\mu g/m^3$. Assuming linear progress, ACHD calculated 2019 design values for the Liberty monitor for both the annual and 24-hour[71] $PM_{2.5}$ NAAQS in Table 12.

TABLE 12—LIBERTY MONITOR AIR QUALITY CONCENTRATION MILESTONES

[$\mu g/m^3$]

| Liberty design value | Base year (2011) | Projected year (2021) | Linear yearly rate | Milestone year (2019) | Milestone year (2022) |
|---|---|---|---|---|---|
| Annual | 15.0 | 12.0 | −0.3 | 12.6 | 12.0 |
| 24-Hour | 44 | 35 | −0.9 | 37 | 35 |

b. Allegheny County $PM_{2.5}$ Area 2019 QM Report

PADEP submitted the Allegheny County 2019 QM Report to EPA on January 14, 2020 and a supplement to that report dated April 8, 2020, (collectively, the 2019 QM Report). The 2019 QM Report includes air quality monitoring data reports from AQS showing that the 2016–2018 design values for the Liberty monitor met the milestone levels set forth in Table 12. In addition, the preliminary[72] 2017–2019 design values at the Liberty monitor are lower than the 2016–2018 design values. The data is presented in Table 13.

TABLE 13—LIBERTY MONITOR DESIGN VALUES FOR THE 2012 ANNUAL AND 24 HOUR $PM_{2.5}$ NAAQS

[In $\mu g/m^3$]

| NAAQS | 2019 Milestone | 2016–2018 Final | 2017–2019 Preliminary |
|---|---|---|---|
| Annual | 12.6 | 12.6 | 12.4 |
| 24-Hour | 37 | 37 | 35 |

AQS reports submitted in the 2019 QM Report continue to show that all other monitors in the Allegheny County area have design values lower than those of the Liberty monitor. To demonstrate RFP is being met, as part of the 2019 QM Report ACHD verified that all controls listed as part of the plan's control strategy remain in place. Further, ACHD states that, ''RFP is being achieved for Allegheny County and progress should continue toward attainment, to be achieved by the attainment date of December 31, 2021.'' Furthermore, PADEP concurred with ACHD's certification that the control strategy is being implemented in Allegheny County consistent with the RFP plan and that milestones are being achieved as included in the SIP.

In the attainment plan, ACHD developed the 2019 RFP milestone emissions inventory by linearly interpolating 2011 base year and projected 2021 attainment year emissions inventories used in its modeled attainment demonstration. In the 2019 QM report, ACHD presented updated actual emissions data for the stationary point source sector of the emissions inventory for 2017 and 2018, along with prior data for the 2011–2016 period, as listed in Table 14.

[69] 40 CFR 51.1013(b).

[70] Id. at pp. 42016–42017.

[71] The 24-hour $PM_{2.5}$ NAAQS is set at 35 $\mu g/m^3$.

[72] The 2019 data is fully validated and quality-assured, but not yet certified. The 2019 data must be certified by May 1, 2020, in accordance with 40 CFR 58.15.

TABLE 14—ANNUAL ALLEGHENY COUNTY POINT SOURCE EMISSIONS FOR THE PERIOD 2011–2018, WITH YEARLY LINEAR PROGRESS RATES

[In tons/year]

| Pollutant | Point source emissions (tons/year) | | | | | | | | Linear progress yearly rate |
|---|---|---|---|---|---|---|---|---|---|
| | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | |
| $PM_{2.5}$ | 2,503 | 1,725 | 1,822 | 2,127 | 1,511 | 1,373 | 1,282 | 1,360 | −145 |
| $SO_2$ | 13,460 | 6,542 | 6,032 | 8,593 | 5,279 | 4,864 | 4,758 | 7,122 | −716 |
| $NO_X$ | 11,128 | 11,881 | 13,073 | 13,715 | 10,278 | 8,560 | 6,337 | 6,925 | −882 |

Pursuant to 40 CFR 51.1013(b)(3), the QM report must include a discussion of whether the $PM_{2.5}$ NAAQS will be attained by the projected attainment date for the area. ACHD's 2019 QM report contains an evaluation of ambient air quality trends, meteorology, and emission control strategies. In the 2019 QM Report, ACHD concludes that it expects the area to attain the 2012 annual $PM_{2.5}$ NAAQS by the December 31, 2021 attainment date. The 2019 report also contains a trend analysis of the Liberty monitor showing a decline in monitored $PM_{2.5}$ concentrations through 2019. An accompanying analysis of quarterly means for the Liberty monitor from 1999 to 2019 shows that the lowest quarterly means have occurred in the last four years, with three of the record-low quarters occurring in the last two years. The annual weighted $PM_{2.5}$ means for the Liberty monitor are shown in Table 15 for the 2009–2019 period.

TABLE 15—LIBERTY MONITOR ANNUAL WEIGHTED MEAN CONCENTRATIONS, 2009–2019

| Metric | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Liberty weighted mean ($\mu g/m^3$) | 15.0 | 16.0 | 14.0 | 14.3 | 12.0 | 12.7 | 12.9 | 12.8 | 13.4 | 11.5 | 12.2 |

**Note:** ACHD observes that concentrations are declining based on emission controls, but differences in the yearly concentrations at the Liberty monitor show dependence on the frequency and severity of inversions. Inversions were less frequent in 2013 and more prevalent in 2012 and 2017.

ACHD concludes that, based on monitored data, meteorology, and controls, ACHD expects that the Allegheny County Area will attain the 2012 annual $PM_{2.5}$ NAAQS by or before its December 31, 2021 attainment deadline.

3. EPA's Evaluation and Proposed Action on the QM Demonstration

EPA has reviewed the QM demonstration contained in the September 30, 2019 moderate area attainment plan for the Allegheny County Area, as well as the 2019 QM Report submitted to EPA on January 14, 2020 (as supplemented on April 8, 2020). This demonstration confirms that the monitored ambient air quality levels in the area satisfy EPA requirements for milestone levels.

The 2019 QM report shows that 2016–2018 design values for the Liberty monitor (the only monitor that did not meet the NAAQS since the area was designated nonattainment) met the milestone test established by ACHD in the attainment plan. Preliminary 2017–2019 design values at the Liberty monitor presented in the 2019 QM report are lower than the 2016–2018 design values. Finally, air quality data reports from EPA's AQS show that the 2016–2018 design values for the Liberty monitor met the QM levels set out in the attainment plan.

EPA has reviewed the RFP data presented in the 2019 QM Report and finds that the Allegheny County area has made demonstrable progress in reducing emissions of $PM_{2.5}$ and $PM_{2.5}$ significant precursors since EPA designated the area nonattainment for the $PM_{2.5}$ NAAQS in 2015. Comparing stationary source emissions in the 2019 QM Report to those predicted in the attainment plan for 2019, EPA finds that the most recent emissions inventory is well below the RFP milestone. Therefore, EPA finds that emissions reductions are meeting RFP through the 2019 period.

EPA determined in an April 22, 2020 letter to PADEP that (based on its review of information contained in the plan and additional information provided in the 2019 QM report) ACHD has adequately demonstrated that the 2019 QMs for a moderate area plan have been met. The 2019 QM Report contains each of the required components to meet the QM requirements of CAA section 189(c)(2) and 40 CFR 51.1013(b).

For further information on EPA's review of the QM methodology and the 2019 QM Report, please refer to our TSD on the 2019 QM Report prepared in support of this action, which is available in the docket.[73]

*H. Contingency Measures*

1. Requirements for Contingency Measures

In accordance with section 172(c)(9) of the CAA, the $PM_{2.5}$ SIP Requirements Rule requires that attainment demonstrations for moderate $PM_{2.5}$ nonattainment areas include contingency measures.[74] Contingency measures are additional control measures to be implemented in the event that EPA determines that an area failed to meet RFP requirements (including associated QMs) or failed to attain the $PM_{2.5}$ primary standard by the applicable attainment date.

In order for contingency measures to be approvable as part of a state's $PM_{2.5}$ moderate area attainment plan, the measures must meet the following requirements set forth in the $PM_{2.5}$ SIP Requirements Rule and 40 CFR 51.1014: (1) The contingency measures must be fully adopted rules or control measures that are ready to be implemented quickly upon a determination by the Administrator of the nonattainment area's failure to meet RFP, failure to meet any QM, failure to submit a QM

[73] By letter dated April 22, 2020, from EPA Regional Administrator Servidio to PADEP Secretary McDonnell, EPA determined that ACHD adequately demonstrated that the 2019 QMs provided in the attainment plan have been met.

[74] *See* 40 CFR 51.1014 and 81 FR 58010 at p. 58066, August 24, 2016.

report or failure to attain the standard by the applicable attainment date; (2) the plan must contain trigger mechanisms for the contingency measures, specify a schedule for implementation, and indicate that the measures will be implemented with minimal further action by the state or by EPA; [75] (3) the contingency measures shall consist of control measures that are not otherwise included in the control strategy or that achieve emissions reductions not otherwise relied upon in the control strategy for the area; and (4) the contingency measures should provide for emissions reductions approximately equivalent to one year's worth of reductions needed for RFP.

2. Contingency Measures in the Allegheny County $PM_{2.5}$ Plan

Section 8 (Contingency Measures) of the Allegheny County $PM_{2.5}$ Plan identifies as contingency measures two actions for the mitigation of primary $PM_{2.5}$ from the U.S. Steel Clairton Plant that are to be implemented as the result of a July 27, 2019 settlement agreement and order (#19060) between ACHD and U.S. Steel. These actions, which include the installation of a cover and/or air curtain and the installation of a new combustion (under-firing) stack at the U.S. Steel Clairton Works, are to be implemented by May 1, 2020 and November 1, 2021, respectively. ACHD predicts that, based on additional modeling, these two actions will lead to a reduction in absolute annual modeled impacts of 0.10 $\mu g/m^3$ at the Liberty monitor (AQS Site ID 42–003–0064) and that the resulting 2022 $PM_{2.5}$ annual design value will be lowered by 0.07 $\mu g/m^3$. ACHD did not include these expected reductions in $PM_{2.5}$ emissions at the U.S. Steel Clairton facility in the emissions inventory portion of the Allegheny County $PM_{2.5}$ Plan.

3. EPA's Evaluation and Proposed Action on Contingency Measures

EPA does not consider the two actions contained in the July 27, 2019 settlement agreement and order to be suitable contingency measures. According to the $PM_{2.5}$ SIP Requirements Rule, ''Contingency measures must be fully adopted rules or control measures that are ready to be implemented quickly upon a determination by the Administrator of the nonattainment area's failure to meet RFP, failure to meet any QM, failure to submit a QM report or failure to attain the standard by the applicable attainment date.'' 81 FR 58010 at 58066, August 24, 2016.

Contingency measures are to be implemented only if they are ''triggered'' in the event of the Administrator's determination that the Area failed to meet RFP requirements (including associated QMs) or failed to attain the $PM_{2.5}$ NAAQS by the applicable attainment date. The installation of the air curtain and stack at the U.S. Steel Clairton Coke Works will be implemented regardless of whether the Allegheny County Area fails to meet the RFP requirements or attain the $PM_{2.5}$ NAAQS by the attainment date. Measures that will be implemented regardless of being triggered are not considered appropriate to use as contingency measures. Therefore, EPA cannot fully approve Section 8 (Contingency Measures) of the Allegheny County $PM_{2.5}$ Plan because the two measures in the settlement agreement and order do not meet the contingency measures requirements of the $PM_{2.5}$ SIP Requirements Rule and 40 CFR 51.1014.

EPA informed ACHD of this concern prior to the publication of ACHD's proposed plan. In response, PADEP submitted a letter to EPA dated April 20, 2020, concurring with ACHD's commitment to adopt specific contingency measures and an attainment year MVEB in accordance with EPA's proposed conditional approval of those elements of the September 30, 2019 SIP revision. In its April 7, 2020 letter to PADEP, ACHD commits to adopt measures from the following list that will provide for a reduction of 34 tons per year of direct $PM_{2.5}$ emissions countywide (or an equivalent reduction in combination of $PM_{2.5}$ precursors), or 9.4 tons per year of $PM_{2.5}$ in the immediate vicinity of the Liberty monitor. Measures include implementation of the following at the U.S. Steel Clairton Coke Works: (1) Increased residence times for the Pushing Emission Control (PEC) hoods during the pushing process (as described in ACHD Article XXI § 2105.21.e.6) for batteries 1–3, 13–15, and 19–20; (2) increased baffle washing for the Quench Towers; (3) road and parking lot paving; and (4) improvements to the PEC baghouses. Additional potential measures include road paving on a portion of unpaved public county roads; adoption of an ordinance to restrict sale and use of heavy fuel oil and/or waste derived liquid fuel (WDLF) in Allegheny County; expansion of an existing wood stove change out program; repowering or replacement of tugboats and/or locomotives utilized by the U.S. Steel Mon Valley Works facilities; and replacement of locomotives at the McKeesport switchyard with new, cleaner equipment that meets the most recent standards.

After adopting measures, PADEP will submit a SIP revision, on behalf of ACHD, containing the adopted measures and meeting the requirements of the $PM_{2.5}$ SIP Requirements Rule and 40 CFR 51.1014. In addition, the contingency measures section will include a description of the trigger mechanisms and schedules for implementation of the contingency measures, as required by section 51.1014. ACHD and PADEP have committed to submit the contingency measures SIP revision to EPA as expeditiously as possible, but no later than one year after the effective date of EPA's final notice of conditional approval of the September 30, 2019 SIP revision.

However, as stated previously, the expected emission reductions from the installation of the air curtain and stack at the U.S. Steel Clairton Coke Works were not included in the emissions inventory included in the Allegheny County $PM_{2.5}$ Plan. Therefore, it is expected that these actions will provide for additional emission reductions beyond those projected in the Allegheny County $PM_{2.5}$ Plan. Thus, the installation of the air curtain and stack at Clairton provide additional assurance that the 2012 $PM_{2.5}$ NAAQS will be attained in the Allegheny County nonattainment area by the attainment date.

Therefore, EPA concludes that the installation of the air curtain and stack at the U.S. Steel Clairton Coke Works are better suited as additional control measures for attainment of the $PM_{2.5}$ NAAQS in the Allegheny County Area. EPA is proposing to approve the installation of the air curtain and stack at the Clairton Coke Works contained in the settlement agreement and order (#19060) referenced in the Allegheny County $PM_{2.5}$ Plan as additional control measures for the attainment of the $PM_{2.5}$ NAAQS in the Allegheny County nonattainment area.

EPA is also proposing to conditionally approve the contingency measures portion of the Allegheny County $PM_{2.5}$ Plan. As discussed previously, ACHD commits to adopt contingency measures and submit, through PADEP, a supplemental SIP revision consisting of

[75] According to the $PM_{2.5}$ SIP Requirements Rule, states must show that the contingency measures can be implemented with minimal further action and no additional rulemaking actions, such as public hearings or legislative review. EPA generally expects all actions needed to effect full implementation of the contingency measures to occur within 60 days after EPA notifies the state of the area's failure to meet an RFP requirement or attain the NAAQS.

a revised contingency measures section of the Allegheny County $PM_{2.5}$ Plan that includes adopted contingency measures from the April 20, 2020 letter and meets the requirements of the $PM_{2.5}$ SIP Requirements Rule and 40 CFR 51.1014. EPA's approval of the contingency measures portion of the Allegheny County $PM_{2.5}$ Plan is contingent on ACHD's adoption of approvable contingency measures and submittal of a SIP revision that meets the contingency measures requirements of the $PM_{2.5}$ SIP Requirements Rule and 40 CFR 51.1014.

*I. Transportation Conformity and MVEBs*

1. Requirements for Motor Vehicle Emission Budgets

Section 176(c) of the CAA requires Federal actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone. Section 176(c)(4) of the CAA requires that transportation plans, programs, and projects which are funded or approved under title 23 of the United States Code must be determined to conform with state or Federal air implementation plans. A MVEB is that portion of the total allowable emissions allocated to highway and transit vehicle use that are defined in the implementation plan for a control strategy SIP revision.[76]

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, the area metropolitan planning organization (MPO) coordinates with state and local air quality and transportation agencies, EPA, FHWA, and FTA to demonstrate that an area's regional transportation plans and transportation improvement programs conform to the applicable SIP.[77] This conformity demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the MVEB contained in all control strategy SIPs.[78] An attainment, maintenance, or RFP plan SIP should include budgets for the attainment year, each required RFP milestone year, and the last year of the maintenance plan, as appropriate. Budgets are generally established for specific years and specific pollutants or precursors and must reflect all of the motor vehicle control measures contained in the applicable plan.[79] For MVEBs to be approvable, they must meet, at a minimum, EPA's conformity adequacy criteria at 40 CFR 93.118(e)(4).

All $PM_{2.5}$ control strategy SIP MVEBs must include direct $PM_{2.5}$ motor vehicle emissions (including emissions from tailpipes, brake wear, and tire wear).[80] Precursors of $PM_{2.5}$ must also be included in the MVEB, in certain circumstances. $NO_X$ is included in $PM_{2.5}$ nonattainment area MVEBs, unless both EPA Regional Administrator and the director of the state air agency made a finding that transportation-related emissions of $NO_X$ are insignificant to $PM_{2.5}$ nonattainment in the area.[81] Other potential $PM_{2.5}$ precursor emissions, such as VOC, $SO_2$ and $NH_3$ are only included in $PM_{2.5}$ area MVEBs if EPA has determined them to be significant in the area.[82]

In order for a pollutant or precursor to be considered an insignificant contributor, the control strategy SIP must demonstrate that it is unreasonable to expect that such an area would experience enough motor vehicle emissions growth in that pollutant/precursor for a NAAQS violation to occur. Insignificance determinations are based on factors such as air quality, SIP motor vehicle control measures, trends and projections of motor vehicle emissions, and the percentage of the total SIP inventory that is comprised of motor vehicle emissions.[83] ACHD did not submit and is not seeking an insignificance determination for $NO_X$.

2. Motor Vehicle Emission Budgets in the Allegheny County $PM_{2.5}$ Attainment Plan

The Commonwealth's September 30, 2019 SIP revision lacks a MVEB specific to the 2012 $PM_{2.5}$ attainment plan for the attainment year of 2021. Instead, the SIP revision refers to existing MVEBs for the 1997 and 2006 $PM_{2.5}$ NAAQS established by EPA's approval of the maintenance plan for the Pittsburgh-Beaver Valley area for the 1997 and 2006 $PM_{2.5}$ NAAQS.[84] This maintenance plan included MVEBs for 2017 and 2025, for the larger Pittsburgh-Beaver Valley area (comprised of part of Allegheny County (excluding the Liberty-Clairton area), Beaver, Butler, Washington, and Westmoreland Counties, as well as portions of Armstrong County, Greene, and Lawrence Counties).

Neither EPA nor the Commonwealth's air director have made transportation-related insignificance findings for $NO_X$, and EPA has not determined that transportation-related emissions of $SO_2$, VOC, or $NH_3$ are significant in Allegheny County. Therefore, there is no established MVEB for $SO_2$, VOC, and $NH_3$ in any approved control strategy SIP for the Allegheny County $PM_{2.5}$ area. ACHD has determined VOC and $NH_3$ to be insignificant as precursors to $PM_{2.5}$ nonattainment as part of the attainment plan.[85] Therefore, transportation conformity requirements are applicable only to $PM_{2.5}$ and $NO_X$ for the Allegheny County Area.

3. EPA's Evaluation and Proposed Action on the Intended MVEB

EPA is proposing to find that ACHD's plan failed to establish a MVEB for the 2012 $PM_{2.5}$ attainment plan control strategy SIP for the 2021 attainment year, as required for emission budgets by 40 CFR 93.118. A budget is required for each NAAQS for each control strategy SIP, so that conformity can be demonstrated via a ''budget'' test for that particular area and control strategy milestone.[86]

Because the Allegheny County $PM_{2.5}$ Plan fails to establish an attainment year 2021 MVEB for $PM_{2.5}$ and $NO_X$, EPA cannot approve this element of the plan at this time. However, PADEP subsequently submitted a letter to EPA

[76] EPA's Transportation Conformity Rule at 40 CFR 93.101 defines a ''control strategy SIP revision'' as a ''plan which contains specific strategies for controlling the emissions and reducing ambient levels of pollutants in order to satisfy CAA requirements of RFP and attainment.''

[77] The Southwestern Pennsylvania Commission (SPC) is the official Metropolitan Planning Organization (MPO) for the 10-county Southwestern Pennsylvania Region, which includes the City of Pittsburgh and surrounding counties—including Allegheny County. SPC is responsible for planning and prioritizing the use of all state and Federal transportation funds allocated to the region.

[78] *See* 40 CFR 93.118(a).

[79] *See* 40 CFR 93.118(e)(4)(v).

[80] Per 40 CFR 93.102(b)(3), direct $PM_{2.5}$ emissions from re-entrained road dust need only be included in the MVEB if EPA Regional Administrator or the director of the state air agency has made a finding that re-entrained road dust emissions within the area are a significant contributor to the $PM_{2.5}$ nonattainment problem or if the applicable SIP includes re-entrained road dust in the budget as part of the RFP, attainment, or maintenance strategy.

[81] *See* 40 CFR 93.102(b)(2)(iv).

[82] *See* 40 CFR 93.102(b)(2)(v).

[83] *See* 40 CFR 93.109(f) for criteria for insignificance determinations. EPA's rationale for allowing insignificance determinations is described in the July 1, 2004 revision to the Transportation Conformity Rule at 69 FR 40004.

[84] *See* 80 FR 59624, October 2, 2015.

[85] *See* Section 5 (Modeling Demonstration) of the September 30, 2019 SIP revision.

[86] *See* 40 CFR 93.118(a), (b), and (e).

dated April 20, 2020, committing to remedy this deficiency by establishing a MVEB in accordance with EPA's Transportation Conformity Rule requirements by September 30, 2020. Because ACHD and the MPO have identified the actual MVEB to be established as part of their April 20, 2020 commitment, EPA is including the MVEB in this action for informational purposes only. The MVEB must still be adopted by Allegheny County through its normal SIP development process, which includes EPA's related requirements to undergo public comment. The April 20, 2020 commitment letter clearly identifies the MVEB that ACHD and the MPO intend to propose for the 2021 attainment year, as shown in Table 16.

TABLE 16—ALLEGHENY COUNTY, PA 2012 $PM_{2.5}$ NAAQS ATTAINMENT YEAR INTENDED MVEB FOR DIRECT $PM_{2.5}$ AND NITROGEN OXIDES ($NO_x$)

| Motor vehicle emissions budget year | Direct $PM_{2.5}$ on-road emissions (tons per year) | $NO_X$ on-road emissions (tons per year) |
|---|---|---|
| 2021 | 266 | 5,708 |

Remedy of this MVEB-related deficiency of the September 30, 2019 SIP revision entails: Identifying the attainment year MVEB in a supplemental SIP revision; conducting a public comment process on the identified MVEB (per the requirements of EPA conformity rule at 40 CFR 93.118(e)); and formally submitting the established MVEB to EPA as a supplemental revision to the attainment plan SIP revision. EPA is proposing to conditionally approve the MVEB element of the SIP submittal until ACHD remedies the deficiency with the 2021 MVEB.

## IV. Summary of Proposed Action and Request for Public Comment

Under CAA section 110(k)(3), EPA is proposing to approve Pennsylvania's September 30, 2019 SIP revision to address the CAA's Moderate area planning requirements for the 2012 $PM_{2.5}$ NAAQS in the Allegheny County nonattainment area—with the exception of the contingency measures and MVEB elements of the plan, which EPA proposes to conditionally approve.

Specifically, EPA is proposing to approve the following elements of the Allegheny County $PM_{2.5}$ Plan:

(1) The 2011 base year emissions inventory as meeting the requirements of CAA section 172(c)(3);

(2) The RACM/RACT demonstration as meeting the requirements of CAA sections 172(c)(1) and 189(a)(1)(C);

(3) The attainment demonstration as meeting the requirements of CAA sections 172(c)(1) and 189(a)(1)(B);

(4) The RFP demonstration as meeting the requirements of CAA section 172(c)(2); and

(5) The QM demonstration as meeting the requirements of CAA section 189(c).

EPA also proposes to conditionally approve the MVEB and contingency measures elements of the Allegheny County $PM_{2.5}$ Plan. Under section 110(k)(4) of the CAA, EPA may conditionally approve a plan based on a commitment from the Commonwealth to adopt specific enforceable measures within a date certain no more than one year from the date of final conditional approval. If Pennsylvania fails to meet its commitments by the commitment date, the approval is treated as a disapproval.

Specifically, EPA is proposing to conditionally approve the following elements of the Allegheny County $PM_{2.5}$ Plan:

(1) The attainment year 2021 MVEB, as the plan failed to identify the MVEB, as required by CAA section 176(c) and 40 CFR part 93, subpart A. However, Pennsylvania submitted a commitment letter to EPA on April 20, 2020 transmitting ACHD's April 7, 2020 letter that identifies their proposed MVEB for 2021 and commits to finalize a 2021 budget (following public notice and comment) and to submit it to EPA by September 30, 2020 as a revision to this SIP submission and;

(2) The contingency measures in Section 8 (Contingency Measures) of the Allegheny County $PM_{2.5}$ Plan, as the submitted contingency measures do not satisfy the requirements of the CAA section 172(c)(9) or the $PM_{2.5}$ SIP Requirements Rule at 40 CFR 51.1014. Upon receipt of that subsequent SIP submission, EPA will take separate action to determine whether those adopted contingency measures satisfy relevant EPA requirements for contingency measures.

EPA is soliciting public comments on the issues discussed in this document. The deadline and instructions for submission of comments are provided in the **DATES** and **ADDRESSES** sections of this action. EPA will consider any received comments prior to finalizing this proposed action.

## V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA.

Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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).

In addition, this proposed rule proposing to approve the Allegheny County $PM_{2.5}$ Plan (with the exception of the contingency measures and MVEB elements, which EPA is proposing to conditionally approve) does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 4, 2020

**Cosmo Servidio,**

*Regional Administrator, Region III.*

[FR Doc. 2020–12499 Filed 6–11–20; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

**[EPA–HQ–OAR–2019–0698; FRL–10009–66–OAR]**

**RIN 2060–AU81**

## Protection of Stratospheric Ozone: Listing of Substitutes Under the Significant New Alternatives Policy Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Pursuant to the U.S. Environmental Protection Agency's (EPA) Significant New Alternatives Policy program, this action proposes to list certain substances in the refrigeration and air conditioning sector and the foam blowing sector. For the retail food refrigeration—medium-temperature stand-alone units (new) end-use, EPA is proposing to list substitutes as acceptable subject to narrowed use limits. For the residential and light commercial air conditioning and heat pumps (new) end-use, EPA is proposing to list substitutes as acceptable subject to use conditions. For the foam blowing sector, extruded polystyrene: Boardstock and billet end-use, EPA is proposing to list substitutes as acceptable. This action also proposes to remove an acceptable subject to use conditions listing for the fire suppression sector because EPA more recently listed the substitute as acceptable with no use restrictions.

**DATES:** Comments must be received on or before July 27, 2020. Any party requesting a public hearing must notify the contact listed below under **FOR FURTHER INFORMATION CONTACT** by 5 p.m. Eastern Daylight Time on June 17, 2020. If a virtual hearing is held, it will take place on or before June 29, 2020 and further information will be provided on EPA's Stratospheric Ozone website at *www.epa.gov/ozone/snap.*

**ADDRESSES:** You may send comments, identified by docket identification (ID) number EPA–HQ–OAR–2019–0698, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, EPA's full 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.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room was closed to public visitors on March 31, 2020, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* or email, as there is a temporary suspension of mail delivery to EPA, and no hand deliveries are currently accepted. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Christina Thompson, Stratospheric Protection Division, Office of Atmospheric Programs (Mail Code 6205T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–0983; email address: *thompson.christina@epa.gov.* Notices and rulemakings under EPA's Significant New Alternatives Policy program are available on EPA's Stratospheric Ozone website at *https://www.epa.gov/snap/snap-regulations.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

## I. General Information

### *A. Executive Summary and Background*

This action proposes to list new alternatives for the refrigeration and air conditioning sector and for the foam blowing sector and to change an existing listing for the fire suppression sector. Specifically, EPA is proposing to:

- List R–448A, R–449A and R–449B as acceptable, subject to narrowed use limits, for use in retail food refrigeration—medium-temperature stand-alone units for new equipment;
- List R–452B, R–454A, R–454B, R–454C and R–457A as acceptable, subject to use conditions, for use in residential and light commercial air conditioning (AC) and heat pumps for new equipment and R–32 as acceptable, subject to use conditions, for use in residential and light commercial AC and heat pumps—equipment other than self-contained room air conditioners, for new equipment;
- List blends of 40 to 52 percent hydrofluorocarbon (HFC)–134a and the remainder hydrofluoroolefin (HFO)–1234ze(E); blends of 40 to 52 percent HFC–134a with 40 to 60 percent HFO–1234ze(E) and 10 to 20 percent each water and carbon dioxide ($CO_2$); and blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water as acceptable for use in extruded polystyrene: Boardstock and billet (XPS); and
- Remove Powdered Aerosol E from the list of fire suppression substitutes acceptable subject to use conditions in total flooding applications.

EPA is proposing these listings after its evaluation of human health and environmental information on various substitutes submitted to the Significant New Alternatives Policy (SNAP) program. This action provides additional flexibility for industry by providing new options in specific uses and situations.

In this proposed rule, EPA refers to listings made in a final rule issued July 20, 2015, at 80 FR 42870 (''2015 Rule''). The 2015 Rule, among other things, changed the listings for certain HFCs and blends from acceptable to unacceptable in various end-uses in the aerosols, refrigeration and air conditioning, and foam blowing sectors. After a challenge to the 2015 Rule, the United States Court of Appeals for the District of Columbia Circuit (''the court'') issued a partial vacatur of the 2015 Rule ''to the extent it requires manufacturers to replace HFCs with a substitute substance'' [1] and remanded the rule to the Agency for further proceedings.[2] The court also upheld EPA's listing changes as being reasonable and not ''arbitrary and capricious.'' [3] This proposed rule is not EPA's response to the court's decision. EPA is developing a future proposed rule to respond to the court's decision.

SNAP Program Background

The SNAP program implements section 612 of the Clean Air Act (CAA). Several major provisions of section 612 are:

1. Rulemaking

Section 612(c) requires EPA to promulgate rules making it unlawful to replace any class I (chlorofluorocarbon (CFC), halon, carbon tetrachloride, methyl chloroform, methyl bromide, hydrobromofluorocarbon, and chlorobromomethane) or class II (hydrochlorofluorocarbon (HCFC)) ozone-depleting substances (ODS) with any substitute that the Administrator determines may present adverse effects to human health or the environment where the Administrator has identified an alternative that (1) reduces the overall risk to human health and the environment and (2) is currently or potentially available.

2. Listing of Unacceptable/Acceptable Substitutes

Section 612(c) requires EPA to publish a list of the substitutes that it finds to be unacceptable for specific uses and to publish a corresponding list of acceptable substitutes for specific uses.

3. Petition Process

Section 612(d) grants the right to any person to petition EPA to add a substance to, or delete a substance from, the lists published in accordance with section 612(c).

4. 90-Day Notification

Section 612(e) directs EPA to require any person who produces a chemical substitute for a class I substance to notify the Agency not less than 90 days before a new or existing chemical is introduced into interstate commerce for significant new use as a substitute for a class I substance. The producer must also provide the Agency with the producer's unpublished health and safety studies on such substitutes.

The regulations for the SNAP program are promulgated at 40 CFR part 82, subpart G, and the Agency's process for reviewing SNAP submissions is described in regulations at 40 CFR 82.180. Under these rules, the Agency has identified five types of listing decisions: Acceptable; acceptable subject to use conditions; acceptable subject to narrowed use limits; unacceptable; and pending (40 CFR 82.180(b)). Use conditions and narrowed use limits are both considered

[1] *Mexichem Fluor, Inc.* v. *EPA,* 866 F.3d 451, 462 (D.C. Cir. 2017).

[2] Later, the court issued a similar decision on portions of a similar final rule issued December 1, 2016 at 81 FR 86778 (''2016 Rule''). *See Mexichem Fluor, Inc.* v. *EPA,* Judgment, Case No. 17–1024 (D.C. Cir., April 5, 2019), 760 Fed. Appx. 6 (Mem). That rule is not relevant for this action.

[3] *Mexichem Fluor,* 866 F.3d at 462–63.

''use restrictions,'' as described below. Substitutes that are deemed acceptable with no use restrictions (no use conditions or narrowed use limits) can be used for all applications within the relevant end-uses in the sector. After reviewing a substitute, the Agency may determine that a substitute is acceptable only if certain conditions in the way that the substitute is used are met to minimize risks to human health and the environment. EPA describes such substitutes as ''acceptable subject to use conditions.'' (40 CFR 82.180(b)(2)). For some substitutes, the Agency may permit a narrowed range of use within an end-use or sector. For example, the Agency may limit the use of a substitute to certain end-uses or specific applications within an industry sector. EPA describes these substitutes as ''acceptable subject to narrowed use limits.'' Under the narrowed use limit, users intending to adopt these substitutes ''must ascertain that other alternatives are not technically feasible.'' (40 CFR 82.180(b)(3)).

In making decisions regarding whether a substitute is acceptable or unacceptable, and whether substitutes present risks that are lower than or comparable to risks from other substitutes that are currently or potentially available in the end-uses under consideration, EPA examines the criteria in 40 CFR 82.180(a)(7): (i) Atmospheric effects and related health and environmental impacts; (ii) general population risks from ambient exposure to compounds with direct toxicity and to increased ground-level ozone; (iii) ecosystem risks; (iv) occupational risks; (v) consumer risks; (vi) flammability; and (vii) cost and availability of the substitute.

For additional information on the SNAP program, visit the SNAP portion of EPA's Ozone Layer Protection website at *www.epa.gov/snap.* Copies of the full lists of acceptable substitutes for ODS in all industrial sectors are available at *www.epa.gov/snap/substitutes-sector.* For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking published March 18, 1994 (59 FR 13044), codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations are found at: *www.epa.gov/snap/snap-regulations.* Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions, are also listed in the appendices to 40 CFR part 82, subpart G.

*B. Does this action apply to me?*

The following list identifies regulated entities that may be affected by this proposed rule and their respective North American Industrial Classification System (NAICS) codes:

- All Other Basic Organic Chemical Manufacturing (NAICS 325199)
- Polystyrene Foam Product Manufacturing (NAICS 326140)
- Urethane and Other Foam Product (except Polystyrene) Manufacturing (NAICS 326150)
- Air Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS 333415)
- Refrigeration Equipment and Supplies Merchant Wholesalers (NAICS 423740)
- Supermarkets and Other Grocery (except Convenience) Stores (NAICS 44511 & 445110)
- Convenience Stores (NAICS 445120)
- Limited-Service Restaurants (NAICS 722513)
- Cafeterias, Grill Buffets, and Buffets (NAICS 722514)
- Snack and Nonalcoholic Beverage Bars (NAICS 722515)
- Fire Protection (NAICS 922160)

*C. What acronyms and abbreviations are used in the preamble?*

Below is a list of acronyms and abbreviations used in the preamble of this document:

AC—Air Conditioning
ADA—Americans with Disabilities Act
AEL—Acceptable Exposure Limit
AHRI—Air-Conditioning, Heating, and Refrigeration Institute
ANSI—American National Standards Institute
ASHRAE—American Society of Heating, Refrigerating and Air-Conditioning Engineers
ASTM—American Society for Testing and Materials
CAA—Clean Air Act
CAS Reg. No.—Chemical Abstracts Service Registry Identification Number
CBI—Confidential Business Information
CCAC—Climate and Clean Air Coalition
CFC—Chlorofluorocarbon
CFR—Code of Federal Regulations
$CO_2$—Carbon Dioxide
DOE—United States Department of Energy
EPA—United States Environmental Protection Agency
FR—Federal Register
GSHP—Ground-Source Heat Pump
GWP—Global Warming Potential
HCFC—Hydrochlorofluorocarbon
HFC—Hydrofluorocarbon
HFO—Hydrofluoroolefin
HP—Heat Pump
ICF—ICF International, Inc.
IPCC—Intergovernmental Panel on Climate Change
LFL—Lower Flammability Limit
MBtu—Million British thermal units
NAAQS—National Ambient Air Quality Standards
NAICS—North American Industrial Classification System
NFPA—National Fire Protection Association
NIOSH—National Institute for Occupational Safety and Health
NPRM—Notice of Proposed Rulemaking
ODP—Ozone Depletion Potential
OMB—United States Office of Management and Budget
OSHA—United States Occupational Safety and Health Administration
PEL—Permissible Exposure Limit
ppm—Parts Per Million
PRA—Paperwork Reduction Act
PTAC—Packaged Terminal Air Conditioner
PTHP—Packaged Terminal Heat Pump
RFA—Regulatory Flexibility Act
SDS—Safety Data Sheet
SIP—State Implementation Plan
SNAP—Significant New Alternatives Policy
STEL—Short-term Exposure Limit
TSCA—Toxic Substances Control Act
TWA—Time Weighted Average
UL—Underwriters Laboratories Inc
UMRA—Unfunded Mandates Reform Act
VOC—Volatile Organic Compounds
VRF—Variable Refrigerant Flow
WEEL—Workplace Environmental Exposure Limit
WSHP—Water-Source Heat Pump
XPS—Extruded Polystyrene: Boardstock and Billet

## II. What is EPA proposing in this action?

*A. Retail Food Refrigeration—Proposed Listing of R–448A, R–449A and R–449B as Acceptable, Subject to Narrowed Use Limits, for Retail Food Refrigeration—Medium-Temperature Stand-Alone Units (new)*

EPA is proposing to list R–448A, R–449A, and R–449B as acceptable, subject to narrowed use limits, in new equipment only for new medium-temperature stand-alone units in retail food refrigeration (hereafter, ''new medium-temperature stand-alone units'').[4]

[4] EPA previously divided the retail food refrigeration end-use into separate categories, including stand-alone equipment (76 FR 78832, December 20, 2011). The Agency further subdivided stand-alone equipment to distinguish between medium-temperature equipment, which maintains products above 32 °F (0 °C), and low-temperature equipment, which maintains products at or below 32°F (0 °C) (80 FR 42870, July 20, 2015).

Under the narrowed use limit, users [5] intending to adopt these refrigerants ''must ascertain that other alternatives are not technically feasible.'' (40 CFR 82.180(b)(3)). In addition, the end users ''must document the results of their evaluation and retain the results on file for the purpose of demonstrating compliance. This documentation shall include descriptions of substitutes examined and rejected, processes or products in which the substitute is needed, reason for rejection of other alternatives, *e.g.,* performance, technical or safety standards, and the anticipated date other substitutes will be available and projected time for switching to other available substitutes.'' (40 CFR 82.180(b)(3)).

1. Background on Retail Food Refrigeration—Medium-Temperature Stand-Alone Units

Retail food refrigeration is characterized by storing and displaying, generally for sale, food and beverages at different temperatures for different products (*e.g.,* chilled and frozen food). Stand-alone units in retail food refrigeration (hereafter, ''stand-alone units'') consist of refrigerators, freezers, and reach-in coolers (either open or with doors) where all refrigeration components are integrated and, for the smallest types, the refrigeration circuit is entirely brazed or welded. These systems are charged with refrigerant at the factory and typically require only an electricity supply to begin operation.

For purposes of the SNAP program, medium-temperature stand-alone units maintain a temperature above 32 °F (0 °C). Most are typically designed to maintain products at temperatures roughly between 32 °F (0 °C) and 41 °F (5 °C). EPA treats this as a separate end-use category from low-temperature stand-alone units designed to maintain products at temperatures roughly between −40 °F (−40 °C) and 32 °F (0 °C) (*i.e.,* freezers). In addition, the Agency considers equipment designed to make or process cold food and beverages that are dispensed via a nozzle, including soft-serve ice cream machines, ''slushy'' iced beverage dispensers, and soft-drink dispensers, to be a separate end-use category from stand-alone units (refrigerated food processing and dispensing equipment). EPA has listed different substitutes as acceptable in these end-use categories based on the Agency's understanding of the availability of substitutes able to meet the technical and regulatory requirements for each equipment type and temperature range. For example, EPA listed R–448A, R–449A and R–449B as acceptable in low-temperature stand-alone units and in refrigerated food processing and dispensing equipment (80 FR 42053, July 16, 2015; 81 FR 70029, October 11, 2016). Whereas EPA listed R–290 (propane) as acceptable subject to use conditions in stand-alone units, both medium-temperature and low-temperature (76 FR 78832, December 20, 2011), the Agency has not listed it for refrigerated food processing and dispensing equipment. Acceptable substitutes for medium-temperature stand-alone units include ammonia vapor compression with secondary loop, R–744 (carbon dioxide or $CO_2$), R–290, R–441A, R–450A, R–513A, and R–600a (isobutane), among others.

In the 2015 Rule, EPA changed the listing of 31 refrigerants [6] from acceptable to unacceptable for medium temperature stand-alone units. At that time, EPA indicated that it believed that other alternatives that posed lower risk were available for this end use. As part of a petition from the Air-Conditioning, Heating, and Refrigeration Institute (AHRI),[7] described in section 3 below, EPA received information indicating that manufacturers were unable to design certain types of medium-temperature stand-alone equipment with the available acceptable alternatives. AHRI explained that due to the thermodynamic properties of the available alternatives, equipment would need to be redesigned using larger components. Because these components are located at the bottom of the unit, the larger size would lead to designs where the refrigerated product would be placed too high to comply with countertop height requirements of the Americans with Disabilities Act (ADA), or would be too wide such that it protruded into aisles and likewise conflicted with ADA requirements.

2. What are R–448A, R–449A and R–449B and how do they compare to other refrigerants in the same end-use?

R–448A, marketed under the trade name Solstice® N–40, is a weighted blend of 26 percent HFC–32, which is also known as difluoromethane (Chemical Abstracts Service Registry Number [CAS Reg. No.] 75–10–5); 26 percent HFC–125, which is also known as 1,1,1,2,2-pentafluoroethane (CAS Reg. No. 354–33–6); 21 percent HFC–134a, which is also known as 1,1,1,2-tetrafluoroethane (CAS Reg. No. 811–97–2); 20 percent HFO–1234yf, which is also known as 2,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 754–12–1); and seven percent HFO–1234ze(E), which is also known as trans-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9). R–449A, marketed under the trade name Opteon® XP 40, is a weighted blend of 24.3 percent HFC–32, 24.7 percent HFC–125, 25.7 percent HFC–134a, and 25.3 percent HFO–1234yf. R–449B, marketed under the trade name Forane® 449B, is a weighted blend of 25.2 percent HFC–32, 24.3 percent HFC–125, 27.3 percent HFC–134a, and 23.2 percent HFO–1234yf.

EPA previously listed R–448A, R–449A, and R–449B as acceptable refrigerants in a number of other refrigeration and air conditioning end-uses, including other retail food refrigeration end-use categories (*e.g.,* 80 FR 42053, July 16, 2015; 81 FR 70029, October 11, 2016; 82 FR 33809, July 21, 2017; 83 FR 50026, October 4, 2018; 84 FR 64765, November 25, 2019).

Redacted submissions and supporting documentation for R–448A, R–449A, and R–449B are provided in the docket for this proposed rule (EPA–HQ–OAR–2019–0698) at *https://www.regulations.gov.* EPA performed an assessment to examine the health and environmental risks of each of these substitutes. These assessments are available in the docket for this proposed rule.[8] [9] [10]

*Environmental information:* R–448A, R–449A, and R–449B have an ozone depletion potential (ODP) of zero.[11]

[5] Note that the definition of ''use'' includes ''but [is] not limited to use in a manufacturing process or product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses''; hence, this definition includes the manufacture of a product pre-charged with or intended for a particular refrigerant. (40 CFR 82.172).

[6] Specifically, FOR12A, FOR12B, HFC–134a, HFC–227ea, KDD6, R125/290/134a/600a (55.0/1.0/42.5/1.5), R–404A, R–407A, R–407B, R–407C, R–407F, R–410A, R–410B, R–417A, R–421A, R–421B, R–422A, R–422B, R–422C, R–422D, R–424A, R–426A, R–428A, R–434A, R–437A, R–438A, R–507A, RS–24 (2002 formulation), RS–44 (2003 formulation), SP34E, and THR–03.

[7] AHRI, 2017. Petition Requesting EPA SNAP Approval of R–448A/449A/449B for Medium Temperature, Stand-Alone Retail Food Refrigeration Equipment. Submitted March 20, 2017.

[8] ICF, 2020a. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–448A.

[9] ICF, 2020b. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–449A.

[10] ICF, 2020c. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–449B.

[11] If a compound contains no chlorine, bromine, or iodine, or if it is a solid under conditions of use, its ODP is generally considered to be zero. Unless otherwise stated, all non-zero ODPs in this document are from EPA's regulations at appendix A to subpart A of 40 CFR part 82.

Their components, HFC–32, HFC–125, HFC–134a, HFO–1234yf, and in the case of R–448A, HFO–1234ze(E), have global warming potentials (GWPs) of 675; 3,500; 1,430; [12] one to four; [13] [14] and one to six; [15] respectively. HFC–32 (CAS Reg. No. 75–10–5), HFC–125 (CAS Reg. No. 354–33–6), HFC–134a (CAS Reg. No. 811–97–2), HFO–1234yf (CAS Reg. No. 754–12–1) and HFO–1234ze(E) (CAS Reg. No. 29118–24–9)—the components of R–448A, R–449A, and R–449B—are excluded from the definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of state implementation plans (SIPs) to attain and maintain the national ambient air quality standards (NAAQS). Knowingly venting or otherwise knowingly releasing or disposing of these refrigerant blends in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration is prohibited as provided in section 608(c)(2) of the CAA and EPA's regulations at 40 CFR 82.154(a)(1).

*Flammability information:* R–448A, R–449A, and R–449B as formulated, and even considering the worst-case fractionation for flammability, are not flammable.

*Toxicity and exposure data:* Potential health effects of exposure to these substitutes include drowsiness or dizziness. The substitutes may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, the substitutes may cause irregular heartbeat. The substitutes could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

The American Industrial Hygiene Association (AIHA) has established workplace environmental exposure limits (WEELs) of 1,000 parts per million (ppm) as an eight hour time-weighted average (8-hr TWA) for HFC–32, HFC–125, and HFC–134a, and 500 ppm for HFO–1234yf, the components of R–448A, R–449A, and R–449B; and 800 ppm for HFO–1234ze(E), also a component of R–448A. The manufacturer of R–448A recommends an acceptable exposure limit (AEL) of 890 ppm on an 8-hr TWA for the blend. The manufacturer of R–449A recommends an AEL of 830 ppm on an 8-hr TWA for the blend. The manufacturer of R–449B recommends an AEL of 865 ppm on an 8-hr TWA for the blend. EPA anticipates that users will be able to meet the AIHA WEELs and manufacturers' AELs and address potential health risks by following requirements and recommendations in the manufacturers' safety data sheets (SDS), in American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

*Comparison to other substitutes in this end-use:* R–448A, R–449A, and R–449B have ODPs of zero, comparable to or lower than other acceptable substitutes in this end-use, with ODPs ranging from zero to 0.098.

R–448A's GWP of 1,390, R–449A's GWP of 1,400, and R–449B's GWP of 1,410 are higher than those of other acceptable substitutes for retail food refrigeration—medium-temperature stand-alone units (new), including ammonia absorption, R–744, R–450A, and R–513A with GWPs ranging from zero to 630.

Information regarding the flammability and toxicity of other available alternatives are provided in the listing decisions previously made (see *https://www.epa.gov/snap/substitutes-stand-alone-equipment*). Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with ASHRAE 15 and other industry standards, recommendations in the manufacturers' safety data sheet (SDS), and other safety precautions common in the refrigeration and air conditioning industry.

Although R–448A, R–449A, and R–449B present a higher overall risk to human health and the environment than other acceptable alternatives in this end-use category based on significantly higher GWPs than other available alternatives, with GWPs ranging from zero (ammonia in a secondary loop) to 630 (R–513A), as provided below, information suggests that other alternatives may not be available for certain uses and users of medium-temperature stand-alone equipment. Thus, EPA is proposing to list these substitutes as acceptable subject to narrowed use limits in this end-use. The manufacturers of new medium-temperature stand-alone equipment would need to demonstrate that the other alternatives are not technically feasible. They must document the results of their evaluation that showed the other alternatives to be not technically feasible and maintain that documentation in their files. This documentation, which does not need to be submitted to EPA unless requested to demonstrate compliance, ''shall include descriptions of substitutes examined and rejected, processes or products in which the substitute is needed, reason for rejection of other alternatives, *e.g.,* performance, technical or safety standards, and the anticipated date other substitutes will be available and projected time for switching to other available substitutes.'' (40 CFR 82.180(b)(3)).

3. Summary of AHRI Petition

AHRI petitioned EPA under CAA section 612(d) to add R–448A, R–449A, and R–449B to the list of acceptable substitutes for new and retrofit medium-temperature stand-alone units. See 40 CFR 82.184 for further information regarding petitions under the SNAP program. EPA and AHRI have exchanged information related to this petition between March 2017 and November 2018. Although we are not formally responding to the AHRI petition or deeming it ''complete'' in this proposed rulemaking, some of the information received as part of this petition is relevant to the proposed listing, as discussed below, and EPA's action in this rulemaking may be considered responsive to certain aspects of this petition, given that EPA is proposing to list R–448A, R–449A, and R–449B as acceptable, subject to narrowed use limits, in new medium-temperature stand-alone units.

In its petition, AHRI raised claims that refrigerants currently listed as acceptable are not available for use in all types of equipment within this end-use category. AHRI's petition addressed

[12] Unless otherwise specified, GWP values are from IPCC (2007) Climate Change 2007: *The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.* S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.). Cambridge University Press. Cambridge, United Kingdom 996 pp.

[13] Nielsen et al., 2007. Nielsen, O.J., Javadi, M.S., Sulbaek Andersen, M.P., Hurley, M.D., Wallington, T.J., Singh, R. 2007. Atmospheric chemistry of $CF_3CF{=}CH_2$: Kinetics and mechanisms of gas-phase reactions with Cl atoms, OH radicals, and $O_3$. Chemical Physics Letters 439, 18–22. Available online at *http://www.cogci.dk/network/OJN_174_CF3CF=CH2.pdf.*

[14] Hodnebrog Ø. et al., 2013. Hodnebrog Ø., Etminan, M., Fuglestvedt, J.S., Marston, G., Myhre, G., Nielsen, C.J., Shine, K.P., Wallington, T.J.: Global Warming Potentials and Radiative Efficiencies of Halocarbons and Related Compounds: A Comprehensive Review, Reviews of Geophysics, 51, 300–378, doi:10.1002/rog.20013, 2013.

[15] Hodnebrog Ø. et al., 2013 and Javadi et al., 2008. M.S. Javadi, R. Søndergaard, O.J. Nielsen, M.D. Hurley, and T.J. Wellington, 2008. Atmospheric chemistry of trans-$CF_3CH{=}CHF$: products and mechanisms of hydroxyl radical and chlorine atom-initiated oxidation. Atmospheric Chemistry and Physics Discussions 8, 1069–1088, 2008.

five key points. First, AHRI claims, based on their members' experience in the industry, that the use of these three refrigerants compared to the acceptable alternatives is simpler based on their members' experience and knowledge and on the equipment efficiency and component supply borne out of EPA's listing of these refrigerants in low-temperature stand-alone units and other end-use categories. However, EPA notes that it does not consider the simplicity of designing equipment to be part of the SNAP criteria. In fact, manufacturer literature [16] [17] [18] [19] [20] shows that there are some medium-temperature stand-alone units available with the acceptable alternatives, indicating that at least for some products and some manufacturers, any complexity issues with designing such equipment have been resolved.

Second, AHRI claims that the available alternatives are not able to meet the U.S. Department of Energy (DOE) Energy Conservation Standards for Commercial Refrigeration Equipment (79 FR 17725, March 28, 2014), which have a compliance date of March 27, 2017, for some equipment types. AHRI also indicates there is a lack of components designed for R–290 for capacities between 3,000 and 12,000 million British thermal units per hour (MBtu/hour), which preclude that alternative's use in larger stand-alone units, especially those with open cases (*i.e.,* no doors). They also state that the 150-gram limit established by EPA as a use condition for R–290 leads to needing multiple smaller compressor systems for such larger equipment, which requires more space to house and leads to equipment designs that would not comply with the ADA. Further to the point of ADA compliance, AHRI indicates that the thermodynamic properties of the other alternatives (such as R–450A and R–513A) are such that larger components are needed to achieve the same amount of cooling, and that these larger components lead to designs conflicting with requirements of the ADA such as counter height. AHRI provided information (see presentation titled ''AHRI Petition for SNAP Approval of R–448A, R–449A&B In Medium Temperature Stand-Alone Commercial Refrigeration Equipment'' in Docket EPA–HQ–OAR–2019–0698) that evaluated the capacity and efficiency of relevant equipment using R–450A and R–513A, two acceptable alternatives, and for R–448A, R–449A and R–449B. In the larger units (1 horsepower and above), their results showed 6% to 29% lower capacities with the two acceptable alternatives compared to R–404A, while R–448A, R–449A and R–449B showed capacities up to 7% better compared to R–404A. This information suggests that certain equipment configurations would require significantly larger refrigeration equipment that could jeopardize compliance with ADA for those types of equipment.

Regarding the efficiency standards, EPA previously noted that medium-temperature stand-alone units would fall under a classification ending in .SC.M within the DOE regulations (80 FR 42902, July 20, 2015). Several codes could precede .SC.M to indicate the unit design (*e.g.,* horizontal or vertical, open or with doors). As also discussed in that rule, ''EPA does not have a practice in the SNAP program of including . . . energy efficiency in the overall risk analysis. We do consider issues such as technical needs for energy efficiency (*e.g.,* to meet DOE standards) in determining whether alternatives are 'available.' '' However, EPA also explained ''that the refrigerant is only one of many factors affecting energy efficiency. Moreover, even as refrigerant transitions have taken place over past decades, we have seen improved energy efficiency. This is often due to equipment redesigns and technology advancements that include factors besides the choice of refrigerant.'' (80 FR 42946, July 20, 2015). Therefore, for this proposed rule, EPA is not basing our proposed listing decision on energy efficiency, although the Agency has previously indicated that an analysis of equipment performance could be part of the evaluation required to use R–448A, R–449A, and R–449B under the proposed narrowed use limit.

Third, AHRI indicates that a design alternative—reconfiguring stand-alone units into remote condensing units—would likely lead to higher emissions. EPA listed R–448A, R–449A and R–449B as acceptable for remote condensing units (80 FR 42053, July 16, 2015; 81 FR 70029, October 11, 2016). The choice of using such a design alternative, however, is not germane to this proposal, which is evaluating the use of these refrigerants in medium-temperature stand-alone equipment. Therefore, for this proposed rule, EPA is not basing our proposed listing decision on the fact that such a design alternative exists.

Fourth, AHRI notes that some equipment is designed to meet both low- and medium-temperature conditions, requiring more complex designs with a risk of refrigerant cross-contamination if R–448A, R–449A, or R–449B was used for the low-temperature range but was not acceptable for the medium-temperature range. As explained above, the complexity of designing equipment is not part of the SNAP review criteria.

Fifth, AHRI claims that the cost to redesign equipment to an acceptable refrigerant like R–450A or R–513A would be high. EPA noted in the 2015 Rule that only certain elements of cost are part of the SNAP criteria. We stated that ''under the SNAP criteria for review in 40 CFR 82.180(a)(7), the only cost information that EPA considers as part of its SNAP review is the cost of the substitute under review.'' (80 FR 42898, July 15, 2015). Because the cost to redesign equipment is not part of the SNAP criteria, EPA is not basing our proposed listing decision on such costs.

4. What is EPA proposing for R–448A, R–449A and R–449B?

EPA understands that to construct certain medium-temperature stand-alone units with the available acceptable refrigerants would require significantly larger components, or the addition of multiple refrigeration systems, which may lead to redesigning the units in such a manner that could be inconsistent with the ADA requirements. AHRI specifically pointed to R–448A, R–449A, and R–449B as refrigerants that would, on the contrary, be feasible in such equipment and requested that those refrigerants be added to the list of acceptable refrigerants for new medium-temperature stand-alone units.

Given the concern about designing equipment capable of complying with ADA requirements, EPA is proposing to list R–448A, R–449A, and R–449B as acceptable, subject to narrowed use limits, for this end-use category. Users, including manufacturers, using a substitute listed as acceptable, subject to narrowed use limits, must ascertain that other substitutes or alternatives are not technically feasible. As explained in the initial SNAP rulemaking (59 FR 13063, March 18, 1994), under the narrowed use limit, ''Users are expected to undertake a thorough technical investigation of alternatives before implementing the otherwise restricted substitute'' (*i.e.,* R–448A, R–449A or R–

[16] CCAC, 2012. Technology Forum on Climate Friendly Alternatives in Commercial Refrigeration. Meeting Summary. 8 December 2012.

[17] Coca-Cola, 2014. Coca-Cola Installs 1 Millionth HFC-Free Cooler Globally, Preventing 5.25MM Metric Tons of CO2, January 22, 2014.

[18] Shecco, 2013a. HCs Gaining Market Prominence in US—View from the NAFEM Show—Part 1, February 18, 2013.

[19] Shecco, 2013b. HCs Gaining Market Prominence in US—View from the NAFEM Show—Part 2, February 25, 2013.

[20] Shecco, 2015. New Regulations Inspire Hydrocarbon Displays at U.S. NAFEM Show, February 24, 2015.

449B for this proposal). Further, ''[t]he Agency expects users to contact vendors of alternatives to explore with experts whether or not other acceptable substitutes are technically feasible for the process, product or system in question'' (*i.e.,* in new medium-temperature stand-alone units for this proposal) to the otherwise restricted substitute. The initial SNAP rule also explained that ''[a]lthough users are not required to report the results of their investigations to EPA, companies must document these results, and retain them in company files for the purpose of demonstrating compliance'' for up to five years after the date of creation of the records. In this circumstance, ''users'' would generally be considered the manufacturers producing medium temperature stand-alone equipment using one of these three substitutes. This information includes descriptions of:

- Process or product in which the substitute is needed;
- Substitutes examined and rejected;
- Reason for rejection of other alternatives, *e.g.,* performance, technical or safety standards; and/or
- Anticipated date other substitutes will be available and projected time for switching.

An example of a viable explanation under a narrowed use limit should include information such as a market analysis of the components for other alternatives that indicate a lack of availability in the required sizes or with required features, or design diagrams that indicate excessive loss of refrigerated volumes or failure to meet ADA requirements.

At this time, EPA does not have sufficient information indicating that there is any other basis that would preclude use of other available alternatives. Regarding AHRI's concerns about the cost of redesigning equipment to use the currently acceptable alternatives, as explained in previous rulemakings referenced above, EPA does not consider the cost of transitioning to alternatives in making listing decisions. In addition, the fact, on its own, that designs using a safer alternative may be more complex is not a sufficient basis to list a substitute that poses greater risk as acceptable. EPA is taking comment on the proposed listings as well as the specific narrowed use limits discussed above.

*B. Residential and Light Commercial Air Conditioning and Heat Pumps—Proposed Listing of R–452B, R–454A, R–454B, R–454C, and R–457A as Acceptable, Subject to Use Conditions, for use in Residential and Light Commercial Air Conditioning and Heat Pumps End-Use for New Equipment; and R–32 as Acceptable, Subject to Use Conditions, for Use in Residential and Light Commercial Air Conditioning and Heat Pumps—Equipment Other Than Self-Contained Room Air Conditioners, for New Equipment*

EPA previously listed R–32 as acceptable subject to use conditions as a substitute in residential and light commercial air conditioning and heat pumps for self-contained room air conditioners, including packaged terminal air conditioners (PTACs), packaged terminal heat pumps (PTHPs), window AC units, portable room AC equipment, and wall-mounted self-contained ACs (80 FR 19454, April 10, 2015).[21] This proposed rulemaking is proposing to find R–32 acceptable, subject to use conditions, for self-contained ACs that are typically larger than room-size (*e.g.* rooftop units, water-source heat pumps, and ground-source heat pumps) and split systems, as explained below, which are part of the residential and light commercial air conditioning and heat pump end-use. For convenience, in this proposed rule we discuss the proposed listing decision for R–32 together with the proposed decision for R–452B, R–454A, R–454B, R–454C, and R–457A (hereafter called ''the five refrigerant blends'') but we note here that this proposed decision for R–32 is not a proposal to revisit or modify the existing acceptable subject to use conditions listing for R–32 for self-contained room air conditioners.

EPA proposes to list the five refrigerant blends (*i.e.,* R–452B, R–454A, R–454B, R–454C, and R–457A) as acceptable subject to use conditions as substitutes in residential and light commercial air conditioning and heat pumps for both self-contained and split systems and R–32 as acceptable subject to use conditions in residential and light commercial air conditioning and heat pumps for split systems and for specific types of self-contained systems that are part of the residential and light commercial air conditioning and heat pump end-use but for which R–32 has not been previously listed.

EPA proposes the following use conditions:

(1) UL Standard—These refrigerants may be used only in AC equipment, both self-contained equipment and split-systems, that meet all requirements listed in the 3rd edition, dated November 1, 2019, of Underwriters Laboratories (UL) Standard 60335–2–40, ''Household And Similar Electrical Appliances—Safety—Part 2–40: Particular Requirements for Electrical Heat Pumps, Air Conditioners and Dehumidifiers'' (UL Standard). If this rule is finalized as proposed, in cases where the final rule would include requirements different than those of the 3rd edition of UL Standard 60335–2–40, the appliance would need to meet the requirements of the final rule in place of the requirements in the UL Standard. See section II.B.4 of the preamble for further discussion on the requirements of this standard that EPA is proposing to incorporate by reference.

(2) New equipment only—These refrigerants may be used only in new equipment designed specifically and clearly identified for the refrigerant; *i.e.,* none of these substitutes may be used as a conversion or ''retrofit'' refrigerant for existing equipment.

(3) Warning labels—The following markings, or the equivalent, must be provided in letters no less than 6.4 mm (¼ inch) high and must be permanent:

(a) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing''

(b) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used''

(c) On the inside of the air conditioning equipment near the compressor: ''WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner's Guide Before Attempting to Service This Product. All Safety Precautions Must be Followed''

(d) For any equipment pre-charged at the factory, on the equipment packaging: ''WARNING—Risk of Fire due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations''

(e) On the indoor unit[22] near the nameplate:

[21] In this proposed rule, we use the term ''air conditioner'' and ''AC'' to cover equipment that cools air, heats air, or has the function to do both (typically referred to as a ''heat pump''). While such equipment might humidify or dehumidify the air, the term does not include equipment whose purpose is for latent cooling only (*i.e.,* dehumidifiers), which are a separate end-use under SNAP.

[22] This labeling is required for split systems and self-contained equipment alike.

a. At the top of the marking: ''Minimum Installation height, X m (W ft)''. This marking is only required if the similar marking is required by the 3rd edition of UL 60335–2–40. The terms ''X'' and ''W'' shall be replaced by the numeric height as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the height in Inch-Pound units is placed in parentheses and the word ''and'' has been replaced by the opening parenthesis.

b. Immediately below (a) above or at the top of the marking if (a) is not required: ''Minimum room area (operating or storage), Y $m^2$ (Z $ft^2$)''. The terms ''Y'' and ''Z'' shall be replaced by the numeric area as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the area in Inch-Pound units is placed in parentheses and the word ''and'' has been replaced by the opening parenthesis.

(f) For non-fixed equipment, including portable air conditioners, window air conditioners, packaged terminal air conditioners and packaged terminal heat pumps, on the outside of the product: ''WARNING—Risk of Fire or Explosion—Store in a well-ventilated room without continuously operating flames or other potential ignition.''

(g) For fixed equipment, including rooftop units and split air conditioners, ''WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions.''

(4) Markings—Equipment must have distinguishing red (Pantone® Matching System (PMS) #185 or RAL 3020) color-coded hoses and piping to indicate use of a flammable refrigerant. The air conditioning equipment shall have marked service ports, pipes, hoses and other devices through which the refrigerant is serviced. Markings shall extend at least 1 inch (25mm) from the servicing port and shall be replaced if removed.

The regulatory text of the proposed decisions appears in tables at the end of this document. If finalized as proposed, this text would be codified in appendix W of 40 CFR part 82 subpart G. The proposed regulatory text contains listing decisions for the end-uses discussed above. EPA notes that there may be other legal obligations pertaining to the manufacture, use, handling, and disposal of the proposed refrigerants that are not included in the information listed in the tables (*e.g.,* the CAA section 608(c)(2) prohibition on knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration, or Department of Transportation requirements for transport of flammable gases). Mildly flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260–270).

1. Background on Residential and Light Commercial Air Conditioning and Heat Pumps

The residential and light commercial air conditioning and heat pumps end-use includes equipment for cooling air in individual rooms, in single-family homes, and in small commercial buildings. Heat pumps are equipment types that heat, or have the option to either cool or heat, air for such locations. This end-use differs from commercial comfort AC, which uses chillers that cool water that is then used to cool air throughout a large commercial building, such as an office building or hotel. This end-use includes both self-contained and split systems. Self-contained systems include some rooftop AC units (*e.g.,* those ducted to supply conditioned air to multiple spaces) and many types of room ACs, including PTACs, PTHPs, some rooftop AC units, window AC units, portable room AC units, and wall-mounted self-contained ACs, designed for use in a single room. Split systems include ducted and non-ducted mini-splits (which might also be designed for use in a single room), multi-splits and variable refrigerant flow (VRF) systems, and ducted unitary splits. Water-source and ground-source heat pumps often are packaged systems similar to the self-contained equipment described above but could be applied with the condenser separated from the other components similar to split systems. Examples of equipment for residential and light commercial AC and heat pumps include:

- Central air conditioners, also called unitary AC or unitary split systems. These systems include an outdoor unit with a condenser and a compressor, refrigerant lines, an indoor unit with an evaporator, and ducts to carry cooled air throughout a building. Central heat pumps are similar but offer the choice to either heat or cool the indoor space.
- Multi-split air conditioners and heat pumps. These systems include one or more outdoor unit(s) with a condenser and a compressor and multiple indoor units, each of which is connected to the outdoor unit by refrigerant lines. Non-ducted multi-splits provide cooled or heated air directly from the indoor unit rather than providing the air through ducts.
- Mini-split air conditioners and heat pumps. These systems include an outdoor unit with a condenser and a compressor and a single indoor unit that is connected to the outdoor unit by refrigerant lines. Non-ducted mini-splits provide cooled or heated air directly from the indoor unit rather than being carried through ducts.
- Rooftop AC units. These are units that combine the compressor, condenser and evaporator in a single package and may contain additional components for filtration and dehumidification. Most units also include dampers to control air intake. Rooftop AC units cool or heat outside air that is then delivered to the space directly through the ceiling or through a duct network. Rooftop AC units are common in small commercial buildings such as a single store in a mall with no indoor passageways between stores (*i.e.,* a ''strip-mall''). They can also be set up in an array to provide cooling or heating throughout a larger commercial establishment such as a department store or supermarket.
- Window air conditioners. These are self-contained units that fit in a window with the condenser extending outside the window.
- PTACs and PTHPs. These are self-contained units that consist of a separate, un-encased combination of heating and cooling assemblies mounted through a wall. PTACs and PTHPs are intended for use in a single room and use no ducts to carry cooled air and no external refrigerant lines. Typical applications include motel or dormitory air conditioners.
- Portable room air conditioners. These are self-contained units that are designed to be moved easily from room to room, usually having wheels. They may contain an exhaust hose that can be placed through a window or door to eject heat to the outside.
- Water-source heat pumps (WSHPs) and ground-source heat pumps (GSHPs). These are similar to unitary split systems except that heat is ejected (when in cooling mode) from the condenser through a second circuit rather than directly with outside air. The second circuit transfers the heat to the ground, ground water, or another body of water such as a lake using water, or a brine could be used if temperatures would risk freezing. Some systems can perform heating in a similar matter with the refrigerant circuit

running in reverse; regardless, the term ''heat pump'' is most often used.

All of these types of air conditioning equipment would be subject to the listing decisions under this rule for the identified substitutes if those decisions become final.[23]

Of these types of equipment, window air conditioners, PTACs, PTHPs, rooftop AC units, portable room air conditioners, and often GSHPs and WSHPs are self-contained equipment with the condenser, compressor, evaporator, and tubing all within casing in a single unit. In contrast, unitary split systems, multi-split systems and mini-split systems have an outdoor condenser that is separated from an indoor unit. Compared to split systems, self-contained equipment typically has smaller charge sizes, has fewer locations that are prone to leak, and is less likely to require servicing by a technician. These types of air conditioning equipment—both self-contained and split systems—all fall under the scope of the UL 60335–2–40 standard ''Household And Similar Electrical Appliances—Safety—Part 2–40: Requirements for Electrical Heat Pumps, Air Conditioners and Dehumidifiers.''

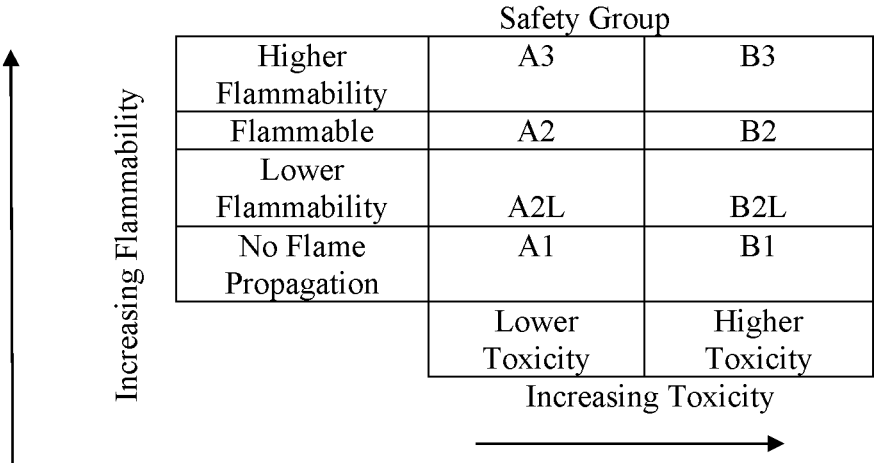
2. What are the ASHRAE classifications for refrigerant flammability?

The American National Standards Institute/American Society of Heating, Refrigerating and Air Conditioning Engineers (ANSI/ASHRAE) Standard 34–2019 assigns a safety group classification for each refrigerant which consists of two to three alphanumeric characters (*e.g.,* A2L or B1). The initial capital letter indicates the toxicity and the numeral denotes the flammability. ASHRAE classifies Class A refrigerants as refrigerants for which toxicity has not been identified at concentrations less than or equal to 400 ppm by volume, based on data used to determine threshold limit value-time-weighted average (TLV–TWA) or consistent indices. Class B signifies refrigerants for which there is evidence of toxicity at concentrations below 400 ppm by volume, based on data used to determine TLV–TWA or consistent indices.

The refrigerants are also assigned a flammability classification of 1, 2, 2L, or 3. Tests for flammability are conducted in accordance with American Society for Testing and Materials (ASTM) E681 using a spark ignition source at 140 °F (60 °C) and 14.7 psia (101.3 kPa).[24] The flammability classification ''1'' is given to refrigerants that, when tested, show no flame propagation. The flammability classification ''2'' is given to refrigerants that, when tested, exhibit flame propagation, have a heat of combustion less than 19,000 kJ/kg (8,169 Btu/lb), and have a lower flammability limit (LFL) greater than 0.10 kg/m$^3$. The flammability classification ''2L'' is given to refrigerants that, when tested, exhibit flame propagation, have a heat of combustion less than 19,000 kJ/kg (8,169 BTU/lb), have an LFL greater than 0.10 kg/m$^3$, and have a maximum burning velocity of 10 cm/s or lower when tested at in dry air at 73.4 °F (23.0 °C) and 14.7 psia (101.3 kPa). The flammability classification ''3'' is given to refrigerants that, when tested, exhibit flame propagation and that either have a heat of combustion of 19,000 kJ/kg (8,169 BTU/lb) or greater or have an LFL of 0.10 kg/m$^3$ or lower.

For flammability classifications, refrigerant blends are designated based on the worst case of formulation for flammability and the worst case of fractionation for flammability determined for the blend.

Figure 1. Refrigerant Safety Group Classification




Using these safety group classifications, ANSI/ASHRAE Standard 34–2019 categorizes R–32 and the five refrigerant blends in this section of the proposed rulemaking in the A2L Safety Group.

3. What are R–32, R–452B, R–454A, R–454B, R–454C and R–457A and how do they compare to other refrigerants in the same end-use?

R–32 is a mildly flammable refrigerant, and the five refrigerant blends are mildly flammable refrigerant blends, all with an ASHRAE safety classification of A2L. The respective CAS Reg. Nos. of R–32 and the components of the five refrigerant blends are listed below.

R–32 is also known as HFC–32 or difluoromethane (CAS Reg. No. 75–10–5). EPA previously listed R–32 as an acceptable refrigerant for some types of residential and light commercial air conditioning and heat pumps end-use categories, specifically self-contained

[23] As noted above, self-contained room air conditioners using R–32 would not be affected by this proposed rule.

[24] ASHRAE, 2019. ANSI/ASHRAE Standard 34–2019: Designation and Safety Classification of Refrigerants.

room air conditioners such as window units. PTACs, PTHPs, portable room AC, and wall-mounted AC (80 FR 19454, April 10, 2015). As noted above, this proposal would add a listing for this substitute to include rooftop units, GSHPs and WSHPs, which are typically self-contained but not sized for a single room, and various types of split systems.

R–452B, also known by the trade name ''Opteon™ XL 55,'' and also known as ''Solstice® L41y,'' is a mildly flammable blend consisting of 67 percent by weight HFC–32; seven percent HFC–125, also known as 1,1,1,2,2-pentafluoroethane (CAS Reg. No. 354–33–6); and 26 percent HFO–1234yf, also known as 2,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 754–12–1). R–454A, also known by the trade name ''Opteon™ XL 40,'' is a mildly flammable blend consisting of 35 percent HFC–32 and 65 percent HFO–1234yf. R–454B, also known by the trade names ''Opteon™ XL 41'' and ''Puron Advance™,'' is a mildly flammable blend consisting of 68.9 percent HFC–32 and 31.1 percent HFO–1234yf. R–454C, also known by the trade name ''Opteon™ XL 20,'' is a mildly flammable blend consisting of 21.5 percent HFC–32 and 78.5 percent HFO–1234yf. R–457A, also known by the trade name ''Forane® 457A,'' is a mildly flammable blend consisting of 70 percent HFO–1234yf, 18 percent HFC–32, and 12 percent HFC–152a, which is also known as ethane, 1,1-difluoro (CAS Reg. No. 75–37–6).

Redacted submissions and supporting documentation for R–32 and the five refrigerant blends are provided in the docket for this proposed rule (EPA–HQ–OAR–2019–0698) at *https://www.regulations.gov.* EPA performed an assessment to examine the health and environmental risks of each of these substitutes. These assessments are available in the docket for this proposed rule.[25] [26] [27] [28] [29] [30]

*Environmental information:* R–32 and the five refrigerant blends have ODPs of zero.

R–32 has a GWP of 675. The five refrigerant blends are made up of the components HFC–32, HFC–125, HFO–1234yf and HFC–152a, which have GWPs of 675, 3,500, one to four, and 124, respectively.[31] If these values are weighted by mass percentage, then R–452B, R–454A, R–454B, R–454C and R–457A have GWPs of about 700, 240, 470, 150 and 140 respectively.

HFC–32, HFC–125, HFC–134a, HFC–152a, HFO–1234yf and HFO–1234ze(E)—the components of the five refrigerant blends—and R–32 are excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or otherwise knowingly releasing or disposing of these refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration is prohibited as provided in section 608(c)(2) of the CAA and EPA's regulations at 40 CFR 82.154(a)(1).

*Flammability information:* R–32 and the five refrigerant blends are mildly flammable. All have an ASHRAE flammability classification of 2L.

*Toxicity and exposure data:* Potential health effects of exposure to these substitutes include drowsiness or dizziness. The substitutes may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, the substitutes may cause irregular heartbeat. The substitutes could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

The AIHA has established WEELs of 1,000 ppm as an 8-hr TWA for HFC–32 and the component refrigerants HFC–125 and HFC–152a; the AIHA has established a WEEL of 500 ppm as an 8-hr TWA for HFO–1234yf. The manufacturer of R–452B, R–454A, R–454B, and R–454C recommends AELs, respectively, of 874, 690, 854, and 615 ppm on an 8-hr TWA for these blends. EPA anticipates that users will be able to meet the AIHA WEEL and manufacturers' AELs and address potential health risks by following requirements and recommendations in the manufacturers' SDS, in ASHRAE Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

*Comparison to other substitutes in this end-use:* R–32 and the five refrigerant blends all have an ODP of zero, the same as other acceptable substitutes in this end-use.

R–32 and the five refrigerant blends' GWPs, ranging from 140 to 700, are higher than some of the acceptable substitutes for residential and light commercial air conditioning and heat pumps, including ammonia absorption, R–290, and R–441A [32] with GWPs ranging from zero to three. R–32 and the five refrigerant blends' GWPs are lower than some of the acceptable substitutes for residential and light commercial air conditioning and heat pumps, such as HFC–134a, R–410A, and R–507A with GWPs of 1,430, 2,090 and 3,990 respectively.

Information regarding the toxicity of other available alternatives are provided in the listing decisions previously made (see *https://www.epa.gov/snap/substitutes-residential-and-light-commercial-air-conditioning-and-heat-pumps*). Toxicity risks are comparable to or lower than toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with ASHRAE 15 and other industry standards, recommendations in the manufacturers' SDS, and other safety precautions common in the refrigeration and air conditioning industry.

Although flammability risk may be greater than flammability risks of other available substitutes in the same end-use, this risk can be minimized by use consistent with ASHRAE 15 and other industry standards such as UL 60335–2–40, recommendations in the manufacturers' SDS, and other safety precautions common in the refrigeration and air conditioning industry. EPA is proposing use conditions to reduce the potential risk associated with the flammability of these alternatives so that they will not pose significantly greater risk than other acceptable substitutes in this end-use.

4. Why is EPA proposing these specific use conditions?

EPA is proposing to list the five refrigerant blends as acceptable, subject to use conditions, for use in the residential and light commercial air conditioning and heat pumps end-use for both self-contained and splits systems for new equipment. EPA is also proposing to list R–32 as acceptable,

[25] ICF, 2020d. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: HFC–32.

[26] ICF, 2020e. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–452B.

[27] ICF, 2020f. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454A.

[28] ICF, 2020g. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454B.

[29] ICF, 2020h. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454C.

[30] ICF, 2020i. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps; Substitute (New Equipment): R–457A.

[31] See section II.A.2 for sources of these GWP values.

[32] R–290 and R–441A are only acceptable in new self-contained room air conditioning equipment, subject to use conditions.

subject to use conditions, for use in the residential and light commercial air conditioning and heat pumps end use for split systems and certain types of self-contained equipment for new equipment. As explained above, EPA is not proposing to change the existing listing of R–32 as acceptable, subject to use conditions, in self-contained room ACs (*e.g.,* window units, PTACs, PTHPs, portable room ACs, and wall-mounted self-contained ACs). The use conditions are identified in the listing under subheading II.B, above, and are explained here in greater detail. The use conditions EPA proposes include conditions requiring use of each refrigerant in new equipment, which can be specifically designed for the refrigerant; use consistent with the UL 60335–2–40 industry standard, including testing, charge sizes, ventilation, usage space requirements, and certain hazard warnings and markings; and revisions to the requirements for warnings and markings on equipment to inform consumers and technicians of potential flammability hazards. The listings with specific use conditions are intended to allow for the use of these mildly flammable refrigerants in a manner that will ensure they do not pose a greater overall risk to human health and the environment than other substitutes in this end-use. We seek comment on the proposed listings including the specific use conditions discussed below.

New Equipment Only; Not Intended for Use as a Retrofit Alternative

EPA is proposing that these refrigerants may be used only in new equipment [33] which has been designed to address concerns unique to flammable refrigerants—*i.e.,* none of these substitutes may be used as a conversion or ''retrofit'' refrigerant for existing equipment. These flammable refrigerants were not submitted under the SNAP program to be used in retrofitted equipment, and no information was provided on how to address hazards if these flammable refrigerants were to be used in equipment that was designed for non-flammable refrigerants. Therefore, EPA is only proposing that these refrigerants may be used in new equipment which can be properly designed for their use.

Standards

EPA is proposing that the flammable refrigerants may be used only in equipment that meets all requirements in UL Standard 60335–2–40, Edition 3 for air conditioning equipment. This UL Standard indicates that refrigerant charges greater than a specific amount (called ''$m_3$'' in the UL Standard and based on the refrigerant's LFL) are beyond its scope and that national standards might apply, such as for instance ANSI/ASHRAE 15–2019. Because EPA has not evaluated such situations, this proposal only covers equipment that fits within the scope of the UL Standard.

Those participating in the UL 60335–2–40 consensus standards process (hereafter ''UL'') have tested equipment for flammability risk in residential applications and evaluated the relevant scientific studies. Further, UL has developed safety standards including requirements for construction and system design, for markings, and for performance tests concerning refrigerant leakage, ignition of switching components, surface temperature of parts, and component strength after being scratched. Certain aspects of system construction and design, including charge size, ventilation, and installation space, and greater detail on markings, are discussed further below in this section. The UL 60335–2–40 Standard was developed in an open and consensus-based approach, with the assistance of experts in the air conditioning industry as well as experts involved in assessing the safety of products. While similar standards exist from other bodies such as the International Electrotechnical Commission, we are proposing to rely on specific UL standards that are most applicable and recognized by the U.S. market. This approach is the same as that in our previous rules on flammable refrigerants (*e.g.* 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015).

A summary of the requirements of UL 60335–2–40 as they affect the refrigerants and end-use addressed in this section of our proposal follows. This summary is offered for information only and does not provide a complete review of the requirements in this standard.

Among the provisions in UL 60335–2–40 are limits on the amount of refrigerant allowed in each type of appliance based on several factors explained in that standard. The requirements in UL 60335–2–40 would reduce the risk to workers and consumers.

The limitations on refrigerant charge size for residential and light commercial air conditioning and heat pumps would be required in accordance with UL 60335–2–40, Edition 3. As discussed above in this section, EPA believes UL standards are most applicable to the U.S. market and offer requirements developed by a consensus of experts. EPA is proposing to require charge size limits for each of the proposed refrigerants by equipment type in accordance with UL 60335–2–40, Edition 3. Annex GG of the standard provides the charge limits, ventilation requirements and requirements for secondary circuits. The standard specifies requirements for installation space of an appliance (*i.e.,* room floor area) and/or ventilation or other requirements which are determined according to the refrigerant charge used in the appliance, the installation location and the type of ventilation of the location or of the appliance. Within Annex GG, Table GG.1 provides guidance on how to apply the requirements to allow for safe use of flammable refrigerants. UL 60335–2–40, Edition 3 contains provisions for safety mitigation. These mitigation requirements were developed to ensure the safe use of flammable refrigerants over a range of appliances. In general, as larger charge sizes are used, more stringent mitigation requirements are required. In certain applications refrigerant detection systems (as described in Annex LL, *Refrigerant detection systems for A2L refrigerants*) and refrigerant sensors (as described in Annex MM, *Refrigerant sensor location confirmation tests*) such as safety alarms are required. Where mechanical ventilation (*i.e.,* fans) is required in accordance with Annex GG or Annex 101.DVG, it must be initiated by a separate refrigerant detection system either as part of the appliance or installed separately. In a room with no mechanical ventilation, Annex GG provides requirements for openings to rooms based on several factors, including the charge size and the room area. The minimum opening is intended to be sufficient so that natural ventilation would reduce the risk of using a flammable refrigerant. The standard also includes specific requirements for split system appliances covering construction, instruction manuals, and allowable charge sizes, mechanical ventilation, safety alarms, and shut off valves for A2L refrigerants.

In addition to Annex GG and Table GG.1 mentioned above, UL 60335–2–40 has a requirement for the maximum charge for an appliance using an A2L refrigerant. If the appliance is a portable appliance, a non-fixed factory-sealed single package, or a cord-connected appliance which may be periodically or seasonally relocated (excluding servicing) by the end user, there are no

[33] This is intended to mean a completely new refrigeration circuit containing a new compressor, evaporator, condenser and refrigerant tubing.

additional requirements for room area, ventilation, or other risk mitigation if the charge is sufficiently small—under three times the LFL. Additional requirements exist for charge sizes exceeding three times the LFL.

Labeling

As a use condition, EPA is proposing to require labeling of residential and light commercial air conditioning and heat pump equipment. EPA would require the warning labels on the equipment contain letters at least ¼ inch high. The label must be permanently affixed to the equipment. Warning label language requirements are described in Section II.B of this proposed rule, ''Residential and light commercial air conditioning and heat pumps end-use.'' The warning label language is similar to or exactly the same as that required in UL 60335–2–40.

The major difference between this proposed requirement and the requirements in Table 101.DVF.1 of UL 60335–2–40 is that the markings for A2L refrigerants, including R–32 and the five refrigerant blends (*i.e.,* R–452B, R–454A, R–454B, R–454C and R–457A), are required to be no less than 3.2 mm (⅛ inch) high in the standard instead of 6.4 mm (¼ inch) as EPA is proposing in this action. EPA believes that it would be difficult to see warning labels with the minimum lettering height requirement for A2L refrigerants of ⅛ inch in the UL Standard. Therefore, as in the requirements in our previous flammable refrigerants rules (*e.g.,* 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), EPA is proposing that the minimum height for lettering must be ¼ inch as opposed to ⅛ inch, which will make it easier for technicians, consumers, retail storeowners, first responders, and those disposing the appliance to view the warning labels.

EPA is requesting comment on requiring labeling, the height of the lettering, and the likelihood of labels remaining on a product throughout the lifecycle of the product, including its disposal.

Markings

Our understanding of the UL Standard is that red markings, similar to those EPA has applied as use conditions in past actions for flammable refrigerants (76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), are required by the UL Standard for A2 and A3 refrigerants but not A2L refrigerants. EPA is proposing that such markings apply to these A2L refrigerants as well to establish a common, familiar and standard means of identifying the use of a flammable refrigerant.

These red markings will help technicians immediately identify the use of a flammable refrigerant, thereby potentially reducing the risk of using sparking equipment or otherwise having an ignition source nearby. The AC and refrigeration industry currently uses red-colored hoses and piping as means for identifying the use of a flammable refrigerant based on previous SNAP listings. Likewise, distinguishing coloring has been used elsewhere to indicate an unusual and potentially dangerous situation, for example in the use of orange-insulated wires in hybrid electric vehicles. Currently in SNAP listings, color-coded hoses or pipes must be used for ethane, HFC–32, isobutane, propane, or R–441A in certain types of equipment. All such tubing must be colored red PMS #185 or RAL 3020 to match the red band displayed on the container of flammable refrigerants under the AHRI Guideline N, ''2016 Guideline for Assignment of Refrigerant Container Colors.'' EPA wants to ensure that there is adequate notice for technicians and others that a flammable refrigerant is being used within a particular piece of equipment or appliance. EPA is also concerned with ensuring adequate notification of the presence of flammable refrigerants for personnel disposing of appliances containing flammable refrigerants. As explained in a previous SNAP rule, one mechanism to distinguish hoses and pipes is to add a colored plastic sleeve or cap to the service tube. (80 FR 19465, April 10, 2015). The colored plastic sleeve or cap would have to be forcibly removed in order to access the service tube. This would signal to the technician that the refrigeration circuit that she/he was about to access contained a flammable refrigerant, even if all warning labels were somehow removed. This sleeve would be of the same red color (PMS #185 or RAL 3020) and could also be boldly marked with a graphic to indicate the refrigerant was flammable. This could be a cost-effective alternative to painting or dyeing the hose or pipe.

EPA is proposing the use of color-coded hoses or piping as a way for technicians and others to recognize that a flammable refrigerant is used in the equipment. This would be in addition to the proposed use of warning labels discussed above. EPA believes having two such warning methods is reasonable and consistent with other general industry practices. This approach is the same as that adopted in our previous rules on flammable refrigerants (*e.g.,* 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015).

5. What additional information is EPA including in these listings?

EPA is including recommendations, found in the ''Further information'' column of the regulatory text at the end of this document, to protect personnel from the risks of using flammable refrigerants. Similar to our previous listing of flammable refrigerants for this end-use (80 FR 19454, April 10, 2015), EPA is including information on the U.S. Occupational Safety and Health Administration (OSHA) requirements at 29 CFR part 1910, proper ventilation, personal protective equipment, fire extinguishers, use of spark-proof tools and equipment designed for flammable refrigerants, and training.

Since this additional information is not part of the regulatory decision, these statements would not be binding for the proposed use of the substitutes under the SNAP program. However, the information so listed may be binding under other regulatory programs (*e.g.,* worker protection regulations promulgated by OSHA). The ''Further Information'' identified in the proposed listing does not necessarily include all other legal obligations pertaining to the use of the substitutes. While the items listed would not be legally binding under the SNAP program, EPA would encourage users of substitutes to apply all statements in the ''Further Information'' column in their use of these substitutes if this proposal is finalized. In many instances, the information simply refers to sound operating practices that have already been identified in existing industry and/or building codes or standards. Thus, many of the statements, if adopted, would not result in the user making significant changes in existing operating practices.

EPA notes that Annex HH of UL 60335–2–40, *Competence of service personnel,* provides guidelines for service personnel to ensure they receive training specifically to address potential risks of servicing equipment using flammable refrigerants. Annex HH provides recommendations that such training cover several aspects relevant to flammable refrigerants including recognition of ignition sources, information about refrigerant detectors, and other safety concepts. Additional training information recommended would address the proper working procedures for equipment commissioning, maintenance, repair, decommissioning and disposal. The Agency notes that this section of the UL Standard is described as informational,

rather than ''normative,'' *i.e.,* it is intended to provide information but not to be an absolute requirement under the UL standard. Because Annex HH is informative, rather than normative, it is not a requirement of the UL Standard and following it would not be required under our proposed use conditions. Nonetheless, in this proposal, EPA is providing as ''Further information'' some information on training, including a recommendation that personnel follow Annex HH.

6. On what aspects is EPA requesting additional comment?

In the past, when finding flammable refrigerants acceptable subject to use conditions for self-contained equipment, EPA considered a requirement for training but decided that industry is better suited than EPA to design the content of any such training. At the time, this UL Standard did not exist, and the UL standards that EPA incorporated by reference did not contain a similar informative annex on training. EPA expected that the use conditions would be met by work performed at the factory in a controlled environment. Consistent with past SNAP rules on flammable refrigerants in refrigeration and air conditioning equipment (*e.g.* 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), EPA is not proposing to require specific training or service practices. However, the Agency is interested in comments on whether this approach should still be followed or if, through a separate rulemaking, EPA should propose to establish training and service requirements, and, if so, how such a training program might be managed and to what extent or for which types of products such requirements should apply. EPA is particularly interested in comments on requiring training for personnel working with split systems because this equipment is generally charged in the field. EPA likewise is interested in comments on the extent to which the use conditions including the UL Standard requirements can be addressed at the factory by trained factory employees in a controlled environment with limited access by the general public, for self-contained equipment and split systems. EPA will consider these comments in determining whether to initiate a separate rulemaking to establish specific service practices and training on the use of flammable refrigerants in this end use.

*C. Extruded Polystyrene: Boardstock and Billet—Proposed Listing of Blends of 40 to 52 Percent HFC–134a by Weight and the Remainder HFO–1234ze(E); Blends of 40 to 52 Percent HFC–134a With 40 to 60 Percent HFO–1234ze(E) and 10 to 20 Percent Each Water and $CO_2$ by Weight; and Blends With Maximum of 51 Percent HFC–134a, 17 to 41 Percent HFC–152a, up to 20 Percent $CO_2$ and one to 13 Percent Water*

EPA is proposing to list three blends containing HFC–134a as acceptable blowing agents in extruded polystyrene: Boardstock and billet (XPS): Blends of 40 to 52 percent HFC–134a by weight and the remainder HFO–1234ze(E); blends of 40 to 52 percent HFC–134a with 40 to 60 percent HFO–1234ze(E) and 10 to 20 percent each water and $CO_2$ by weight; and blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water. EPA is also proposing to revise the unacceptable listing for blends of certain HFCs in XPS for consistency with the acceptable listings for these blends of HFC–134a.

1. Background on XPS

The foam blowing end-use for XPS includes insulation for roofing, walls, floors, and pipes. This type of insulation foam can provide both thermal insulation and protection against moisture. XPS products have a variety of sizes and densities with differing technical requirements. XPS billet consists of thick blocks that may be used for flotation or for fabrication into shapes, such as for insulation of pipes or fittings. XPS boards are extruded through a die at high temperatures (approximately 90 °C). Flammability of the blowing agent and of the foam formulation is a potential hazard that may be addressed in a number of ways, including engineering controls such as ventilation and use of explosion-proof materials and/or use of less flammable blowing agents. In some cases, foam blowing agents may be pre-blended in a container. In other cases, multiple blowing agents are introduced during blowing of the foam, or ''co-blown.''

UL, Factory Mutual (FM), or another organization may test the final foam product for consistency with ASTM Standard C578, ''Standard Specification for Rigid, Cellular Polystyrene Thermal Insulation,'' so that the foam qualifies for meeting building codes.[34] The foam undergoes testing for properties such as density, thermal resistance (''R-value''), compressive strength, flexural strength, water vapor permeance, water absorption, dimensional stability, flame spread, and smoke generation to meet building codes.[35] Flame spread and smoke testing is conducted according to ASTM E84, ''Standard Test Method for Surface Burning Characteristics of Building Materials.'' Flame retardants may need to be added to the foam's composition to meet flame spread and smoke testing requirements. There may be additional tests such as for heat and ultraviolet radiation sensitivity for XPS manufactured for roofing applications.

XPS historically used CFC–12 as a blowing agent and then transitioned to use of HCFC–22 and/or HCFC–142b. EPA listed HCFC–22 and HCFC–142b as unacceptable blowing agents as of January 1, 2010 (72 FR 14432, March 28, 2007). HFC–134a and HFC blends, particularly blends of HFC–134a, became widely used in XPS in the following decade. In the 2015 Rule, EPA changed the status of certain HFCs and HFC blends from acceptable to unacceptable in XPS as of January 1, 2021, including HFC–134a, HFC–245fa, HFC–365mfc, and blends thereof.[36] Recognizing that multiple steps needed to be taken to transition to other blowing agents, including research and testing, EPA provided several years for those actions prior to the change of status date of January 1, 2021.

Based on recent submissions to EPA, EPA is aware of extensive research and testing on a number of new blowing agents for use in XPS. These newer substitutes include HFOs, hydrochlorofluoroolefins, or non-fluorinated compounds, in some cases co-blown with HFCs. In this notice of proposed rulemaking (NPRM), EPA is proposing to list as acceptable three new substitutes for use in XPS.

[34] In Canada, the applicable standard is CAN/ULC–S701, ''Standard for Thermal Insulation, Polystyrene, Boards and Pipe Covering.''

[35] Source: Extruded Polystyrene Foam Association, web page for technical information on standards. *http://xpsa.com/tech-info-standards.html.*

[36] As noted above, EPA is developing a future proposed rule to respond to the court's partial vacatur and remand of the 2015 Rule and notes that the court decision upheld EPA's listing changes as being reasonable and not ''arbitrary and capricious.''

2. What are blends of 40 to 52 percent HFC–134a and the remainder HFO–1234ze(E); blends of 40 to 52 percent HFC–134a with 40 to 60 percent HFO–1234ze(E) and 10 to 20 percent each water and carbon dioxide; and blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water, and how do they compare to other foam blowing agents in the same end-use?

EPA is proposing to list as acceptable (1) blends of 40 to 52 percent HFC–134a by weight and the remainder HFO–1234ze(E) for use in XPS (hereafter referred to as ''HFC–134a/HFO–1234ze(E) blends''); (2) blends of 40 to 52 percent HFC–134a with 40 to 60 percent HFO–1234ze(E) and 10 to 20 percent each water and $CO_2$ by weight for use in XPS (hereafter referred to as ''$CO_2$/water/HFC–134a/HFO–1234ze(E) blends''); and (3) blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water (hereafter referred to as ''HFC–134a/HFC–152a/$CO_2$/water blends''). The components of the blends are co-blown.

HFC–134a is also known as 1,1,1,2-tetrafluoroethane (CAS Reg. No. 811–97–2). HFC–152a, also known as 1,1, difluoroethane, has CAS Reg. No. 75–37–6. HFO–1234ze is also known as HFC–1234ze, HFO–1234ze(E) or *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9). $CO_2$ has CAS Reg. No. 124–38–9 and water has CAS Reg. No. 7732–18–5.

Redacted submissions and supporting documentation for these blends are provided in the docket for this proposed rule (EPA–HQ–OAR–2019–0698) at *https://www.regulations.gov.* EPA performed assessments to examine the health and environmental risks of these substitutes. These assessments are available in the docket for this proposed rule.[37] [38] [39]

*Environmental information:* The substitutes have an ODP of zero. Their components, HFC–134a, HFC–152a, HFO–1234ze(E), $CO_2$, and water have GWPs of 1,430,[40] 124,[41] one to six,[42] one,[43] and less than one,[44] respectively. If these values are weighted by mass percentage, then the blends range in GWP from about 580 to 750.[45] HFC–134a, HFC–152a, HFO–1234ze(E), $CO_2$, and water—components of the blends—are excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS.

*Flammability information:* The component HFC–152a is moderately flammable. The other components of the blends are non-flammable at standard temperature and pressure using the standard test method ASTM E681. However, at higher temperatures such as the temperatures typical for extruding XPS, HFC–134a, and HFO–1234ze(E) may be flammable, particularly at higher humidity levels.[46] Blends containing 50 percent or more HFC–134a have been found to have acceptable flammable process stability under conditions of use (*i.e.,* XPS extrusion).[47]

*Toxicity and exposure data:* Potential health effects of this substitute at lower concentrations include headache, nausea, drowsiness and dizziness. The substitute may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, it may cause central nervous system depression and affect respiration. The substitute could cause asphyxiation, if air is displaced by vapors in a confined space. These health effects are common to other foam blowing agents used in this end-use.

The AIHA has established WEELs of 1,000 ppm as an 8-hr TWA for HFC–134a and HFC–152a and 800 ppm for HFO–1234ze(E). $CO_2$ has an eight hour/day, 40 hour/week permissible exposure limit (PEL) of 5000 ppm in the workplace required by OSHA and a 15-minute recommended short-term exposure limit (STEL) of 30,000 ppm established by the National Institute for Occupational Safety and Health (NIOSH). EPA anticipates that users will be able to meet the AIHA WEELs, OSHA PEL, and NIOSH STEL and address potential health risks by following requirements and recommendations in the manufacturer's SDSs and other safety precautions common to the foam blowing industry.

*Comparison to other substitutes in this end-use:* HFC–134a/HFO–1234ze(E) blends, $CO_2$/water/HFC–134a/HFO–1234ze(E) blends, and HFC–134a/HFC–152a/$CO_2$/water blends have ODPs of zero, comparable to all other acceptable substitutes in this end-use, such as HFC–152a, HFO–1234ze(E), methyl formate, and $CO_2$.

The GWPs of 580 to 750 for the HFC–134a/HFO–1234ze(E) blends, the $CO_2$/water/HFC–134a/HFO–1234ze(E) blends, and HFC–134a/HFC–152a/$CO_2$/water blends are higher than those for acceptable alternatives such as HFC–152a, HFO–1234ze(E), light saturated hydrocarbons C3–C6 [48] and methyl formate, with respective GWPs of 124, one to six,[49] three to ten,[50] and less than five.[51]

Information regarding the flammability and toxicity of other available alternatives are provided in the listing decisions previously made (see *https://www.epa.gov/snap/substitutes-polystyrene-extruded-boardstock-and-billet*). Flammability and toxicity risks of the HFC–134a/HFO–1234ze(E), the $CO_2$/water/HFC–134a/HFO–1234ze(E) blends, and HFC–134a/HFC–152a/$CO_2$/water blends are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the AIHA WEELs, OSHA PEL, NIOSH STEL, recommendations in the manufacturer's SDSs, and other safety precautions common in the foam-blowing industry.

[37] ICF, 2020j. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends of 40 to 52 Percent HFC–134a by Weight and the Remainder HFO–1234ze(E) (HFC–HFO Co-blowing Agents).

[38] ICF, 2020k. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends of 40 to 52 Percent HFC–134a with 40 to 60 Percent HFO–1234ze(E) and 10 to 20 Percent Each Water and $CO_2$ by Weight (Co-blowing Blends).

[39] ICF, 2020l. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends with Maximum of 51 Percent HFC–134a, 17 to 41 Percent HFC–152a, up to 20 Percent $CO_2$ and One to 13 Percent Water (Blends for Foam Blowing).

[40] IPCC (2007).

[41] IPCC (2007).

[42] Hodnebrog *et al.,* 2013 and Javadi *et al.,* 2008.

[43] IPCC (2007).

[44] Sherwood et al 2018. This paper estimated that water vapor emitted near Earth's surface due to anthropogenic sources, *e.g.* irrigation, would have a GWP of $-10^{-3}$ to $5 \times 10^{-4}$. ''The global warming potential of near-surface emitted water vapour,'' Steven C Sherwood, Vishal Dixit and Chryséis Salomez. *Environ. Res. Lett.* 13 (2018) 104006.

[45] A GWP of 580 corresponds to formulations containing approximately 40 percent HFC–134a and the remainder HFO–1234ze(E) or HFO–1234ze(E), $CO_2$ and water or HFC–152a, $CO_2$ and water; a GWP of 750 corresponds to formulations containing 52 percent HFC–134a and the remainder of HFO–1234ze(E) or HFO–1234ze(E), $CO_2$ and water. or 51 percent HFC–134a and the remainder HFC–152a, $CO_2$, and water.

[46] Bellair and Hood, 2019. Comprehensive evaluation of the flammability and ignitability of HFO–1234ze, R.J. Bellair and L. Hood, *Process Safety and Environmental Protection* 132 (2019) 273–284. Available online at *doi.org/10.1016/j.psep.2019.09.033.*

[47] DuPont, 2019a. August 23, 2019. Letter from DuPont Performance Building Solutions to EPA.

[48] That is, alkanes with three to six carbons such as butane, n-pentane, isopentane, and cyclopentane.

[49] Hodnebrog *et al.,* 2013 and Javadi *et al.,* 2008.

[50] EPA, undated. ''Summary of Substitute Foam Blowing Agents Listed in SNAP Notice 25.'' Available online at *https://www.epa.gov/sites/production/files/2014-11/documents/notice25substitutefoams.pdf.*

[51] EPA, undated.

3. What is EPA proposing for HFC–134a blends in XPS?

EPA is proposing to list three specific blends of HFC–134a as acceptable in XPS. These blends have higher GWPs and are otherwise comparable or lower in risk than other alternatives listed as acceptable; however, EPA is taking this action because the Agency believes that other acceptable alternatives are not generally available for most needs under this end-use. Information available to the Agency at the time that the Agency finalized the 2015 Rule indicated that other substitutes listed as acceptable for this end-use, notably HFC–152a, HFO–1234ze(E), light saturated hydrocarbons C3–C6, and methyl formate, should be able to meet product requirements after further research and testing and thus would be available by January 1, 2021. Since that time, information provided in multiple SNAP submissions indicates that despite research and testing over the past several years, three of these four substitutes—HFO–1234ze(E), light saturated hydrocarbons C3–C6, and methyl formate—have not been proven to meet density and testing requirements of building codes and standards, such as for thermal efficiency, compressive strength, and flame and smoke generation, necessary for XPS products. One of the three manufacturers of XPS in the United States has had some success using neat [52] HFC–152a as a blowing agent to manufacture some XPS products.

In order for substitutes to be available in this end-use, they must be capable of blowing foam that meets the technical needs of XPS products including density and ability to meet testing requirements of building codes and standards, such as for thermal efficiency, compressive strength, and flame and smoke generation. EPA considered relevant information included in multiple SNAP submissions in the development of this proposal regarding whether foam blowing agents currently listed as acceptable can be used to produce foam that meets the performance specifications for XPS foam. The submitter of the proposed blends presented specific evidence supporting a claim that other acceptable substitutes have not yet provided sufficient performance when considering density and testing requirements. In particular, the submitter provided information developed over five years evaluating a variety of alternative blowing agents in hundreds of trials. The submitter indicated that it was having difficulty meeting requirements for insulation value (''R-value'') with neat acceptable blowing agents such as HFO–1234ze(E), HFC–152a, and $CO_2$.[53] Further, the submitter indicated that if in some cases it could meet R-value requirements with those neat blowing agents, these alternatives were not able to meet other requirements such as compressive strength, density and thickness, or fire test results. The submitter also identified challenges with meeting code requirements for XPS products manufactured with flammable substitutes (*e.g.,* HFC–152a, light saturated hydrocarbons C3–C6, and methyl formate) and provided examples of failed test results.

Based on all of the evidence before the Agency, it now appears that only one of the substitutes that the Agency believed at the time of the 2015 Rule would be available for use in XPS foam as of January 1, 2021 is in fact available and likely could only be used to meet the needs for some portion of the XPS foams market.[54] The Agency is concerned about ensuring that the needs of the full XPS foams market in the United States can be met. In addition to a concern that all of the needs of the XPS foams market cannot be met, EPA considers it important that the SNAP program not limit the choice of acceptable substitutes to only one option, where possible. For these reasons, EPA is proposing to list additional blowing agent options for XPS that have been proven to work for this end-use.

The submitter has tested the three blends with HFC–134a addressed in this proposal and has found the blends create larger cells in XPS which can be important for meeting the needed range of densities and meeting other testing requirements. Thus, by adding these two substitutes to the list of acceptable substitutes, XPS manufacturers will have at least three viable substitutes to choose from in manufacturing XPS products and these substitutes should allow manufacturers to meet additional needs for XPS foams in the United States. EPA requests comment on the proposed listing of these blends of HFC–134a as acceptable in XPS.

EPA notes that the proposed listings are summarized below. Because the Agency is not proposing to restrict or prohibit use of these substitutes in this end-use, it is not proposing regulatory text at the end of this document that, if finalized, would appear in the CFR. If EPA were to finalize these listings as proposed, the Agency would publish them in the preamble to the final rule and would add them to the list of acceptable substitutes for XPS on EPA's website at *https://www.epa.gov/snap/substitutes-polystyrene-extruded-boardstock-and-billet.*

SUMMARY OF PROPOSED NEW LISTINGS FOR XPS FOAM BLOWING AGENTS

| End-use | Substitute | Proposed decision | Further information |
|---|---|---|---|
| Extruded Polystyrene: Boardstock and Billet. | Blends of 40 to 52 percent HFC–134a by weight and the remainder HFO–1234ze(E). | Acceptable * ..... | These blends have GWPs of 580 to 750, depending on the specific composition. Blends containing 50 percent or more HFC–134a have been found to have acceptable flammable process stability under conditions of use (i.e., XPS extrusion). |
| Extruded Polystyrene: Boardstock and Billet. | Blends of 40 to 52 percent HFC–134a with 40 to 60 percent HFO–1234ze(E) and 10 to 20 percent each water and $CO_2$ by weight. | Acceptable * ..... | These blends have GWPs of 580 to 750, depending on the specific composition. Blends containing 50 percent or more HFC–134a have been found to have acceptable flammable process stability under conditions of use (i.e., XPS extrusion). |

[52] Individual, unblended blowing agents.

[53] DuPont, 2019b. December 17, 2019 Letter from DuPont Performance Building Solutions to EPA.

[54] The set of products that may be able to be manufactured with HFC–152a would account for a minority of the current market for XPS.

SUMMARY OF PROPOSED NEW LISTINGS FOR XPS FOAM BLOWING AGENTS—Continued

| End-use | Substitute | Proposed decision | Further information |
|---|---|---|---|
| Extruded Polystyrene: Boardstock and Billet. | Blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water. | Acceptable * ..... | These blends have GWPs of 580 to 750, depending on the specific composition. Blends containing 50 percent or more HFC–134a have been found to have acceptable flammable process stability under conditions of use (i.e., XPS extrusion). |

* Notwithstanding the unacceptable listings in general for blends of HFC–134a in XPS, EPA is proposing these specific blends of HFC–134a to be acceptable in this end-use.

In light of the Agency's proposal to list the above-mentioned blends of HFC–134a as acceptable, EPA is proposing to revise the current unacceptable listing for blends of certain HFCs in XPS in appendix U to 40 CFR part 82, subpart G. The listing for unacceptable substitutes in XPS states that HFC–134a, HFC–245fa, HFC–365mfc, and blends thereof; and Formacel TI, Formacel B, and Formacel Z–6 are ''unacceptable as of January 1, 2021, except where allowed under a narrowed use limit.'' EPA is proposing to revise the listing of unacceptable substitutes for XPS in appendix U to read that the substitutes are ''Unacceptable as of January 1, 2021 except where allowed under a narrowed use limit or where blends are specifically listed as acceptable.'' EPA is not opening up for comment other aspects of this existing listing.

*D. Total Flooding: Proposed Removal of Powdered Aerosol E From the List of Substitutes Acceptable Subject to use Conditions*

Powdered Aerosol E, also marketed under the trade names of FirePro, FirePro Xtinguish, and FireBan, is generated in an automated manufacturing process during which the chemicals, in powder form, are mixed and then supplied to end users as a solid contained within a fire extinguisher. In the presence of heat, the solid converts to an aerosol consisting mainly of potassium salts. EPA listed Powdered Aerosol E as acceptable, subject to use conditions, as a total flooding agent (71 FR 56359, September 27, 2006). The use conditions required that Powdered Aerosol E be used only in areas that are normally unoccupied, because the Agency did not have sufficient information at that time supporting its safe use in areas that are normally occupied. Based on a review of additional information from the submitter to support the safe use of Powdered Aerosol E in normally occupied spaces, EPA subsequently determined that Powdered Aerosol E is also acceptable for use in total flooding systems for normally occupied spaces (83 FR 50026, October 4, 2018). The listing provides that Powdered Aerosol E is acceptable for total flooding uses, which includes both unoccupied and occupied spaces. In the October 2018 listing action, EPA noted that in a subsequent rulemaking, the Agency would remove the previous listing of Powdered Aerosol E as acceptable, subject to use conditions since the use condition is no longer applicable. EPA is proposing to take the ministerial action of removing that listing for Powdered Aerosol E and is requesting comment on this proposal.

## III. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

This action is expected to be an Executive Order 13771 deregulatory action. This proposed rule is expected to provide meaningful burden reduction because it allows for the use of additional ODS substitutes and there is no requirement to use the substitutes listed in this action.

*C. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0226. The approved Information Collection Request includes five types of respondent reporting and recordkeeping activities pursuant to SNAP regulations: Submission of a SNAP petition, filing a Toxic Substances Control Act (TSCA)/SNAP Addendum, notification for test marketing activity, recordkeeping for substitutes acceptable subject to use restrictions, and recordkeeping for small volume uses. This rule contains no new requirements for reporting or recordkeeping.

*D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action allows the additional options of using R–32, R–448A, R–449A, R–449B, R–452B, R–454A, R–454B, R–454C, R–457A, blends of 40 to 52 percent HFC–134a by weight and the remainder HFO–1234ze(E), blends of 40 to 52 percent HFC–134a with 44 to 58 percent HFO–1234ze(E) and one to two percent each water and $CO_2$ by weight, and blends with maximum of 51 percent HFC–134a, 17 to 41 percent HFC–152a, up to 20 percent $CO_2$ and one to 13 percent water in the specified end-uses, but does not mandate such use. Users who choose to use R–448A, R–449A, and R–449B must make a reasonable effort to ascertain that other substitutes or alternatives are not technically feasible and must document and keep records of the results of such investigations. Because equipment for R–452B, R–454A, R–454B, R–454C, and R–457A is not manufactured yet in the U.S. for the residential and light commercial air conditioning and heat pumps end-use, no change in business practice is required to meet the use conditions, resulting in no adverse impact compared to the absence of this rule. Equipment for R–32 already being manufactured has been subject to similar use conditions, resulting in no adverse impact compared to the absence of this rule. Thus, the rule would not impose new costs on small entities if finalized as proposed. We have

therefore concluded that this action will not impose a significant adverse regulatory burden for all directly regulated small entities.

*E. Unfunded Mandates Reform Act (UMRA)*

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

*F. Executive Order 13132: Federalism*

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

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

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175.

Thus, Executive Order 13175 does not apply to this action. EPA periodically updates tribal officials on air regulations through the monthly meetings of the National Tribal Air Association and will share information on this rulemaking through this and other fora.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The EPA has not conducted a separate analysis of risks to infants and children associated with this rule. Any risks to children are not different than the risks to the general population. This action's health and risk assessments are contained in the comparisons of toxicity for the various substitutes, as well as in the risk screens for the substitutes that are proposed to be listed. The risk screens are in the docket for this rulemaking.

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

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

*J. National Technology Transfer and Advancement Act*

This action involves technical standards. EPA proposes to use and incorporate by reference portions of the 2019 UL Standard 60335–2–40, which establishes requirements for the evaluation of residential air conditioning equipment and safe use of flammable refrigerants, among other things. The standard is discussed in greater detail in section II.B.4 of this preamble.

The 2019 UL Standard 60335–2–40 is available at *http://www.shopulstandards.com/ProductDetail.aspx?UniqueKey=36463,* and may be purchased by mail at: COMM 2000, 151 Eastern Avenue, Bensenville, IL 60106; Email: *orders@shopulstandards.com;* Telephone: 1–888–853–3503 in the U.S. or Canada (other countries dial 1–415–352–2178); internet address: *http://ulstandards.ul.com/* or *www.comm-2000.com.* The cost of the 2019 UL Standard 60335–2–40 is $440 for an electronic copy and $550 for hardcopy. UL also offers a subscription service to the Standards Certification Customer Library (SCCL) that allows unlimited access to their standards and related documents. The cost of obtaining this standard is not a significant financial burden for equipment manufacturers and purchase is not required for those selling, installing, and servicing the equipment. Therefore, EPA proposes that the UL standard proposed to be incorporated by reference is reasonably available.

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

EPA believes that it is not feasible to quantify any disproportionately high and adverse human health or environmental effects from this action on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994) because for all affected populations there is no requirement to use any of the alternatives listed in this action.

## IV. References

Unless specified otherwise, all documents are available electronically through the Federal Docket Management System, Docket number EPA–HQ–OAR–2019–0698.

AHRI, 2017. Petition Requesting EPA SNAP Approval of R–448A/449A/449B for Medium Temperature, Stand-Alone Retail Food Refrigeration Equipment. Submitted March 20, 2017.

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ICF, 2020a. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–448A.

ICF, 2020b. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–449A.

ICF, 2020c. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R–449B.

ICF, 2020d. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: HFC–32.

ICF, 2020e. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–452B.

ICF, 2020f. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454A.

ICF, 2020g. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454B.

ICF, 2020h. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454C.
ICF, 2020i. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps; Substitute (New Equipment): R–457A.
ICF, 2020j. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends of 40 to 52 Percent HFC–134a by Weight and the Remainder HFO–1234ze(E) (HFC–HFO Co-blowing Agents).
ICF, 2020k. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends of 40 to 52 Percent HFC–134a with 40 to 60 Percent HFO–1234ze(E) and 10 to 20 Percent Each Water and $CO_2$ by Weight (Co-blowing Blends).
ICF, 2020l. Risk Screen on Substitutes in Extruded Polystyrene Boardstock and Billet Foam; Substitute: Blends with Maximum of 51 Percent HFC–134a, 17 to 41 Percent HFC–152a, up to 20 Percent $CO_2$ and One to 13 Percent Water (Blends for Foam Blowing).
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Shecco, 2013b. HCs Gaining Market Prominence in US—View from the NAFEM Show—Part 2, February 25, 2013.
Shecco, 2015. New Regulations Inspire Hydrocarbon Displays at U.S. NAFEM Show, February 24, 2015.
Sherwood et. al. 2018. Sherwood, S. C, Vishal, D., and Salomez, C. (2018) The global warming potential of near-surface emitted water vapour. Environ. Res. Lett.,13 104006. Available online at *https://iopscience.iop.org/article/10.1088/1748-9326/aae018/pdf.*
UL 60335–2–40, 2019. Household And Similar Electrical Appliances—Safety—Part 2–40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers. Third Edition. November 1, 2019.

**List of Subjects in 40 CFR Part 82**

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Stratospheric ozone layer.

**Andrew Wheeler,**

*Administrator.*

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 82 as follows:

## PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7601, 7671–7671q.

### Subpart G—Significant New Alternatives Policy Program

■ 2. Appendix O to subpart G of part 82 is amended by removing in the table the entry ''Total flooding; Powdered Aerosol E (FirePro®)''.

■ 3. In appendix U to subpart G of part 82:

■ a. Revise the appendix U to subpart G of part 82 heading.

■ b. Revise in the table entitled ''Unacceptable Substitutes'' the entry ''Polystyrene: Extruded Boardstock and Billet''.

The revisions read as follows:

**Appendix U to Subpart G of Part 82—Unacceptable Substitutes and Substitutes Subject to Use Restrictions Listed in the July 20, 2015 Final Rule, Effective August 19, 2015 and in the [Date of publication of the final rule in the Federal Register] Final Rule, Effective [Date 30 Days After Date of Publication of the Final Rule in the Federal Register]**

* * * * *

UNACCEPTABLE SUBSTITUTES

| End-use | Substitute | Decision | Further information |
|---|---|---|---|
| * | * * | * * | * * |
| Polystyrene: Extruded Boardstock and Billet. | HFC–134a, HFC–245fa, HFC–365mfc, and blends thereof; Formacel TI, Formacel B, and Formacel Z–6. | Unacceptable as of January 1, 2021 except where allowed under a narrowed use limit or where a blend is specifically listed as acceptable. | These foam blowing agents have GWPs ranging from higher than 140 to approximately 1,500. Other substitutes will be available for this end-use with lower overall risk to human health and the environment by the status change date. |
| * | * * | * * | * * |

* * * * *

■ 4. Add appendix W to subpart G of part 82 to read as follows:

**Appendix W to Subpart G of Part 82—Substitutes Listed in the [Date of Publication of the Final Rule in the Federal Register] Final Rule—Effective [Date 30 Days After Date of Publication of the Final Rule in the Federal Register]**

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO NARROWED USE LIMITS

| End-use | Substitute | Decision | Narrowed use limits | Further information |
|---|---|---|---|---|
| Retail food refrigeration—medium- temperature stand-alone units (new only). | R–448A, R–449A, R–449B. | Acceptable Subject to Narrowed Use Limits. | Acceptable only for use in new medium-temperature stand-alone units where reasonable efforts have been made to ascertain that other alternatives are not technically feasible due to the inability to meet ADA requirements. | Users are required to document and retain the results of their technical investigation of alternatives for the purpose of demonstrating compliance. Information should include descriptions of:<br>• Process or product in which the substitute is needed;<br>• Substitutes examined and rejected;<br>• Reason for rejection of other alternatives, e.g., performance, technical or safety standards, ADA requirements; and/or<br>• Anticipated date other substitutes will be available and projected time for switching. |

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS

| End-use | Substitute | Decision | Use conditions | Further information |
|---|---|---|---|---|
| I. Residential and light commercial air conditioning and heat pumps (new only). | R–452B, R–454A, R–454B, R–454C and R–457A. | Acceptable Subject to Use Conditions. | These refrigerants may be used only in new equipment specifically designed and clearly identified for the refrigerants (i.e., none of these substitutes may be used as a conversion or ''retrofit'' refrigerant for existing equipment designed for other refrigerants).<br><br>These substitutes may only be used in air conditioning equipment that meets all requirements in UL 60335–2–40.[1 2 3] In cases where this appendix includes requirements more stringent than those of UL 60335–2–40, the appliance must meet the requirements of this appendix in place of the requirements in UL 60335–2–40.<br><br>The charge size for the equipment must not exceed the maximum refrigerant mass determined according to UL 60335–2–40 for the room size where the air conditioner is used.<br><br>The following markings must be attached at the locations provided and must be permanent:<br>(a) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing.'' | Applicable OSHA requirements at 29 CFR part 1910 must be followed, including those at 29 CFR 1910.94 (ventilation) and 1910.106 (flammable and combustible liquids), 1910.110 (storage and handling of liquefied petroleum gases), and 1910.1000 (toxic and hazardous substances).<br>Proper ventilation should be maintained at all times during the manufacture and storage of equipment containing hydrocarbon refrigerants through adherence to good manufacturing practices as per 29 CFR 1910.106. If refrigerant levels in the air surrounding the equipment rise above one-fourth of the lower flammability limit, the space should be evacuated and reentry should occur only after the space has been properly ventilated.<br>Technicians and equipment manufacturers should wear appropriate personal protective equipment, including chemical goggles and protective gloves, when handling flammable refrigerants. Special care should be taken to avoid contact with the skin which, like many refrigerants, can cause freeze burns on the skin.<br>A class B dry powder type fire extinguisher should be kept nearby.<br>Technicians should only use spark-proof tools when working on air conditioning equipment with flammable refrigerants. |

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

| End-use | Substitute | Decision | Use conditions | Further information |
|---|---|---|---|---|
| | | | (b) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used.'' | Any recovery equipment used should be designed for flammable refrigerants. Any refrigerant releases should be in a well-ventilated area, such as outside of a building. Only technicians specifically trained in handling flammable refrigerants should service refrigeration equipment containing this refrigerant. Technicians should gain an understanding of minimizing the risk of fire and the steps to use flammable refrigerants safely. |
| | | | (c) On the inside of the air conditioning equipment near the compressor: ''WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner's Guide Before Attempting To Service This Product. All Safety Precautions Must be Followed.'' | Room occupants should evacuate the space immediately following the accidental release of this refrigerant.<br>Personnel commissioning, maintaining, repairing, decommissioning and disposing of appliances with these refrigerants should obtain training and follow practices consistent with Annex HH of UL 260355–2–40, 3rd edition. |
| | | | (d) For any equipment pre-charged at the factory, on the equipment packaging''WARNING—Risk of Fire due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations''<br>(e) On the indoor unit near the nameplate:<br>a. At the top of the marking: ''Minimum Installation height, X m (W ft)''. This marking is only required if required by UL 60335–2–40. The terms ''X'' and ''W'' shall be replaced by the numeric height as calculated per UL 60335–2–40. Note that the formatting here is slightly different than UL 60335–2–40; specifically, the height in Inch-Pound units is placed in parentheses and the word ''and'' has been replaced by the opening parenthesis..<br>b. Immediately below the markings described in I.(a) or at the top of the marking if (a) is not required: ''Minimum room area (operating or storage), Y $m^2$ (Z $ft^2$)''. The terms ''Y'' and ''Z'' shall be replaced by the numeric area as calculated per UL 60335–2–40. Note that the formatting here is slightly different than UL 60335–2–40; specifically, the area in Inch-Pound units is placed in parentheses and the word ''and'' has been replaced by the opening parenthesis..<br>(f) For non-fixed equipment, including portable air conditioners, window air conditioners, packaged terminal air conditioners and packaged terminal heat pumps, on the outside of the product: ''WARNING—Risk of Fire or Explosion—Store in a well ventilated room without continuously operating flames or other potential ignition.''<br>(g) For fixed equipment, including rooftop units and split air conditioners, ''WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions.''<br>(h) All of these markings must be in letters no less than 6.4 mm (¼ inch) high. | CAA section 608(c)(2) prohibition on knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration.<br>Department of Transportation requirements for transport of flammable gases must be followed.<br>Mildly flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260–270). |

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

| End-use | Substitute | Decision | Use conditions | Further information |
|---|---|---|---|---|
| | | | The equipment must have red Pantone Matching System (PMS) #185 or RAL 3020 marked pipes, hoses, or other devices through which the refrigerant passes, to indicate the use of a flammable refrigerant. This color must be applied at all service ports and other parts of the system where service puncturing or other actions creating an opening from the refrigerant circuit to the atmosphere might be expected and must extend a minimum of one (1) inch (25mm) in both directions from such locations and shall be replaced if removed. | |
| II. Residential and light commercial air conditioning and heat pumps (new only), excluding self-contained room air conditioners. | R–32 ..... | Acceptable Subject to Use Conditions. | This refrigerant may be used only in new equipment specifically designed and clearly identified for the refrigerants (i.e., none of these substitutes may be used as a conversion or ''retrofit'' refrigerant for existing equipment designed for other refrigerants).<br>These substitutes may only be used in air conditioning equipment that meets all requirements in UL 60335–2–40.[1 2 3] In cases where this appendix includes requirements more stringent than those of UL 60335–2–40, the appliance must meet the requirements of this appendix in place of the requirements in UL 60335–2–40<br>The charge size for the equipment must not exceed the maximum refrigerant mass determined according to UL 60335–2–40 for the room size where the air conditioner is used.<br>The following markings must be attached at the locations provided and must be permanent:<br>(a) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing.''<br>(b) On the outside of the air conditioning equipment: ''WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used.''<br>(c) On the inside of the air conditioning equipment near the compressor: ''WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner's Guide Before Attempting To Service This Product. All Safety Precautions Must be Followed.''<br>(d) For any equipment pre-charged at the factory, on the equipment packaging: ''WARNING—Risk of Fire due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations''<br>(e) On the indoor unit near the nameplate: | Applicable OSHA requirements at 29 CFR part 1910 must be followed, including those at 29 CFR 1910.94 (ventilation) and 1910.106 (flammable and combustible liquids), 1910.110 (storage and handling of liquefied petroleum gases), and 1910.1000 (toxic and hazardous substances).<br>Proper ventilation should be maintained at all times during the manufacture and storage of equipment containing hydrocarbon refrigerants through adherence to good manufacturing practices as per 29 CFR 1910.106. If refrigerant levels in the air surrounding the equipment rise above one-fourth of the lower flammability limit, the space should be evacuated and reentry should occur only after the space has been properly ventilated.<br>Technicians and equipment manufacturers should wear appropriate personal protective equipment, including chemical goggles and protective gloves, when handling flammable refrigerants. Special care should be taken to avoid contact with the skin which, like many refrigerants, can cause freeze burns on the skin.<br>A class B dry powder type fire extinguisher should be kept nearby.<br>Technicians should only use spark-proof tools when working on air conditioning equipment with flammable refrigerants.<br>Any recovery equipment used should be designed for flammable refrigerants. Any refrigerant releases should be in a well-ventilated area, such as outside of a building. Only technicians specifically trained in handling flammable refrigerants should service refrigeration equipment containing this refrigerant. Technicians should gain an understanding of minimizing the risk of fire and the steps to use flammable refrigerants safely.<br>Room occupants should evacuate the space immediately following the accidental release of this refrigerant.<br>Personnel commissioning, maintaining, repairing, decommissioning and disposing of appliances with this refrigerant should obtain training and follow practices consistent with Annex HH of UL 260355–2–40, 3rd edition. |

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

| End-use | Substitute | Decision | Use conditions | Further information |
|---|---|---|---|---|
| | | | a. At the top of the marking: "Minimum Installation height, X m (W ft)". This marking is only required if required by UL 60335–2–40. The terms "X" and "W" shall be replaced by the numeric height as calculated per UL 60335–2–40. Note that the formatting here is slightly different than UL 60335–2–40; specifically, the height in Inch-Pound units is placed in parentheses and the word "and" has been replaced by the opening parenthesis.. | CAA section 608(c)(2) prohibition on knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration.<br>Department of Transportation requirements for transport of flammable gases must be followed. |
| | | | b. Immediately below the marking specified in II.(a) or at the top of the marking if (a) is not required: "Minimum room area (operating or storage), Y $m^2$ (Z $ft^2$)". The terms "Y" and "Z" shall be replaced by the numeric area as calculated per UL 60335–2–40. Note that the formatting here is slightly different than UL 60335–2–40; specifically, the area in Inch-Pound units is placed in parentheses and the word "and" has been replaced by the opening parenthesis.. | Mildly flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260–270). |
| | | | (f) For fixed equipment, including rooftop units and split air conditioners, "WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions." | |
| | | | (g) All of these markings must be in letters no less than 6.4 mm (¼ inch) high. | |
| | | | The equipment must have red Pantone Matching System (PMS) #185 or RAL 3020 marked pipes, hoses, or other devices through which the refrigerant passes, to indicate the use of a flammable refrigerant. This color must be applied at all service ports and other parts of the system where service puncturing or other actions creating an opening from the refrigerant circuit to the atmosphere might be expected and must extend a minimum of one (1) inch (25mm) in both directions from such locations and shall be replaced if removed. | |

[1] The Director of the Federal Register approves this standard for incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect a copy at U.S. EPA's Air and Radiation Docket; EPA West Building, Room 3334, 1301 Constitution Ave. NW, Washington DC or at the National Archives and Records Administration (NARA). For questions regarding access to these standards, the telephone number of EPA's Air and Radiation Docket is 202–566–1742. For information on the availability of this material at NARA, call 202–741–6030, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

[2] You may obtain this standard from: Underwriters Laboratories Inc. (UL) COMM 2000; 151 Eastern Avenue; Bensenville, IL 60106; *orders@comm-2000.com;* 1–888–853–3503 in the U.S. or Canada (other countries dial +1–415–352–2168); *http://ulstandards.ul.com/* or *www.comm-2000.com.*

[3] UL 60335–2–40, Standard for Household And Similar Electrical Appliances—Safety—Part 2- 40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers, 3rd edition, Dated November 1, 2019.

[FR Doc. 2020–11990 Filed 6–11–20; 8:45 am]

BILLING CODE 6560–50–P

# Notices

Federal Register
Vol. 85, No. 114
Friday, June 12, 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

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2020–0040]**

### Notice of Request for Extension of Approval of an Information Collection; Highly Pathogenic Avian Influenza, All Subtypes, and Newcastle Disease; Additional Restrictions

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** 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 an extension of approval of an information collection associated with the regulations to prevent the introduction of highly pathogenic avian influenza, all subtypes, and Newcastle disease into the United States through the importation of birds, poultry, and unprocessed bird and poultry products.

**DATES:** We will consider all comments that we receive on or before August 11, 2020.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0040.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0040, 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-2020-0040* 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 to prevent the introduction of highly pathogenic avian influenza and Newcastle disease, contact Dr. Bettina Helm, Senior Staff Veterinary Medical Officer, Live Animal Imports, Strategy and Policy, VS, APHIS, 4700 River Road, Unit 40, Riverdale, MD 20737; (301) 851–3300. For information on the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Highly Pathogenic Avian Influenza, All Subtypes, and Newcastle Disease; Additional Restrictions.

*OMB Control Number:* 0579–0245.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. The regulations for the importation of animals and animal products are contained in 9 CFR parts 92 through 98.

The regulations in parts 93, 94, and 95 govern the importation of specified animals and animal products and byproducts to prevent the introduction of various animal diseases, including highly pathogenic avian influenza (HPAI), all subtypes, and Newcastle disease.

HPAI, as defined in § 94.0, is an infectious and fatal disease of poultry. HPAI can strike poultry quickly without any warning signs of infection and, once established, can spread rapidly from flock to flock. HPAI viruses can be spread by manure, equipment, vehicles, egg flats, crates, and people whose clothing or shoes have come in contact with the viruses. In addition, HPAI viruses can remain viable at moderate temperatures for long periods in the environment and can survive indefinitely in frozen material. One gram of contaminated manure can contain enough virus to infect 1 million poultry.

Newcastle disease is a contagious disease of birds and poultry caused by a paramyxovirus. Newcastle disease, as defined in § 94.0, is one of most infectious diseases of poultry in the world. A death rate of almost 100 percent can occur in unvaccinated poultry flocks. Newcastle disease can also infect and cause death even in vaccinated birds and poultry.

APHIS' regulations prohibit or restrict the importation of unprocessed bird and poultry products and byproducts from regions that have reported the presence of HPAI or Newcastle disease, and contain permit and quarantine requirements for U.S. origin pet birds and performing or theatrical birds and poultry returning to the United States. In addition, there are also restrictions concerning importation of live poultry and birds that have been vaccinated for certain types of avian influenza or that have moved through or originate from regions where HPAI or Newcastle disease is considered to exist. These regulations require the use of a number of information collection activities, including various APHIS forms, application of seals, agreements, notarized declarations or affirmations, notification of signs of disease in a recently imported bird, cooperative service agreements, and recordkeeping by processing establishments.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities 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 0.55 hours per response.

*Respondents:* Foreign federal government officials, owners of U.S.-origin pet birds and performing or theatrical birds or poultry returning to the United States, and U.S. importers of bird and poultry carcasses, parts, products and byproducts (bird blood, bird tissues, etc.) of birds and poultry and eggs (other than hatching eggs) from certain regions.

*Estimated annual number of respondents:* 973.

*Estimated annual number of responses per respondent:* 3.81.

*Estimated annual number of responses:* 3,707.

*Estimated total annual burden on respondents:* 2,041 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 8th day of June 2020.

**Michael Watson,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2020–12737 Filed 6–11–20; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2020–0046]**

### Notice of Request for Revision to and Extension of Approval of an Information Collection; U.S. Origin Health Certificate

**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 the export of animals and animal products from the United States.

**DATES:** We will consider all comments that we receive on or before August 11, 2020.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0046.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0046, 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-2020-0046* 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 export of animals and animal products from the United States, contact Dr. Dix Harrell, Veterinarian in Charge, Veterinary Export Trade Services, Field Operations, VS, APHIS, Gainesville Service Center, 8100 NW 15 Place, Gainesville, FL 32606; (352) 313–3060. For more information on the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* U.S. Origin Health Certificate.

*OMB Control Number:* 0579–0020.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, among other things, has the authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict the import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. Disease prevention is the most effective method for maintaining a healthy animal population and for enhancing APHIS' ability to compete in the world market of animal and animal product trade. The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. As part of its mission to facilitate the export of U.S. animals and products, APHIS' Veterinary Services maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States.

Among other things, to ensure a favorable balance of trade, APHIS uses information collection activities, such as U.S. Origin Health Certificates; U.S. Origin Health Certificates for the Export of Horses from the United States to Canada; Health Certificates for the Export of Live Finfish, Mollusks, and Crustaceans (and their Gametes); Country-specific Health Certificates; United States Interstate and International Certificate of Health Examination for Small Animals (Exporters); Inspection and Certification for Animal Products; Undue Hardship Explanations-Animals; Applications for Approval of Inspection Facility-Environmental Certification; Annual Inspections of Export Inspection Facilities; Opportunities to Present Views Concerning Withdrawal of Facility Approval; Certifications to Carry Livestock; Inspections of Vessel Prior to Voyage; Notarized Statements; Aircraft Cleaning and Disinfection; and Travel Time.

We are asking the Office of Management and Budget (OMB) 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 1.098 hours per response.

*Respondents:* Owners and facility operators, accredited veterinarians, exporters, and owners or masters of vessel.

*Estimated annual number of respondents:* 4,072.

*Estimated annual number of responses per respondent:* 95.

*Estimated annual number of responses:* 386,191.

*Estimated total annual burden on respondents:* 424,316 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 8th day of June 2020.

**Michael Watson,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2020–12736 Filed 6–11–20; 8:45 am]

**BILLING CODE 3410–34–P**

## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

### Performance Review Board Membership

**AGENCY:** Architectural and Transportation Barriers Compliance Board.

**ACTION:** Notice.

**SUMMARY:** Notice is given of the appointment of members to a performance review board for the Architectural and Transportation Barriers Compliance Board (Access Board).

**FOR FURTHER INFORMATION CONTACT:** David M. Capozzi, Executive Director, Access Board, 1331 F Street NW, Suite 1000, Washington, DC 20004–1111. Telephone (202) 272–0010.

**SUPPLEMENTARY INFORMATION:** Section 4314 (c) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service (SES) performance review boards. The function of the boards is to review and evaluate the initial appraisal of senior executives' performance and make recommendations to the appointing authority relative to the performance of these executives. Because of its small size, the Access Board has appointed SES career members from other federal agencies to serve on its performance review board. The members of the performance review board for the Access Board are:

- Craig Luigart, Chief Information Officer, Veterans Health Administration, Department of Veterans Affairs;
- Rebecca Bond, Chief, Disability Rights Section, Department of Justice;
- David Insinga, Chief, Space and Facilities Division, Administrative Office of the United States Courts

**David M. Capozzi,**

*Executive Director.*

[FR Doc. 2020–12702 Filed 6–11–20; 8:45 am]

**BILLING CODE 8150–01–P**

## CIVIL RIGHTS COMMISSION

### Sunshine Act Meeting Notice

**AGENCY:** United States Commission on Civil Rights.

**ACTION:** Notice of Commission public business meeting.

**DATES:** Friday June 19, 2020, 10:00 a.m. ET.

**ADDRESSES:** Meeting to take place by telephone and open to the public by telephone: 800–289–0527, Conference ID 709–2711. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, June 19, 2020, is *https://www.streamtext.net/player?event=USCCR.* Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

**FOR FURTHER INFORMATION CONTACT:** Zakee Martin: 202–376–7700; *publicaffairs@usccr.gov.*

**SUPPLEMENTARY INFORMATION:**

**Meeting Agenda**

I. Approval of Agenda
II. Business Meeting
  A. Discussion and vote on the Commission's report, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*
  B. Discussion and vote on Commission Advisory Committees
  - Minnesota Advisory Committee
  - Vermont Advisory Committee

  C. Discussion and vote on Administrative Instruction 5–7, Advisory Committee Meetings and Reports
  D. Discussion and vote on timelines for Commission short-term projects on civil rights impacts of the COVID–19 pandemic
  E. Discussion and vote on Administrative Instruction 5–9, Advisory Committee Appointments
  F. Update from Staff Director on virtual briefing
  G. Management and Operations
  - Staff Director's Report

III. Adjourn Meeting

Dated: June 9, 2020.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2020–12779 Filed 6–10–20; 11:15 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[S–98–2020]**

### Foreign-Trade Zone 98—Birmingham, Alabama; Application for Subzone; Signature Express Transport, LLC, Fairfield, Alabama

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the City of Birmingham, Alabama, grantee of FTZ 98, requesting subzone status for the facility of Signature Express Transport, LLC, located in Fairfield, Alabama. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on June 8, 2020.

The proposed subzone (1.43 acres) is located at 3601 Lloyd Nolan Parkway, Fairfield, Alabama. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 98.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is July 22, 2020. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 6, 2020.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Kemp at

*Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: June 8, 2020.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2020–12705 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[S–59–2020]**

### Approval of Subzone Status; Oldach Associates, LLC; Cataño, Puerto Rico

On April 7, 2020, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Department of Economic Development and Commerce, grantee of FTZ 61, requesting subzone status subject to the existing activation limit of FTZ 61, on behalf of Oldach Associates, LLC, in Cataño, Puerto Rico.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (85 FR 20665, April 14, 2020). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval.

Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 61Z was approved on June 9, 2020, subject to the FTZ Act and the Board's regulations, including § 400.13, and further subject to FTZ 61's 1,821.07-acre activation limit.

Dated: June 9, 2020.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2020–12706 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**RIN 0694–XC062**

### Extension of Deadline for Public Comments for Section 232 National Security Investigation of Imports of Laminations for Stacked Cores for Incorporation Into Transformers, Stacked Cores for Incorporation Into Transformers, Wound Cores for Incorporation Into Transformers, Electrical Transformers, and Transformer Regulators

**AGENCY:** Bureau of Industry and Security, Office of Technology Evaluation, U.S. Department of Commerce.

**ACTIONS:** Extension of comment period.

**SUMMARY:** On May 19, 2020, the Bureau of Industry and Security (BIS) published the Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Laminations for Stacked Cores for Incorporation into Transformers, Stacked Cores for Incorporation into Transformers, Wound Cores for Incorporation into Transformers, Electrical Transformers, and Transformer Regulators. Today's notice extends the deadline for written comments to July 3, 2020 and for rebuttal comments to July 24, 2020.

**DATES:** The comment period for the proposed rule published May 19, 2020 at 85 FR 29926, is extended until July 3, 2020. The due date for rebuttal comments is July 24, 2020. Rebuttal comments may only address issues raised in comments filed on or before July 3, 2020.

**ADDRESSES:** *Submissions:* All written comments on the notice must be addressed to Section 232 Electrical Steel Investigation and filed through the Federal eRulemaking Portal: *http://www.regulations.gov.* To submit comments via *http://www.regulations.gov*, enter docket number BIS–2020–0015 on the home page and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled ''Comment Now!'' (For further information on using *http://www.regulations.gov,* please consult the resources provided on the website by clicking on ''How to Use This Site.'')

**FOR FURTHER INFORMATION CONTACT:** Industrial Studies Division, Bureau of Industry and Security, U.S. Department of Commerce (202) 482–4952, *ESproducts232@bis.doc.gov.* For more information about the section 232 program, including the regulations and the text of previous investigations, please see *www.bis.doc.gov/232.*

**SUPPLEMENTARY INFORMATION:**

#### Background

On May 19, 2020, the Bureau of Industry and Security (BIS) published the *Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Laminations for Stacked Cores for Incorporation into Transformers, Stacked Cores for Incorporation Into Transformers, Wound Cores for Incorporation Into Transformers, Electrical Transformers, and Transformer Regulators* (85 FR 29926). The May 19 notice specified that on May 11, 2020, based on inquiries and requests from interested parties in the United States, including multiple Members of Congress, a domestic Grain-Oriented Electrical Steel (GOES) manufacturer, and producers of Power and Distribution Transformers, the Secretary of Commerce had initiated an investigation to determine the effects on the national security of imports of Laminations for Stacked Cores for Incorporation into Transformers, Stacked Cores for Incorporation Into Transformers, Wound Cores for Incorporation Into Transformers, Electrical Transformers, and Transformer Regulators. This investigation was initiated under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). *See* the May 19 notice for additional details on the investigation and the request for public comments.

#### Extension of Comment Period Deadline

The May 19 notice included a comment period deadline of June 9, 2020 and a rebuttal comment deadline of June 19, 2020. The Department received two requests from the public to extend the comment period deadline, both from trade associations. The Department of Commerce has determined at this time that it is warranted to extend the comment period by twenty-four calendar days and the rebuttal comment period by an additional twenty-one days after the comment period ends. Today's notice specifies that comments may be submitted at any time but must be received by July 3, 2020, to be considered in the drafting of the final report. The due date for rebuttal comments is July 24, 2020, to be considered in the drafting of the final report. Rebuttal comments may only address issues raised in comments filed on or before July 3, 2020.

Today's notice extends the comment period by twenty-four days and the rebuttal comment period by an additional twenty-one days after the end of the comment period to allow for additional time for the public to submit comments to be considered in the drafting of the final report on the investigation of imports of Laminations for Stacked Cores for Incorporation into Transformers, Stacked Cores for Incorporation Into Transformers, Wound Cores for Incorporation Into

Transformers, Electrical Transformers, and Transformer Regulators.

**Richard E. Ashooh,**

*Assistant Secretary for Export Administration.*

[FR Doc. 2020–12759 Filed 6–9–20; 4:15 pm]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–570–118]**

### Wood Mouldings and Millwork Products From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of wood mouldings and millwork products (millwork products) from the People's Republic of China (China). The period of investigation is January 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Irene Gorelik or Faris Montgomery, 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 or (202) 482–1537, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on February 5, 2020.[1] On March 12, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now June 8, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov*. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

#### Scope of the Investigation

The products covered by this investigation are millwork products from China. For a complete description of the scope of this investigation, *see* Appendix I.

#### Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* Commerce intends to issue its preliminary decision regarding comments concerning the scope of the antidumping (AD) and countervailing (CVD) investigations of millwork products from Brazil and China with the preliminary determinations of the AD investigations.

#### Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[6]

Commerce notes that, in making these findings, it relied, in part, on facts available and, because it finds that one or more respondents did not act to the best of their ability to respond to Commerce's requests for information, it drew an adverse inference where appropriate in selecting from among the facts otherwise available.[7] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

#### Alignment

As noted in the Preliminary Decision Memorandum, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), Commerce is aligning the final CVD determination in this investigation with the final determination in the companion AD investigation of millwork products from China based on a request made by the petitioner.[8] Consequently, the final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than October 19, 2020, unless postponed.

#### All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act. In this investigation, as discussed in the Preliminary Decision Memorandum, Commerce preliminarily assigned a rate based entirely on facts available to Fujian Nanping Yuanqiao Wood-Industry Co., Ltd. Therefore, the only preliminary rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for Fujian Yinfeng Imp & Exp Trading Co., Ltd. (Yinfeng). Consequently, the preliminary rate calculated for Yinfeng is also assigned as the preliminary rate for all other producers and exporters.

#### Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

[1] *See Wood Mouldings and Millwork Products from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 85 FR 6513 (February 5, 2020) (*Initiation Notice*).

[2] *See Wood Mouldings and Millwork Products from the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation,* 85 FR 15433 (March 12, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination of the Countervailing Duty Investigation of Wood Mouldings and Millwork Products from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* sections 776(a) and (b) of the Act.

[8] *See* Petitioner's Letter, ''Request to Align Countervailing Duty Investigation Final Determination with Antidumping Duty Investigation Final Determination,'' dated May 4, 2020.

[9] As discussed in the Preliminary Decision Memorandum, Commerce determines that Yinfeng

| Company | Subsidy rate (percent) |
|---|---|
| Fujian Yinfeng Imp & Exp Trading Co., Ltd[9] | 13.61 |
| Fujian Nanping Yuanqiao Wood-Industry Co., Ltd | 245.34 |
| All Others | 13.61 |

## Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

## Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

## Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination.

## Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last verification report is issued in this investigation. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

## International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its determination. If the final determination is affirmative, the ITC will make its final determination before the later of 120 days after the date of this preliminary determination or 45 days after Commerce's final determination.

## Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: June 8, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

### Scope of the Investigation

The merchandise subject to this investigation consists of wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood that undergoes additional manufacturing or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn).

The percentage of composite materials contained in a wood moulding or millwork product is measured by length, except when the composite material is a coating or cladding. Wood mouldings and millwork products that are coated or clad, even along their entire length, with a composite material, but that are otherwise comprised of wood, LVL, or wood and composite materials (where the non-coating composite materials make up 50 percent or less of the total merchandise) are covered by the scope.

The merchandise subject to this investigation consists of wood, LVL, bamboo, or a combination of wood and composite materials that is continuously shaped throughout its length (with the exception of any endwork/dados), profiled wood having a repetitive design in relief, similar milled wood architectural accessories, such as rosettes and plinth blocks, and finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The scope includes continuously shaped wood in the forms of dowels, building components such as interior paneling and jamb parts, and door components such as rails and stiles.

The covered products may be solid wood, laminated, finger-jointed, edge-glued, face-glued, or otherwise joined in the production or remanufacturing process and are covered by the scope whether imported raw, coated (*e.g.,* gesso, polymer, or plastic), primed, painted, stained, wrapped (paper or vinyl overlay), any combination of the aforementioned surface coatings, treated, or which incorporate rot-resistant elements (whether wood or composite). The covered products are covered by the scope whether or not any surface coating(s) or covers obscures the grain, textures, or markings of the wood, whether or not they are ready for use or require final machining (*e.g.,* endwork/dado, hinge/strike machining, weatherstrip or application thereof, mitre) or packaging.

All wood mouldings and millwork products are included within the scope even if they are trimmed; cut-to-size; notched; punched; drilled; or have undergone other forms of minor processing.

Subject merchandise also includes wood mouldings and millwork products that have been further processed in a third country, including but not limited to trimming, cutting, notching, punching, drilling, coating, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

Excluded from the scope of this investigation are exterior fencing, exterior decking and exterior siding products (including solid wood siding, non-wood siding (*e.g.,* composite or cement), and shingles) that are not LVL or finger jointed; finished and unfinished doors; flooring; parts of stair steps (including newel posts, balusters, easing, gooseneck, risers, treads and rail fittings); and picture frame components three feet and under in individual lengths.

Excluded from the scope of this investigation are all products covered by the scope of the antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018).

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Fujian Province Youxi City Mangrove Wood Machining Co., Ltd. and Fujian Province Youxi City Mangrove Wood Machining Co., Ltd., Xicheng Branch are cross-owned affiliates of mandatory respondent Yinfeng.

[10] *See,* generally, 19 CFR 351.309 and 19 CFR 351.303 (for general filing requirements). *See also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020) and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 29615 (May 18, 2020).

Excluded from the scope of this investigation are all products covered by the scope of the antidumping and countervailing duty orders on *Multilayered Wood Flooring from the People's Republic of China. See Multilayered Wood Flooring from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 76 FR 76690 (December 8, 2011); *Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 FR 76693 (December 8, 2011).

Imports of wood mouldings and millwork products are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 4409.10.4010, 4409.10.4090, 4409.10.4500, 4409.10.5000, 4409.22.4000, 4409.22.5000, 4409.29.4100, and 4409.29.5100. Imports of wood mouldings and millwork products may also enter under HTSUS numbers: 4409.10.6000, 4409.10.6500, 4409.22.6000, 4409.22.6500, 4409.29.6100, 4409.29.6600, 4418.99.9095 and 4421.99.9780. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

## Appendix II

**List of Topics Discussed in the Preliminary Decision Memorandum**

I. Summary
II. Background
III. Alignment
IV. Injury Test
V. Diversification of China's Economy
VI. Use of Facts Otherwise Available and Adverse Inferences
VII. Subsidies Valuation
VIII. Benchmarks and Interest Rates
IX. Analysis of Programs
X. Recommendation

[FR Doc. 2020–12752 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–108]**

### Ceramic Tile From the People's Republic of China: Notice of Correction to the Final Affirmative Determination of Sales at Less Than Fair Value, and Final Partial Affirmative Critical Circumstances Determination

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) is issuing a correction to a previously published **Federal Register** notice pertaining to the final determination in the antidumping duty investigation on ceramic tile from the People's Republic of China (China).

**DATES:** Applicable April 7, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mark Flessner, AD/CVD Operations Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6312.

**SUPPLEMENTARY INFORMATION:** On April 7, 2020, Commerce published in the **Federal Register** the notice of *Ceramic Tile from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Partial Affirmative Critical Circumstances Determination.*[1] Due to a typographical error, the listing of the final estimated weighted-average dumping margins omitted one exporter-producer dumping margin and cash deposit rate:

| Exporter | Producer | Estimated weighted-average dumping margin (percent) | Cash deposit rate (adjusted for subsidy offsets) (percent) |
|---|---|---|---|
| Foshan Advance Import and Export Co., Ltd ... | Foshan Xinlianfa Ceramics Co., Ltd ..... | 229.04 | 203.71 |

Properly placed, this entry would have appeared at page 19427 of the *Final Determination.*

We are hereby correcting the *Final Determination* to include the omitted exporter-producer dumping margin and cash deposit rate listed above.

This notice serves as a correction and is published in accordance with section 777(i) of the Tariff Act of 1930, as amended.

Dated: June 8, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–12744 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–010, C–570–011]**

### Crystalline Silicon Photovoltaic Products From the People's Republic of China: Notice of Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on a request from Memory Experts Inc., dba PowerTraveller (Memory Experts), the Department of Commerce (Commerce) is initiating changed circumstances reviews to consider the possible revocation, in part, of the antidumping duty (AD) and countervailing duty (CVD) orders on crystalline silicon photovoltaic products from the People's Republic of China (China) with respect to certain off-grid portable small panels.

**DATES:** Applicable June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Thomas Hanna, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0835.

**SUPPLEMENTARY INFORMATION:**

## Background

On February 18, 2015, Commerce published AD and CVD orders on certain crystalline silicon photovoltaic products from China.[1] On March 16, 2020, Memory Experts, an importer of the subject merchandise, requested, through changed circumstances reviews, revocation of the *Solar Products Orders* with respect to certain off-grid portable small panels pursuant to section 751(b)(1) of the Tariff Act of 1930, as

[1] *See Ceramic Tile from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Partial Affirmative Critical Circumstances Determination,* 85 FR 19425 (April 7, 2020) (*Final Determination*).

[1] *See Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 8592 (February 18, 2015) (*Solar Products Orders*).

amended (the Act) and 19 CFR 351.216(b).[2] On April 13, 2020, Hanwha Q CELL USA, Inc. (Q CELL USA) and SunPower Manufacturing Oregon, LLC (SPMOR), U.S. producers of the domestic like product, submitted letters stating that they did not oppose the partial revocation proposed by Memory Experts.[3] On April 21, 2020, we issued a letter to Memory Experts noting that its changed circumstances reviews request lacked certain information required for Commerce to consider the request.[4] On May 1, 2020, Memory Experts amended its request for changed circumstances reviews by providing the required information.[5]

**Scope of the Solar Products Orders**

The merchandise covered by these orders is modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these orders, subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells produced in a customs territory other than China.

Subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Excluded from the scope of these orders are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of these orders are modules, laminates and/or panels assembled in China, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000 $mm^2$ in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cells. Where more than one module, laminate and/or panel is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all modules, laminates and/or panels that are integrated into the consumer good.

Further, also excluded from the scope of these orders are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from China.[6]

Additionally, excluded from the scope of these orders are solar panels that are: (1) Less than 300,000 mm2 in surface area; (2) less than 27.1 watts in power; (3) coated across their entire surface with a polyurethane doming resin; and (4) joined to a battery charging and maintaining unit (which is an acrylonitrile butadiene styrene (ABS) box that incorporates a light emitting diode (LED)) by coated wires that include a connector to permit the incorporation of an extension cable. The battery charging and maintaining unit utilizes high-frequency triangular pulse waveforms designed to maintain and extend the life of batteries through the reduction of lead sulfate crystals. The above-described battery charging and maintaining unit is currently available under the registered trademark ''SolarPulse.''

Merchandise covered by these orders is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.8030, 8507.20.8040, 8507.20.8060, 8507.20.8090, 8541.40.6015, 8541.40.6020, 8541.40.6030, 8541.40.6035 and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of these orders is dispositive.[7]

**Proposed Revocation of the Solar Products Orders**

Memory Experts proposes that the *Solar Products Orders* be revoked, in part, with respect to certain off-grid portable small panels. Specifically, Memory Experts proposes revoking the *Solar Products Orders* with respect to the solar panels described below:

(1) Off-grid crystalline silicon photovoltaic panels without a glass cover with the following characteristics:

(a) Total power output of 500 watts or less per panel;

(b) Maximum surface area of 8,000 $cm^2$ per panel;

(c) Unit does not include a built-in inverter;

(d) Unit has visible parallel grid collector metallic wire lines every 2–40 millimeters across each solar panel (depending on model);

(e) Solar cells are encased in laminated frosted PET material without stitching; [8]

(f) The panel is encased in polyester fabric with visible stitching which includes a Velcro-type storage pocket and unit closure, or encased within a Neoprene clamshell (depending on model);

(g) Includes LED indicator.

**Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Solar Products Orders in Part**

Pursuant to section 751(b) of the Act, Commerce will conduct a changed circumstances review upon receipt of a request from an interested party [9] that shows changed circumstances sufficient to warrant a review of an order. In accordance with 19 CFR 351.216(d), Commerce determines that the information submitted by Memory Experts, and the domestic producers' affirmative statements of no interest in the *Solar Products Orders* with respect to the products described by Memory Experts, constitute a sufficient basis to conduct changed circumstances reviews of the *Solar Products Orders.*

Section 782(h)(2) of the Act and 19 CFR 351.222(g)(1)(i) provide that Commerce may revoke an order (in whole or in part) if it determines that producers accounting for substantially all of the production of the domestic

[2] *See* Memory Experts' Letter, ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules From the People's Republic of China; Memory Experts Inc., dba PowerTraveller's Request for a Changed Circumstances Review,'' dated March 16, 2020.

[3] *See* Q CELL USA Inc.'s Letter, ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules From the People's Republic of China; Hanwha Q CELL USA, Inc.'s Comments on Memory Experts Inc.'s Request for a Changed Circumstances Review,'' dated April 13, 2020; *see also* SunPower Manufacturing Oregon, LLC's Letter, ''Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China; SPMOR Comments on Memory Experts Inc.'s Request for a Changed Circumstances Review,'' dated April 13, 2020.

[4] *See* Commerce's Letter, ''Crystalline Silicon Photovoltaic Products From the People's Republic of China: Supplemental Questionnaire,'' dated April 21, 2020.

[5] *See* Memory Experts' Letter, ''Supplemental Questionnaire Response of Memory Experts Inc., dba PowerTraveller,'' dated May 1, 2020.

[6] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order,* 77 FR 73017 (December 7, 2012).

[7] *See Solar Products Orders.*

[8] Although the polyester material has stitching on the perimeter of the unit, the cells are not stitched into the PET material.

[9] Memory Experts reported in its March 16, 2020, request for changed circumstances reviews that it is an importer of solar panels. As such, Memory Experts is an interested party pursuant to 19 CFR 351.102(b)(29).

like product have expressed a lack of interest in the order, in whole or in part. In addition, in the event Commerce determines that expedited action is warranted, 19 CFR 351.221(c)(3)(ii) permits Commerce to combine the notices of initiation and preliminary results. In its administrative practice, Commerce has interpreted ''substantially all'' to mean producers accounting for at least 85 percent of the total U.S. production of the domestic like product covered by the order.[10]

The domestic producers state that they do not oppose the partial revocation request; however, because neither domestic party indicated whether it accounts for substantially all of the domestic production of crystalline silicon photovoltaic products, we are not combining this notice of initiation with a preliminary determination, pursuant to 19 CFR 351.221(c)(3)(ii), but will provide interested parties with an opportunity to address the issue of domestic industry support with respect to this requested partial revocation of the *Solar Products Orders,* as explained below. After examining comments, if any, concerning domestic industry support, we will issue the preliminary results of these changed circumstances reviews.

**Public Comment**

Interested parties are invited to provide comments and/or factual information regarding these changed circumstances reviews, including comments on industry support and the proposed partial revocation language. Comments and factual information may be submitted to Commerce no later than ten days after the date of publication of this notice. Rebuttal comments and rebuttal factual information may be filed with Commerce no later than seven days after the comments and/or factual information are filed.[11] Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until July 17, 2020, unless extended.[12] All submissions must be filed electronically using Enforcement and Compliance's AD and CVD Centralized Electronic Service System (ACCESS).[13] An electronically filed document must be received successfully in its entirety by ACCESS, by 5 p.m. Eastern Time on the due dates set forth in this notice.

**Preliminary and Final Results of the Review**

Commerce intends to publish in the **Federal Register** a notice of the preliminary results of these AD and CVD changed circumstances reviews in accordance with 19 CFR 351.221(b)(4) and (c)(3)(i), which will set forth Commerce's preliminary factual and legal conclusions. Commerce will issue its final results of these changed circumstances reviews in accordance with the time limits set forth in 19 CFR 351.216(e).

This initiation notice is published in accordance with section 751(b)(1) of the Act and 19 CFR 351.221(b)(1).

Dated: June 5, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–12745 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

[10] *See, e.g., Certain Cased Pencils From the People's Republic of China: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review, and Intent To Revoke Order in Part,* 77 FR 42276 (July 18, 2012), unchanged in *Certain Cased Pencils From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review, and Determination To Revoke Order, in Part,* 77 FR 53176 (August 31, 2012).

[11] Submissions of rebuttal factual information must comply with 19 CFR 351.301(b)(2).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 29615 (May 18, 2020).

[13] *See generally* 19 CFR 351.303.

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Advisory Committee on Supply Chain Competitiveness: Notice of Public Meetings

**AGENCY:** International Trade Administration, U.S. Department of Commerce.

**ACTION:** Notice of open meetings.

**SUMMARY:** This notice sets forth the schedule and proposed topics of discussion for upcoming public meetings of the Advisory Committee on Supply Chain Competitiveness (Committee).

**DATES:** The meetings will be held on June 25, 2020, from 10:00 a.m. to 12:00 p.m. and 1:00 p.m. to 3:00 p.m., Eastern Daylight Time (EDT).

**ADDRESSES:** The meetings will be held via Webex.

**FOR FURTHER INFORMATION CONTACT:** Richard Boll, Office of Supply Chain, Professional & Business Services (OSCPBS), International Trade Administration. Email: *richard.boll@trade.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The Committee was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.). It provides advice to the Secretary of Commerce on the necessary elements of a comprehensive policy approach to supply chain competitiveness and on regulatory policies and programs and investment priorities that affect the competitiveness of U.S. supply chains. For more information about the Committee visit: *https://www.trade.gov/acscc.*

*Matters To Be Considered:* Committee members are expected to continue to discuss the major competitiveness-related topics raised at the previous Committee meetings, including trade and competitiveness; freight movement and policy; trade innovation; regulatory issues; finance and infrastructure; and workforce development. The Committee's subcommittees will report on the status of their work regarding these topics. The agenda may change to accommodate other Committee business. The Office of Supply Chain, Professional & Business Services will post the final detailed agenda on its website, *https://www.trade.gov/acscc,* at least one week prior to the meeting.

The meetings will be open to the public and press on a first-come, first-served basis. Space is limited. Please contact Richard Boll, at *richard.boll@trade.gov,* for participation information if you wish to participate.

Interested parties may submit written comments to the Committee at any time before and after the meeting. Parties wishing to submit written comments for consideration by the Committee in advance of this meeting email them to *richard.boll@trade.gov.*

For consideration during the meetings, and to ensure transmission to the Committee prior to the meetings, comments must be received no later than 5:00 p.m. EST on June 18, 2020. Comments received after June 18, 2020, will be distributed to the Committee, but may not be considered at the meetings. The minutes of the meetings will be posted on the Committee website within 60 days of the meeting.

**Eugene Alford,**

*Acting Director, Office of Supply Chain, Professional and Business Services.*

[FR Doc. 2020–12687 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–108]**

### Ceramic Tile From the People's Republic of China: Notice of Correction to the Antidumping Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) is issuing a correction to a previously published **Federal Register** notice pertaining to the antidumping duty order on ceramic tile from the People's Republic of China (China).

**DATES:** Applicable June 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mark Flessner, AD/CVD Operations Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6312.

**SUPPLEMENTARY INFORMATION:** On June 1, 2020, Commerce published in the **Federal Register** the notice of *Ceramic Tile from the People's Republic of China: Antidumping Duty Order.*[1] Due to a typographical error, the listing of the final estimated weighted-average dumping margins omitted one exporter-producer dumping margin and cash deposit rate:

| Exporter | Producer | Estimated weighted-average dumping margin (percent) | Cash deposit rate (adjusted for subsidy offsets) (percent) |
|---|---|---|---|
| Foshan Advance Import and Export Co., Ltd ... | Foshan Xinlianfa Ceramics Co., Ltd ..... | 229.04 | 203.71 |

Properly placed, this entry would have appeared at page 33093 of the *Order.*

We are hereby correcting the *Order* to include the omitted exporter-producer dumping margin and cash deposit rate listed above.

This notice serves as a correction and is published in accordance with section 777(i) of the Tariff Act of 1930, as amended.

Dated: June 8, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–12743 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–905]**

### Certain Polyester Staple Fiber From the People's Republic of China: Rescission of 2017–2018 Antidumping Duty Administrative Review

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on certain polyester staple fiber (PSF) from the People's Republic of China (China) for the period of review (POR) June 1, 2017 through May 31, 2018.

**DATES:** Applicable June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Annathea Cook, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–0413.

**SUPPLEMENTARY INFORMATION:**

#### Background

On June 1, 2018, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on PSF from China for the period of June 1, 2017 through May 31, 2018.[1] On June 29, 2018, Commerce received a timely request for review from Yangzhou Tinfulong New Technology Fiber Co., Ltd. (Tinfulong).[2] On August 10, 2018, based on Tinfulong's request, Commerce published in the **Federal Register** a notice of initiation of an administrative review.[3] On September 10, 2018, Tinfulong submitted a timely withdrawal of its request for an administrative 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 that requested the review withdraws its request within 90 days of the publication of the notice of initiation of the requested review. Tinfulong withdrew its request for review within 90 days of the date of publication of the *Initiation Notice.* As such, Commerce received a timely request for withdrawal of the instant administrative review with respect to the single company listed in the *Initiation Notice.* Accordingly, we are rescinding the administrative review of PSF from China for the period of June 1, 2017 through May 31, 2018, in its entirety.

#### Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of PSF from China at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after the publication of this notice in the **Federal Register**.

#### Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

[1] *Ceramic Tile from the People's Republic of China: Antidumping Duty Order,* 85 FR 33089 (June 1, 2020) (*Order*).

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 83 FR 25429 (June 1, 2018).

[2] *See* Tinfulong's Letter, ''Polyester Staple Fiber from the People's Republic of China: Request for Administrative Review,'' dated June 29, 2018.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 39688 (August 10, 2018) (*Initiation Notice*).

[4] *See* Tinfulong's Letter, ''Polyester Staple Fiber from the People's Republic of China: Withdrawal of Review Request,'' dated September 10, 2018.

**Notification Regarding Administrative Protective Order**

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and 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)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: June 9, 2020.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2020–12751 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA171]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Mukilteo Multimodal Construction Project in Washington State

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

**SUMMARY:** NMFS has received a request from the Washington State Department of Transportation (WSDOT) for authorization to take marine mammals incidental to Mukilteo Multimodal Construction Project in Washington State. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than July 13, 2020.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.guan@noaa.gov.*

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

**Background**

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

**National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

**Summary of Request**

On February 18, 2020, NMFS received a request from WSDOT for an IHA to take marine mammals incidental to Mukilteo Multimodal Project in Mukilteo, Washington. The application was deemed adequate and complete on April 13, 2020. WSDOT's request is for take of a small number of 11 species of marine mammals by Level B harassment

and Level A harassment. Neither WSDOT nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

This proposed IHA would cover one year of a larger project for which WSDOT obtained prior IHAs (82 FR 44164; September 21, 2017; 83 FR 43849; August 28, 2018; 84 FR 39263; August 9, 2019). The larger four-year project involves relocating the Mukilteo Ferry Terminal approximately one-third of a mile east of the existing terminal. This is expected to be the fourth and final year of project activity. WSDOT complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section.

**Description of Proposed Activity**

*Overview*

The purpose of the Mukilteo Multimodal Project is to provide safe, reliable, and effective service and connection for general-purpose transportation, transit, high occupancy vehicles (HOV), pedestrians, and bicyclists traveling between Island County and the Seattle/Everett metropolitan area and beyond by constructing a new ferry terminal. The current Mukilteo Ferry Terminal has not had significant improvements for almost 30 years and needs key repairs. The existing facility is deficient in a number of aspects, such as safety, multimodal connectivity, capacity, and the ability to support the goals of local and regional long-range transportation and comprehensive plans. The project is intended to:

- Reduce conflicts, congestion, and safety concerns for pedestrians, bicyclists, and motorists by improving local traffic and safety at the terminal and the surrounding area that serves these transportation needs.
- Provide a terminal and supporting facilities with the infrastructure and operating characteristics needed to improve the safety, security, quality, reliability, efficiency, and effectiveness of multimodal transportation.
- Accommodate future demand projected for transit, HOV, pedestrian, bicycle, and general-purpose traffic.

The proposed Mukilteo Multimodal Project would involve in-water vibratory pile driving and vibratory pile removal. Details of the proposed construction project are provided below.

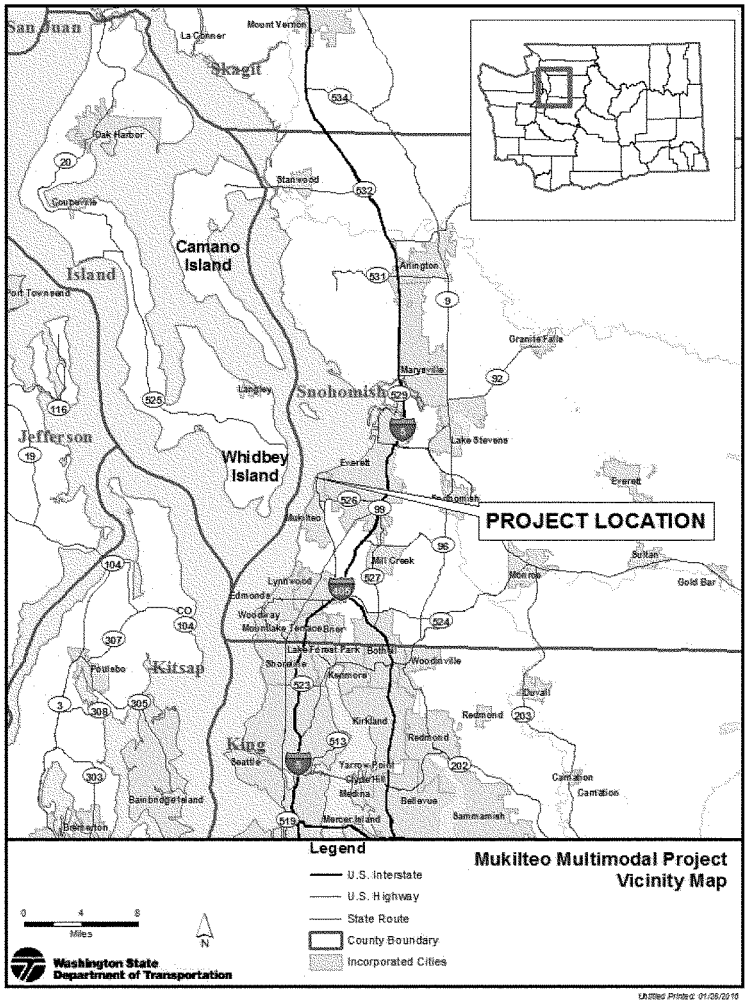
*Dates and Duration*

Due to NMFS and the U.S. Fish and Wildlife Service (USFWS) in-water work timing restrictions to protect Endangered Species Act (ESA)-listed salmonids, planned WSDOT in-water construction is limited each year to July 15 through February 15. For this project, in-water construction is planned to take place between August 1, 2020 and February 15, 2021. The total worst-case time for pile installation and removal is 54 days (Table 1).

*Specific Geographic Region*

The Mukilteo Ferry Terminal is located in the City of Mukilteo, Snohomish County, Washington. The terminal is located in Township 28 North, Range 4 East, Section 3, in Possession Sound. The new terminal will be approximately 1,700 ft (518 m) east of the existing terminal in Township 28N, Range 4E, Section 33 (Figure 1). Land use in the Mukilteo area is a mix of residential, commercial, industrial, and open space and/or undeveloped lands.

**Figure 1 -- Location of Mukilteo Ferry Terminal**




*Detailed Description of Specific Activity*

The proposed project has two activities involving noise production that may impact marine mammals: Vibratory pile removal and vibratory pile driving.

(1) Temporary Pile Removal

Sixty-nine temporary 24 inch steel piles installed to support work platforms will be removed with a vibratory hammer.

(2) Floating Dolphin Piling

The floating dolphin will be moved from the current terminal to the new terminal. A combination of anchors (four) and piles (four) will be used to secure the dolphin anchor chains to the sea floor. Four 30 inch steel piles will be installed with a vibratory hammer.

(3) Existing Terminal Removal

The existing terminal will be removed once the new terminal is complete. The existing terminal comprises 8,120 $ft^2$ (754 $m^2$) of overwater cover and contains approximately 290 12-inch diameter timber piles. All timber piles may be removed with a vibratory hammer, a clamshell, or pulled directly. Use of the vibratory hammer for timber pile removal is not the preferred method and it is likely that most piles will be removed via direct pull. However, for purposes of analysis we assume that all timber piles will be removed using the vibratory hammer.

Details of pile driving activities are provided below and are summarized in Table 1.

- Vibratory removal of 12-inch timber piles would take 15 minutes per pile, 10 piles per day, with 290 piles removed over 29 days.
- Vibratory removal of 24-inch steel pipe piles would take 15 minutes per pile, 3 piles removed per day, with 69 piles removed in 23 days.
- Vibratory driving of 30-inch steel pipe piles would take 30 minutes per pile, 2 piles per day, with 4 piles installed in 2 days.

Pile driving or removal will occur in different days. There is no concurrent pile driving or pile removing.

TABLE 1—SUMMARY OF IN-WATER PILE DRIVING DURATIONS

| Method | Pile size (inch) | Number piles | Minutes per pile | Piles per day | Days |
|---|---|---|---|---|---|
| Vibratory Removal | 12 (timber) | 290 | 15 | 10 | 29 |
| Vibratory Removal | 24 (steel) | 69 | 15 | 3 | 23 |
| Vibratory Drive | 30 (steel) | 4 | 30 | 2 | 2 |
| Total | | | | | 54 |

**Description of Marine Mammals in the Area of Specified Activities**

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this action, 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.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for all species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. All managed stocks in this region are assessed in NMFS's U.S Pacific and Alaska SARs (*e.g.,* Carretta *et al.,* 2020; Muto *et al.,* 2020). All values presented in Table 2 are the most recent available at the time of publication and are available in the 2018 SARs (Carretta *et al.,* 2019; Muto *et al.,* 2019) and draft 2019 SARs (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 2—MARINE MAMMALS WITH POTENTIAL PRESENCE WITHIN THE PROPOSED PROJECT AREA

| Common name | Scientific name | Stock | ESA/MMPA status; strategic (Y/N) [1] | Stock abundance (CV, $N_{min}$, most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| **Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)** | | | | | | |
| Family Eschrichtiidae: | | | | | | |
| Gray whale | *Eschrichtius robustus* | Eastern North Pacific | N | 26,960 (0.05, 25,849) | 801 | 139 |
| Family Balaenopteridae (rorquals): | | | | | | |
| Humpback whale | *Megaptera novaeangliae* | California/Oregon/Washington | Y | 2,900 (0.05, 2,784) | 16.7 | unk |
| Minke whale | *Balaenoptera acutorostrata* | California/Oregon/Washington | N | 636 (0.72, 369) | 3.5 | 1.3 |
| **Superfamily Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| Family Delphinidae: | | | | | | |
| Killer whale | *Orcinus orca* | Eastern North Pacific Southern Resident. | Y | 75 (NA, 75) | 0 | 0 |
| | | West coast transient | N | 243 (NA, 243) | 2.4 | 0 |
| Bottlenose dolphin | *Tursiops truncatus* | California/Oregon/Washington offshore. | N | 1,924 (0.54, 1,255) | 11 | 1.6 |
| Family Phocoenidae (porpoises): | | | | | | |
| Harbor porpoise | *Phocoena phocoena* | Washington inland waters | N | 11,233 (0.37, 8,308) | 66 | 7.2 |
| Dall's porpoise | *P. dalli* | California/Oregon/Washington | N | 25,750 (0.45, 17,954) | 172 | 0.3 |
| **Order Carnivora—Superfamily Pinnipedia** | | | | | | |
| Family Otariidae (eared seals and sea lions): | | | | | | |
| California sea lion | *Zalophus californianus* | U.S | N | 257,606 (NA, 233,515) | 14,011 | 321 |
| Steller sea lion | *Eumetopias jubatus* | Eastern U.S | N | 43,201 (NA, 43,201) | 2,592 | 113 |
| Family Phocidae (earless seals): | | | | | | |
| Harbor seal | *Phoca vitulina* | Washington northern inland waters. | N | 11,036 [4] | NA | 10.6 |

TABLE 2—MARINE MAMMALS WITH POTENTIAL PRESENCE WITHIN THE PROPOSED PROJECT AREA—Continued

| 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] |
|---|---|---|---|---|---|---|
| Northern elephant seal ... | *Mirounga angustirostris* ..... | California breeding ..... | N | 179,000 (NA, 81,368) ..... | 4,882 | 8.8 |

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; $N_{min}$ is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike).

[4] Harbor seal estimate is based on data that are greater than 8 years old, but this is the best available information for use here.

As indicated above, all 11 species (with 12 managed stocks) in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it, with the exception of the Southern Resident killer whale. Take of Southern Resident killer whale can be avoided by implementing strict monitoring and mitigation measures (see Proposed Mitigation and Proposed Monitoring and Reporting sections below).

In addition, the sea otter may be found in inland waters of Washington. However, this species is managed by the U.S. Fish and Wildlife Service and is not considered further in this document.

A detailed description of the marine mammals in the area of the activities is found in the notice of proposed IHA for WSDOT's Season 3 Mukilteo Multimodal construction project (83 FR 30421, June 28, 2018). This information remains valid, as there is no new information available, so we do not repeat it here but provide a summary table with marine mammal species and stock details (Table 2).

**Marine Mammal Hearing**

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS (NMFS, 2018)

| Hearing group | Generalized hearing range * |
|---|---|
| Low-frequency (LF) cetaceans (baleen whales) | 7 Hz to 35 kHz. |
| Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) | 150 Hz to 160 kHz. |
| High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*). | 275 Hz to 160 kHz. |
| Phocid pinnipeds (PW) (underwater) (true seals) | 50 Hz to 86 kHz. |
| Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) | 60 Hz to 39 kHz. |

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Eleven marine mammal species (seven cetacean and four pinniped (two otariid and two phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 2. Of the cetacean species that may be present, three are classified as low-frequency cetaceans (*i.e.,* all mysticete species), two are classified as mid-frequency cetaceans (*i.e.,* all delphinid species), and two are classified as high-frequency cetaceans (*i.e.,* porpoise species).

**Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated

Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

The WSDOT's Mukilteo Multimodal construction work using in-water pile driving and pile removal could adversely affect marine mammal species and stocks by exposing them to elevated noise levels in the vicinity of the activity area.

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran *et al.,* 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is the initial threshold shift. If the threshold shift eventually returns to zero (*i.e.,* the threshold returns to the pre-exposure value), it is a temporary threshold shift (Southall *et al.,* 2007).

**Threshold Shift (Noise-Induced Loss of Hearing)**

When animals exhibit reduced hearing sensitivity (*i.e.,* sounds must be louder for an animal to detect them) following exposure to an intense sound or sound for long duration, it is referred to as a noise-induced threshold shift (TS). An animal can experience temporary threshold shift (TTS) or permanent threshold shift (PTS). TTS can last from minutes or hours to days (*i.e.,* there is complete recovery), can occur in specific frequency ranges (*i.e.,* an animal might only have a temporary loss of hearing sensitivity between the frequencies of 1 and 10 kilohertz (kHz)), and can be of varying amounts (for example, an animal's hearing sensitivity might be reduced initially by only 6 dB or reduced by 30 dB). PTS is permanent, but some recovery is possible. PTS can also occur in a specific frequency range and amount as mentioned above for TTS.

For marine mammals, published data are limited to the captive bottlenose dolphin, beluga, harbor porpoise, and Yangtze finless porpoise (Finneran *et al.,* 2000, 2002, 2003, 2005, 2007, 2010a, 2010b; Finneran and Schlundt, 2010; Lucke *et al.,* 2009; Mooney *et al.,* 2009a, 2009b; Popov *et al.,* 2011a, 2011b; Kastelein *et al.,* 2012a; Schlundt *et al.,* 2000; Nachtigall *et al.,* 2003, 2004). For pinnipeds in water, data are limited to measurements of TTS in harbor seals, an elephant seal, and California sea lions (Kastak *et al.,* 1999, 2005; Kastelein *et al.,* 2012b).

Lucke *et al.* (2009) found a TS of a harbor porpoise after exposing it to airgun noise with a received sound pressure level (SPL) at 200.2 dB (peak-to-peak) re: 1 micropascal (μPa), which corresponds to a sound exposure level of 164.5 dB re: 1 $\mu Pa^2$ s after integrating exposure. Because the airgun noise is a broadband impulse, one cannot directly determine the equivalent of root-mean-square (rms) SPL from the reported peak-to-peak SPLs. However, applying a conservative conversion factor of 16 dB for broadband signals from seismic surveys (McCauley, *et al.,* 2000) to correct for the difference between peak-to-peak levels reported in Lucke *et al.* (2009) and rms SPLs, the rms SPL for TTS would be approximately 184 dB re: 1 μPa, and the received levels associated with PTS (Level A harassment) would be higher. Therefore, based on these studies, NMFS recognizes that TTS of harbor porpoises is lower than other cetacean species empirically tested (Finneran and Schlundt, 2010; Finneran *et al.,* 2002; Kastelein and Jennings, 2012).

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. Also, depending on the degree and frequency range, the effects of PTS on an animal could range in severity, although it is considered generally more serious because it is a permanent condition. Of note, reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so one can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

In addition, exposure to noise could cause masking at particular frequencies for marine mammals, which utilize sound for vital biological functions (Clark *et al.,* 2009). Acoustic masking is when other noises such as from human sources interfere with animal detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction.

Masking occurs at the frequency band that the animals utilize. Therefore, since noise generated from vibratory pile driving is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds by *odontocetes* (toothed whales). However, lower frequency man-made noises are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey noise. It may also affect communication signals when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009).

Unlike TS, masking, which can occur over large temporal and spatial scales, can potentially affect the species at population, community, or even ecosystem levels, as well as individual levels. Masking affects both senders and receivers of the signals and could have long-term chronic effects on marine mammal species and populations. Recent science suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of sound pressure level) in the world's ocean from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand 2009). For WSDOT's Mukilteo Multimodal construction activities, noises from vibratory pile driving and pile removal contribute to the elevated ambient noise levels in the project area, thus increasing potential for or severity of masking. Baseline ambient noise levels in the vicinity of project area are high due to ongoing shipping, construction and other activities in the Puget Sound.

Finally, marine mammals' exposure to certain sounds could lead to behavioral disturbance (Richardson *et al.,* 1995), such as: Changing durations of surfacing

and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haulouts or rookeries).

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.,* 2007). Currently NMFS uses a received level of 160 dB re 1 µPa (rms) to predict the onset of behavioral harassment from intermittent noises (such as impact pile driving), and 120 dB re 1 µPa (rms) for continuous noises (such as vibratory pile driving). For the WSDOT's Mukilteo Multimodal construction activities, only continuous noise is considered for effects analysis because WSDOT plans to use vibratory pile driving and pile removal.

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be biologically significant if the change affects growth, survival, and/or reproduction, which depends on the severity, duration, and context of the effects.

During the previous years of the project, WSDOT conducted the required marine mammal mitigation and monitoring and did not exceed the authorized levels of take. The marine mammal monitoring report for the 2019 Mukilteo Ferry Terminal construction activity shows that a total of 168 harbor seals, 105 California sea lions, 7 Steller sea lions, 12 harbor porpoises, and 1 northern elephant seal were observed within the Level A or Level B harassment zones. These numbers are well under the authorized take numbers issued in the 2019 IHA to WSDOT. In addition, no abnormal or drastic change of behavior of marine mammals was observed by the protected species observers (PSOs) during WSDOT's 2019 Mukilteo Ferry Terminal construction activity.

*Potential Effects on Marine Mammal Habitat*

The primary potential impacts to marine mammal habitat are associated with elevated sound levels produced by vibratory pile removal and pile driving in the area. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

With regard to fish as a prey source for cetaceans and pinnipeds, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.* 1981) and possibly avoid predators (Wilson and Dill 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.,* 1993). In general, fish react more strongly to pulses of sound (such as noise from impact pile driving) rather than continuous signals (such as noise from vibratory pile driving) (Blaxter *et al.,* 1981), and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

During the coastal construction only a small fraction of the available habitat would be ensonified at any given time. Disturbance to fish species would be short-term and fish would return to their pre-disturbance behavior once the pile driving activity ceases. Thus, the proposed construction would have little, if any, impact on marine mammals' prey availability in the area where construction work is planned.

Finally, the time of the proposed construction activity would avoid the spawning season of the ESA-listed salmonid species.

**Estimated Take**

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to vibratory pile driving and pile removal. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutting down pile driving or removal activities when a marine mammal is observed to approach the injury zone)—discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be 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 proposed 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. 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.

WSDOT's Mukilteo Ferry Terminal Year 4 construction project includes the use vibratory pile driving and pile removal, and therefore the 120 dB re 1 µPa (rms) is applicable.

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). WSDOT's Mukilteo Ferry Terminal Year 4 construction project includes the use non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the table 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 | *Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB | *Cell 2:* $L_{E,LF,24h}$: 199 dB. |
| Mid-Frequency (MF) Cetaceans | *Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB | *Cell 4:* $L_{E,MF,24h}$: 198 dB. |
| High-Frequency (HF) Cetaceans | *Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB | *Cell 6:* $L_{E,HF,24h}$: 173 dB. |
| Phocid Pinnipeds (PW) (Underwater) | *Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB | *Cell 8:* $L_{E,PW,24h}$: 201 dB. |
| Otariid Pinnipeds (OW) (Underwater) | *Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB | *Cell 10:* $L_{E,OW,24h}$: 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 activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

*Source Levels*

The project includes vibratory pile removal of 12-inch timber piles and 24-inch steel piles, and vibratory pile driving of 30-inch steel piles. Near source levels (defined as noise level at 10-m from the pile) of these pile driving and removal activities are all based on prior measurements conducted by WSDOT. A summary of the 10-m near source levels of the pile driving and removal activities is provided in Table 5, along with references.

TABLE 5—NEAR SOURCE NOISE LEVELS AT 10-M FROM THE PILE FOR VARIOUS PILE DRIVING AND REMOVAL AT MUKILTEO FERRY TERMINAL YEAR 4 PROJECT

| Activity/pile size | Source level (dB RMS SPL at 10m) | Literature source |
|---|---|---|
| Vibratory removal of 12-inch timber pile | 153 | WSDOT Port Townsend measurement (2011). |
| Vibratory removal of 24-inch steel pile | 166 | WSDOT Manette Bridge measurement (2010). |
| Vibratory driving of 30-inch steel pile | 170 | WSDOT Manette Bridge measurement (2010). |

Level A Harassment Distances and Areas

Distances to Level A harassment thresholds were estimated using the NMFS User Spreadsheet. 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 vibratory pile driving and pile removal, NMFS User Spreadsheet predicts the distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would incur PTS.

A summary of the calculated Level A harassment distances and areas is presented in Table 6.

Level B Harassment Distances and Areas

Level B harassment distances from all pile driving and pile removal activities were based on in situ measurements conducted by WSDOT on the same or similar piles at Mukilteo Ferry Terminal in the early phases of this project. Specifically, the following measurement data were used.

WSDOT has conducted in situ measurements of the Level B harassment zones from vibratory removal of 12-inch diameter timber piles, and vibratory driving of 30-inch diameter steel piles at the Mukilteo Ferry Terminal. For removal of 12-inch timber piles, the measurement results show that underwater noise cannot be detected at a distance of 1.13 km/0.7 miles (Laughlin 2015). For driving of 30-inch steel piles, the sound source verification (SSV) results show that underwater noise cannot be detected at a distance of 7.9 km/4.9 miles) (Laughlin 2017).

No far distance measurement for 24-inch piles has been conducted at the Mukilteo project site to establish the Level B harassment zone. For 24-inch piles, the practical spreading model results in a Level B harassment distance of 10 km/6.2 miles for the source level of 166 $dB_{rms}$ (root-mean-square decibel level). However, given that this source level is less than the 174 $dB_{rms}$ source level for the 30-inch piles, it is assumed that the size of Level B harassment zone for 24-inch pile removal will be the same as for the driving of 30-inch piles (7.9 km/4.9 miles).

The Level B harassment areas were estimated by WSDOT using geographic information system (GIS) tools to eliminate land masses and other obstacles that block sound propagation.

A summary of the measured Level B harassment distances (and assumed Level B harassment distance for 30-in steel piles) and associated areas, and modeled Level A harassment distances, is presented in Table 6.

TABLE 6—LEVEL A AND LEVEL B HARASSMENT DISTANCES AND AREAS

| Source | Level A harassment distance (m)/area ($km^2$) | | | | | Level B harassment distance (m)/ area ($km^2$) |
|---|---|---|---|---|---|---|
| | LF cetaceans | MF cetaceans | HF cetaceans | Phocids | Otariids | |
| Vibratory removal 12 inch timber pile | 3.7/0.0 | 0.3/0.0 | 5.4/0.0 | 2.2/0.0 | 0.2/0.0 | 1,130/1.2 |
| Vibratory removal 24 inch steel pile | 12.1/0.0 | 1.1/0.0 | 18.0/0.0 | 7.4/0.0 | 0.5/0.0 | 7,900/66 |
| Vibratory drive 30 inch steel pile | 27.2/0.0 | 2.4/0.0 | 40.2/0.0 | 16.5/0.0 | 1.2/0.0 | 7,900/66 |

*Marine Mammal Occurrence*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

Marine mammal occurrence are based on the U.S. Navy Marine Species Density Database (U.S. Navy, 2019) and on WSDOT marine mammal monitoring efforts during prior years of construction work at Mukilteo Ferry Terminal. A summary of the marine mammal density is provided in Table 7.

TABLE 7—MARINE MAMMAL DENSITY IN THE WSDOT MUKILTEO MULTIMODAL PROJECT AREA

| Marine mammals | Density (animals/$km^2$) |
|---|---|
| Gray whale | 0.0051 |
| Humpback whale | 0.00014 |
| Minke whale | 0.002 |
| Killer whale (West Coast transient) | 0.002373 |
| Bottlenose dolphin | NA |
| Harbor porpoise | 0.792 |
| Dall's porpoise | 0.047976 |
| Harbor seal | 2.21 |
| Northern elephant seal | 0.00001 |
| California sea lion | 0.1266 |
| Steller sea lion | 0.0368 |

*Take Calculation and Estimation*

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

For most species, take numbers were calculated using the information aggregated in the Navy density database (U.S. Navy, 2019). Where a low to high range of densities is given for a species, the more conservative high density was used. In these cases, take numbers were calculated as:

Total Take = marine mammal density × ensonified area × pile driving days

For species with no density data (*e.g.,* bottlenose dolphin) or species with very low density but observations were made at the project location which may indicate more animals could be present (*e.g.,* humpback whale, West Coast transient killer whale, and northern elephant seal), adjustments were made to estimate the take numbers. Specific adjustments for calculating take numbers for these species are provided below.

- Northern elephant seal—During the Mukilteo project, individuals have been observed on 2 occasions. Observations have been of single individuals, not groups. It is assumed that one individual may be present in the Level

B harassment zone once a month during the in-water work window (7 months), or 7 incidents of take.

• Humpback whale—During the Mukilteo project, individuals have been observed on 2 occasions. Observations have been of single individuals, not groups. It is assumed that one individual may be present in the Level B harassment zone once a month during the in-water work window (7 months), or 7 incidents of take.

• West Coast transient killer whale—take is based on maximum group size observed during the project. Groups of 8 individuals have been observed on 2 occasions. It is assumed that one group of 8 animals may be present in the Level B harassment zone once a month during the in-water work window (7 months), or 56 incidents of take.

• Bottlenose dolphin—The bottlenose dolphin estimate is based on sightings data from Cascadia Research Collective. Between September 2017 and March 2018, a group of up to 7 individuals was sighted in South Puget Sound (EPS, 2018). It is assumed that this group is still present in the area. Given how rare bottlenose dolphins are in the area, it is unlikely they would be present on a daily basis. Instead it is assumed that one group size of 7 animals may be present in the Level B harassment zone once a month during the in-water work window (7 months), or 49 incidents of take.

A summary of estimated marine mammal takes is listed in Table 8.

TABLE 8—ESTIMATED NUMBERS OF MARINE MAMMALS THAT MAY BE EXPOSED TO RECEIVED NOISE LEVELS THAT CAUSE LEVEL B HARASSMENT

| Marine mammals | Estimated level B harassment | Abundance | Percentage (%) |
|---|---|---|---|
| Gray whale | 9 | 26,906 | 0.03 |
| Humpback whale | 7 | 2,900 | 0.24 |
| Minke whale | 3 | 636 | 0.47 |
| Killer whale (West Coast transient) | 56 | 243 | 23.05 |
| Bottlenose dolphin | 49 | 1924 | 2.55 |
| Harbor porpoise | 1,360 | 11,233 | 12.11 |
| Dall's porpoise | 82 | 25,750 | 0.32 |
| Harbor seal | 3,794 | 11,036 | 1.97 |
| Northern elephant seal | 7 | 179,000 | 0.04 |
| California sea lion | 217 | 257,606 | 1.47 |
| Steller sea lion | 63 | 43,201 | 0.02 |

**Proposed Mitigation**

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), 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.

*Time Restriction*

Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In addition, all in-water construction will be limited to the period between August 1, 2020, and February 15, 2021.

*Establishing and Monitoring Level A, Level B Harassment Zones, and Exclusion Zones*

Before the commencement of in-water construction activities, which include vibratory pile driving and pile removal, WSDOT shall establish Level A harassment zones where received underwater SPLs or $SEL_{cum}$ (cumulative sound exposure level) could cause PTS.

WSDOT shall also establish Level B harassment zones where received underwater SPLs are higher than 120 $dB_{rms}$ re 1 μPa for continuous noise sources (vibratory pile driving and pile removal).

WSDOT shall establish a 50 m exclusion zone for all in-water pile driving for cetaceans except Southern Resident killer whale and a 20 m exclusion zone for all in-water pile driving for pinnipeds. These zones encompass all estimated Level A harassment zones.

WSDOT shall establish exclusion zones for Southern Resident killer whale and all marine mammals for which takes are not authorized at the Level B harassment distances. Specifically, for vibratory pile removal of 12-inch timber piles, a 1.13 km exclusion zone shall be established. For vibratory pile removal of 24-inch steel piles and vibratory pile driving of 30-inch steel piles, a 7.9 km exclusion zone shall be established.

A summary of exclusion zones is provided in Table 9.

TABLE 9—EXCLUSION ZONES (m) FOR VARIOUS MARINE MAMMALS

| Activities | Cetaceans except SRKW* | Pinnipeds | SRKW |
|---|---|---|---|
| Vibratory pile removal, 12-inch timber pile | 50 | 20 | 1,130 |
| Vibratory pile removal, 24-inch steel pile or vibratory pile driving, 30-inch steel pile | 50 | 20 | 7,900 |

* SRKW = Southern Resident killer whale.

NMFS-approved PSOs shall conduct an initial survey of the exclusion zones to ensure that no marine mammals are seen within the zones beginning 30 minutes before pile driving and pile removal of a pile segment begins. If marine mammals are found within the exclusion zone, pile driving of the segment would be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor would wait 15 minutes. If no marine mammals are seen by the observer in that time it can be assumed that the animal has moved beyond the exclusion zone.

If pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated exclusion zone prior to commencement of pile driving, the observer(s) must notify the pile driving operator (or other authorized individual) immediately and continue to monitor the exclusion zone. Operations may not resume until the marine mammal has exited the exclusion zone or 15 minutes have elapsed since the last sighting.

*Shutdown Measures*

WSDOT shall implement shutdown measures if a marine mammal is detected within or entering an exclusion zone listed in Table 9.

WSDOT shall also implement shutdown measures if southern resident killer whales are sighted within the vicinity of the project area and are approaching the Level B harassment zone during in-water construction activities.

If a killer whale approaches the Level B harassment zone during pile driving or removal, and it is unknown whether it is a Southern Resident killer whale or a transient killer whale, it shall be assumed to be a Southern Resident killer whale and WSDOT shall implement the shutdown measure.

If a Southern Resident killer whale or an unidentified killer whale enters the Level B harassment zone undetected, in-water pile driving or pile removal shall be suspended until the whale exits the Level B harassment zone, or 15 minutes have elapsed with no sighting of the animal, to avoid further Level B harassment.

Further, WSDOT shall implement shutdown measures if the number of authorized takes for any particular species reaches the limit under the IHA (if issued) and if such marine mammals are sighted within the vicinity of the project area and are approaching the Level B harassment zone during in-water construction activities.

*Coordination With Local Marine Mammal Research Network*

Prior to the start of pile driving for the day, the Orca Network and/or Center for Whale Research will be contacted by WSDOT to find out the location of the nearest marine mammal sightings. The Orca Sightings Network consists of a list of over 600 (and growing) residents, scientists, and government agency personnel in the U.S. and Canada. Sightings are called or emailed into the Orca Network and immediately distributed to other sighting networks including: The NMFS Northwest Fisheries Science Center, the Center for Whale Research, Cascadia Research, the Whale Museum Hotline and the British Columbia Sightings Network.

Sightings information collected by the Orca Network includes detection by hydrophone. The SeaSound Remote Sensing Network is a system of interconnected hydrophones installed in the marine environment of Haro Strait (west side of San Juan Island) to study orca communication, in-water noise, bottom fish ecology and local climatic conditions. A hydrophone at the Port Townsend Marine Science Center measures average in-water sound levels and automatically detects unusual sounds. These passive acoustic devices allow researchers to hear when different marine mammals come into the region. This acoustic network, combined with the volunteer (incidental) visual sighting network allows researchers to document presence and location of various marine mammal species.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, all of which are described above, NMFS has preliminarily determined that the proposed mitigation measures provide the means 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.

**Proposed Monitoring and Reporting**

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term

fitness and survival of individual marine mammals; or (2) populations, species, or stocks.

- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

*Proposed Monitoring Measures*

WSDOT shall employ NMFS-approved PSOs to conduct marine mammal monitoring for its Mukilteo Multimodal Project. The PSOs will observe and collect data on marine mammals in and around the project area for 30 minutes before, during, and for 30 minutes after all pile removal and pile installation work. NMFS-approved PSOs shall meet the following requirements:

1. Independent observers (*i.e.,* not construction personnel) are required;
2. At least one observer must have prior experience working as an observer;
3. Other observers may substitute education (undergraduate degree in biological science or related field) or training for experience;
4. Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and
5. NMFS will require submission and approval of observer Curriculum vitaes;

Monitoring of marine mammals around the construction site shall be conducted using high-quality binoculars (*e.g.,* Zeiss, 10 x 42 power). Due to the different sizes of Level B harassment distances from different pile sizes, several different ZOIs and different monitoring protocols corresponding to a specific pile size will be established.

- During 12-inch vibratory timber pile removal, two land-based PSOs will monitor from the lighthouse and the new ferry terminal observation deck.
- During 24- and 30-inch steel vibratory driving/removal, four land-based and one ferry-based PSO will monitor the zones.

Locations of the land-based PSOs and routes of monitoring vessels are shown in WSDOT's Marine Mammal Monitoring Plan, which is available online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

To verify the required monitoring distance, the exclusion zones and zones of influence will be determined by using a range finder or hand-held global positioning system device.

*Proposed Reporting Measures*

WSDOT is required to submit a draft report on all marine mammal monitoring conducted under the IHA (if issued) within ninety calendar days of the completion of the project. A final report shall be prepared and submitted within 30 days following resolution of comments on the draft report from NMFS.

The marine mammal report must contain the informational elements described in the Marine Mammal Monitoring Plan, dated February 18, 2020, including, but not limited to:

1. Dates and times (begin and end) of all marine mammal monitoring.
2. Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed.
3. Weather parameters and water conditions during each monitoring period (*e.g.,* wind speed, percent cover, visibility, sea state).
4. The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.
5. Age and sex class, if possible, of all marine mammals observed.
6. PSO locations during marine mammal monitoring.
7. Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).
8. Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level B harassment zones while the source was active.
9. 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 to total take numbers, as appropriate).
10. Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.
11. Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.
12. An extrapolation of the estimated takes by Level B harassment based on the number of observed exposures within the Level B harassment zone and the percentage of the Level B harassment zone that was not visible.
13. Submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, WSDOT shall report the incident to the Office of Protected Resources (301–427–8401), NMFS and to the West Coast Region (WCR) regional stranding coordinator (1–866–767–6114) as soon as feasible. If the death or injury was clearly caused by the specified activity, WSDOT must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. WSDOT must not resume their activities until notified by NMFS.

The report must include the following information:

1. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
2. Species identification (if known) or description of the animal(s) involved;
3. Condition of the animal(s) (including carcass condition if the animal is dead);
4. Observed behaviors of the animal(s), if alive;
5. If available, photographs or video footage of the animal(s); and
6. General circumstances under which the animal was discovered.

**Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this

information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all the species listed in Table 9, given that the anticipated effects of WSDOT's Mukilteo Multimodal Project activities involving pile driving and pile removal on marine mammals are expected to be relatively similar in nature. There is no information about the nature or severity of the impacts, or the size, status, or structure of any species or stock that would lead to a different analysis by species for this activity, or else species-specific factors would be identified and analyzed.

Marine mammal takes that are anticipated and proposed to be authorized are expected to be limited to short-term Level B harassment (behavioral and TTS) only. Marine mammals present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction) and avoidance of the area from elevated noise levels during pile driving and pile removal and the implosion noise. These behavioral distances are not expected to affect marine mammals' growth, survival, and reproduction due to the limited geographic area that would be affected in comparison to the much larger habitat for marine mammals in the Puget Sound. A few marine mammals could experience TTS if they occur within the Level B TTS ZOI. However, as discussed earlier in this document, TTS is a temporary loss of hearing sensitivity when exposed to loud sound, and the hearing threshold is expected to recover completely within minutes to hours. Therefore, it is not considered an injury.

Portions of the SRKW range is within the proposed action area. In addition, the entire Puget Sound is designated as the SRKW critical habitat under the ESA. However, WSDOT would be required to implement strict mitigation measures to suspend pile driving or pile removal activities when this stock is detected in the vicinity of the project area. We anticipate that take of SRKW would be avoided. There are no other known important areas for other marine mammals, such as feeding or pupping, areas.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the *Potential Effects on Marine Mammal Habitat* subsection. There is no other ESA designated critical habitat in the vicinity of the Mukilteo Multimodal Project area. The project activities would not permanently modify existing marine mammal habitat. The activities may kill some fish and cause other fish to leave the area temporarily, thus impacting marine mammals' foraging opportunities in a limited portion of the foraging range. However, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences. Therefore, given the consideration of potential impacts to marine mammal prey species and their physical environment, WSDOT's proposed construction activity at the Mukilteo Ferry Terminal would not adversely affect marine mammal habitat.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- Injury—no marine mammal would be taken by Level A harassment in the form of either physical injury or PTS;
- Behavioral disturbance—11 species/stocks of marine mammals would experience behavioral disturbance and TTS from the WSDOT's Mukilteo Ferry Terminal construction. However, as discussed earlier, the area to be affected is small and the duration of the project is short. In addition, the nature of the take would involve mild behavioral modification; and
- Although portion of the SWKR critical habitat is within the project area, strict mitigation measures such as implementing shutdown measures and suspending pile driving are expected to avoid take of SRKW, and impacts to prey species and the habitat itself are expected to be minimal. No other important habitat for marine mammals exist in the vicinity of the project area.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

**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. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The estimated takes are below 24 percent of the population for all marine mammals (Table 7).

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Endangered Species Act**

Section 7(a)(2) of the ESA of 1973 (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 WCR Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

The only species listed under the ESA with the potential to be present in the

action area is the Mexico Distinct Population Segment (DPS) of humpback whales. The effects of this proposed Federal action were adequately analyzed in NMFS' Biological Opinion for the Mukilteo Multimodal Project, Snohomish, Washington, dated August 1, 2017, which concluded that issuance of an IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat. NMFS WCR has confirmed the Incidental Take Statement (ITS) issued in 2017 is applicable for this IHA. That ITS authorizes the take of seven humpback whales from the Mexico DPS.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to issue an IHA to WSDOT for conducting Mukilteo Multimodal Project Year 4 construction in the State of Washington between August 1, 2020, through July 31, 2021, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

**Request for Public Comments**

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for WSDOT's Mukilteo Multimodal construction project. We also request at this time comment on the potential Renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Description of Specific Activity section of this notice is planned or (2) the activities as described in the Specified Activities section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: June 9, 2020.

**Donna S. Wieting,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2020–12753 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA206]**

### Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The Mid-Atlantic Fishery Management Council's Summer Flounder, Scup, and Black Sea Bass Advisory Panel will hold a public webinar meeting, jointly with the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Advisory Panel.

**DATES:** The meeting will be held on Monday, June 29, 2020, from 1 p.m. until 4 p.m.

**ADDRESSES:** The meeting will be held via webinar, which can be accessed at: *http://mafmc.adobeconnect.com/sfsbsb-ap-jun2020/.* Meeting audio can also be accessed via telephone by dialing 1–800–832–0736 and entering room number 4472108.

*Council address:* Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

**FOR FURTHER INFORMATION CONTACT:** Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

**SUPPLEMENTARY INFORMATION:** The Mid-Atlantic Fishery Management Council's Summer Flounder, Scup, and Black Sea Bass Advisory Panel will meet via webinar jointly with the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Advisory Panel. The purpose of this meeting is to discuss recent performance of the summer flounder, scup, and black sea bass commercial and recreational fisheries and develop Fishery Performance Reports. These reports will be considered by the Scientific and Statistical Committee, the Monitoring Committee, Mid-Atlantic Fishery Management Council, and Atlantic States Marine Fisheries Commission when reviewing 2021 catch and landings limits and management measures for summer flounder, scup, and black sea bass. These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: June 9, 2020.

**Tracey L. Thompson,**

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

[FR Doc. 2020–12731 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

**[Docket No. 200609–0154]**

**RIN 0660–XC046**

### Promoting the Sharing of Supply Chain Security Risk Information Between Government and Communications Providers and Suppliers

**AGENCY:** National Telecommunications and Information Administration, U.S. Department of Commerce.

**ACTION:** Notice, request for public comment.

**SUMMARY:** Section 8 of the Secure and Trusted Communications Network Act of 2019 (Act) directs the National Telecommunications and Information Administration (NTIA), in cooperation with other designated federal agencies, to establish a program to share supply chain security risk information with trusted providers of advanced communications service and suppliers of communications equipment or services. Through this Notice and in accordance with the Act, NTIA is requesting comment on ways to facilitate the sharing of security risk information with such trusted providers. These comments will inform the program that NTIA establishes under the Act.

**DATES:** Comments are due on or before July 13, 2020.

**ADDRESSES:** Written comments may be submitted by email to *supplychaininfo@ntia.gov.* Written comments also may be submitted by mail to the National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4725, Attn: Evelyn L. Remaley, Associate Administrator, Office of Policy Analysis and Development, Washington, DC 20230. For more detailed instructions about submitting comments, see the ''Instructions for Commenters'' section at the end of this Notice.

**FOR FURTHER INFORMATION CONTACT:** Megan Doscher, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4725, Washington, DC 20230; telephone (202) 482–2503; *mdoscher@ntia.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002, or at *press@ntia.gov.*

**SUPPLEMENTARY INFORMATION:** Section 8 of the Secure and Trusted Communications Network Act of 2019 (Act) directs NTIA, in cooperation with the Office of the Director of National Intelligence, the Department of Homeland Security (DHS), the Federal Bureau of Investigation, and the Federal Communications Commission (FCC), to establish a program to share ''supply chain security risk'' information with trusted providers of ''advanced communications service'' and suppliers of communications equipment or services.[1] As part of that program, NTIA must ''conduct regular briefings and other events'' to share information with trusted providers and suppliers and ''engage'' with such providers and suppliers, particularly those that are small businesses or that primarily serve rural areas.[2] NTIA must also develop, and submit to Congress, a plan for declassifying material, when feasible, and expediting and expanding the provision of security clearances to facilitate information sharing from the Federal government to trusted providers and suppliers.[3] Therefore, we request comments on several key terms in the Act, as well as on steps that should be taken to best achieve the purposes of the Act.

1. *Key Terms:*

NTIA seeks information to clarify key terms in the Act.

### Supply Chain Security Risk Information

The Act defines ''supply chain security risk'' information to include ''specific risk and vulnerability information related to equipment and software.''[4] NTIA's identification of supply chain security risk information will be aided by other ongoing U.S. Government activities to detect potential security risks to information and communications technology (ICT) supply chains. For example, this effort will be informed by all relevant activities of the National Strategy to Secure 5G, which focuses not only on the identification of information security risks, but on broader strategic risks to the U.S. economy and national security, including risks to the global 5G market, capabilities and infrastructure. Defining ''supply chain security risk'' to encompass national security and economic risk will reinforce the Act's purpose to safeguard the economy and national critical infrastructure against these risks.[5]

NTIA will also be informed by key terms established by the Federal Acquisition Supply Chain Security Act of 2018, which established the Federal Acquisition Security Council (FASC), which is developing, within the Federal government, risk information sharing policies and procedures comparable to those that the Act contemplates for interactions between the Federal government and the private sector.[6] That legislation defines ''supply chain risk'' by reference to 41 U.S.C. 4713, which in turn defines the term to mean ''the risk that any person may sabotage, maliciously introduce unwanted function, extract data, or otherwise manipulate the design, integrity, manufacturing, production, distribution, installation, operation, maintenance, disposition, or retirement of covered articles so as to surveil, deny, disrupt, or otherwise manipulate the function, use, or operation of covered articles or information stored or transmitted on the covered articles.''[7]

NTIA will also consider key terms defined by other bodies, such as the DHS ICT Supply Chain Risk Management Task Force (DHS Task Force), which provides a forum for government-private sector collaboration on supply chain issues and provides advice and recommendations on ways to assess and mitigate risks to the ICT supply chain.[8] One of the DHS Task Force's working groups is identifying and categorizing supply chain threats, as well as providing background information on such threats, their significance, and potential impact on the ICT supply chain.[9]

### Trusted Providers and Suppliers

- NTIA seeks comment on clarifying the term ''trusted providers and suppliers.'' The Act requires information sharing only with ''trusted'' providers and suppliers—entities ''not owned by, controlled by, or subject to the influence of a foreign adversary.''[10] In identifying the providers and suppliers that are ineligible under the Act, NTIA will rely on various designations as set forth in Section § 2(c)(1–4) of the Act. Accordingly, ineligible providers and suppliers will be determined by:

(1) Any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council;

[1] Secure and Trusted Communications Network Act of 2019, Public Law 116–124, 8, 134 Stat. 158, 168 (2020) *(codified at* 47 U.S.C. 1607).

[2] *See id.* § 8(a)(2)(A), (B).

[3] *See id.* § 8(a)(2)(C).

[4] *Id.* § 8(c)(3).

[5] *See* Executive Office of the President, *National Strategy to Secure 5G of the United States of America,* March 2020, available at *https://www.whitehouse.gov/wp-content/uploads/2020/03/National-Strategy-5G-Final.pdf.*

[6] *See* Federal Acquisition Supply Chain Security Act of 2018, Public Law 115–390, Tit. II, § 202, 132 Stat. 5173, 5180–81 (2018) (codified at 41 U.S.C. 1323(a)).

[7] 41 U.S.C. 4713(k)(6).

[8] *See* DHS, Cybersecurity and Infrastructure Security Agency, *Information and Communications Technology Supply Chain Risk Management Task Force: Interim Report,* at iii (Sept. 2019) (*DHS Task Force Interim Report*), *available at https://www.cisa.gov/sites/default/files/publications/ICT%20Supply%20Chain%20Risk%20Management%20Task%20Force%20Interim%20Report%20%28FINAL%29_508.pdf.* For a list of Task Force members and contributors, see *id.* at v–vi.

[9] *See id.* at 17–18.

[10] Act, § 8(c)(4).

(2) the Department of Commerce pursuant to Executive Order No. 13873;

(3) the equipment or service being covered is telecommunications equipment or services, as defined in section 889(f)(3) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232; 132 Stat. 1918); or

(4) an appropriate national security agency.

**Foreign Adversaries**

NTIA directs commenters to the Act's definition of ''foreign adversary,'' which is identical to that in Executive Order 13873, ''Securing the Information and Communications Technology and Services Supply Chain'' (E.O. 13873).[11] E.O. 13873 directs the Secretary of Commerce to review, and where necessary, prohibit transactions involving entities owned, controlled, or subject to foreign adversaries that pose unacceptable risks to the U.S. ICT and services supply chain.[12] NTIA notes that the determination of ''foreign adversary'' for purposes of implementing E.O. 13873 is a matter of executive branch discretion and will be made by the Secretary in consultation with the other agencies identified in the E.O.. To ensure consistency of action across the Federal government, in identifying the providers and suppliers that are eligible under the Act to receive supply chain security risk information, NTIA will rely on pertinent decisions by the Secretary of Commerce under E.O. 13873, as well as other relevant federal determinations.

**Advanced Communications Service**

Finally, NTIA seeks comment on the term, ''advanced communications service.'' The Act directs NTIA to share risk information only with trusted providers of ''advanced communications service,'' which the legislation equates with ''advanced telecommunications capability'' as defined in section 706 of the Telecommunications Act of 1996.[13] As for mobile services, the FCC has determined that 4G Long Term Evolution services offering transmission speeds between 5Mbps/1Mbps and 10Mbps/3Mbps are the ''best proxy'' for advanced mobile service.[14]

*Questions:*

- What sorts of risks and vulnerabilities should be covered by the language ''specific risk and vulnerability information related to equipment and software''?
- What information, if any, is unique to ''supply chain risk information''? In other words, to avoid the re-creation of existing threat and vulnerability information sharing programs, what types of specific, enhanced, or aggregated threat and vulnerability information would be helpful to the private sector to identify, avoid, or mitigate ICT supply chain risks? What information do suppliers and providers need to make informed, risk-based security and transactional decisions?
- Are there supply chain security risks beyond those Congress specified that should be included in an information security program?
- To what extent should NTIA's program be aligned with the actions of the FASC in determining whether an identified threat is a ''security risk''?
- Section 4 of the Act sets a limit of 2,000,000 customers for the Act's ''remove and replace'' reimbursement program. Is this also an appropriate measure to determine small business and rural service provider participation in the program, as required by Section § 8(a)(2)(B)? Would that metric cause any key small or rural providers or suppliers to be missed?
- Are there other factors aligned with the Act that should be considered in determining ''trusted'' providers and suppliers eligible for the program?
- Should NTIA rely on the FCC's benchmarks for ''advanced'' communications services to implement its information sharing program and, if so, what would be the implications for achieving the purposes of the Act?

2. *Information Sharing Policies and Procedures:*

As noted, the Act requires NTIA to share security risk information with trusted providers and suppliers via ''regular briefings and other events.'' It also requires NTIA to ''engage'' with trusted parties, particularly small businesses or those serving rural areas. Although the Act mentions small and rural providers and suppliers only in the context of engagements with the Federal government, NTIA believes those entities should be the principal focus of the information sharing program. The Act's overarching goal is the establishment of an FCC program to reimburse smaller providers for removing from their networks and replacing equipment and services that threaten national security.[15] Congress deemed reimbursement for such entities appropriate because it believed that smaller providers did not receive a sufficient ''heads-up by our government'' about the security risks posed by certain equipment and services and thus made procurement decisions based on the ''bottom line.'' [16] The information sharing program mandated by Section 8 of the Act was intended to ''fix this information gap by ensuring that [small, rural providers] have access to the information they need to keep their networks and Americans secure.'' [17] Accordingly, NTIA plans to structure that program primarily to promote the flow of risk information from the government to small and rural providers and suppliers. We request comment on that approach.

Because much security risk information is also highly sensitive, caution must be exercised in disseminating it. Briefings and events involving multiple participants or attendees, for example, risk exposing sensitive information or placing it in the wrong hands. NTIA seeks to balance the need to safeguard this information with the Act's requirement to share it with trusted providers and suppliers. NTIA notes that security risk information is available either publicly or from non-government sources on various terms.[18] For example, Congress and the Executive Branch raised concerns about the security risks posed by certain Chinese equipment suppliers as early as a decade ago.[19]

*Questions:*

- What means of sharing information best balances the objectives of the Act and the need to safeguard sensitive information? More specifically, what are the best ways for the Federal government to provide ''regular briefings'' to providers and suppliers? Would periodic public updates or notifications be useful or sufficient?
- Should eligible providers and suppliers have an opportunity to request risk and vulnerability information about

[11] Executive Order 13873, ''Securing the Information and Communications Technology and Services Supply Chain,'' 84 FR 22,689 (2019).

[12] *Compare id.* § 8(c)(2) *with* Executive Order 13873, § 3(b), 84 FR 22,689, 22,691 (2019).

[13] *See* Act, § 9(1). Advanced telecommunications capability ''is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.'' Public Law 104–104, 706(c)(1), 101 Stat. 56, 153 (1996) (*codified at* 47 U.S.C. 1302(d)(1)).

[14] Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Manner, 2019 Broadband Deployment Report, 34 FCC Rcd 3857, 3863–64, ¶ 16 (2019). Act, § 8(c)(4).

[16] *See* 165 Cong. Rec. H10286 (daily ed. Dec. 16, 2019) (remarks of Rep. Doyle).

[17] *Id.* (remarks of Rep. Latta).

[18] *See, e.g., DHS Task Force Interim Report* at 14–15.

[19] *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs,* Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, 11425–26, ¶¶ 6–9 (2019).

specific equipment, software, and services? Would an information sharing system that incorporates both ''push'' and ''pull'' capabilities be useful, if possible?

• Are there legal barriers that could impede the ability of trusted providers and suppliers to receive or act on security risk information from the Federal government?

• How can publicly available security risk information be conveyed more expeditiously to more small and rural providers and suppliers?

• What barriers (*e.g.,* awareness, financial, legal) do small and rural providers and suppliers face in accessing security risk information from non-government sources? What could or should the Federal government do to eliminate or mitigate those barriers?

3. *Information Declassification and Security Clearances:*

NTIA's information sharing program must include a plan for declassifying materials, where feasible, and expanding and expediting the provision of security clearances to facilitate the dissemination of security risk information to trusted providers and suppliers. Because both actions potentially risk compromising the confidentiality of sensitive government information, NTIA is seeking additional information.

*Questions:*

• How specific must security risk information be to enable providers and suppliers to make procurement decisions that adequately protect their networks, customers, and users? If, for example, the Federal government issues a security warning about a particular company, how much information do trusted providers or suppliers require about the reason for that warning in order to take appropriate action?

• Is it more helpful for small and rural providers to receive unclassified information through typical civilian channels (for example, by email) or to receive more detailed classified information that would require a staff member to obtain a security clearance and could require travel to receive the classified information in person at a secure location?

• What would be the best way of identifying appropriate staff points of contact at small and rural providers to ensure that they receive security risk information?

• Have small and rural providers and suppliers encountered problems in attempting to obtain security clearances for staff? If so, what has been the nature of those difficulties?

• How many performance-essential security clearances would an organization need to ensure that government-shared security risk information is fully incorporated into its corporate risk-based decision making and response? What challenges would an organization have, if any, in converting such information into action?

• How should NTIA best raise awareness of this program among small business and rural providers?

*Instructions for Commenters:* NTIA invites comment on the full range of issues that may be presented in this Notice, including issues that are not specifically raised in the above questions. Commenters are encouraged to address any or all of the above questions. Comments that contain references to studies, research, and other empirical data that are not widely available should include copies of the referenced materials with the submitted comments. Comments submitted by email should be machine-readable and should not be copy-protected. Responders should include the name of the person or organization filing the comment, which will facilitate agency follow up for clarifications as necessary, as well as a page number on each page of their submissions. All comments received are a part of the public record and will generally be posted on the NTIA website, *http://www.ntia.gov/,* without change. All personal identifying information (for example, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Dated: June 9, 2020.

**Kathy Smith,**

*Chief Counsel, National Telecommunications and Information Administration.*

[FR Doc. 2020–12780 Filed 6–11–20; 8:45 am]

**BILLING CODE 3510–60–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed Additions and Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed additions to and deletions from the Procurement List.

**SUMMARY:** The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products previously furnished by such agencies.

**DATES:** Comments must be received on or before: July 12, 2020.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

**FOR FURTHER INFORMATION CONTACT:** For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

### Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

*Products*

*NSN(s)—Product Name(s):*
MR 11100—Server, Gravy and Sauce, Includes Shipper 21100
MR 11130—Carving Kit, Pumpkin, Assorted Colors
*Mandatory Source of Supply:* Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
*Contracting Activity:* Military Resale-Defense Commissary Agency
*NSN(s)—Product Name(s):*
MR 1186—Broom Dustpan Combo
*Mandatory Source of Supply:* LC Industries, Inc., Durham, NC
*Contracting Activity:* Military Resale-Defense Commissary Agency

*Services*

*Service Type:* Base Supply Center
*Mandatory for:* New Mexico National Guard, Santa Fe, NM
*Mandatory Source of Supply:* Envision, Inc., Wichita, KS
*Contracting Activity:* DEPT OF THE ARMY, W7NQ USPFO ACTIVITY NM ARNG
*Service Type:* Janitorial Service
*Mandatory for:* U.S. Army Engineer District San Francisco, Bay Model Visitor Center and Baseyard Building, Sausalito, CA
*Mandatory Source of Supply:* North Bay Rehabilitation Services, Inc., Rohnert Park, CA
*Contracting Activity:* DEPT OF THE ARMY, W075 ENDIST SAN FRAN
*Service Type:* Custodial Service

*Mandatory for:* FAA, Cheyenne System Support Center, Cheyenne, WY
*Mandatory Source of Supply:* Northwest Community Action Programs of Wyoming, Inc., Worland, WY
*Contracting Activity:* FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS
*Service Type:* Janitorial & Grounds Service
*Mandatory for:* FAA, Air Traffic Control Tower, Teterboro, NJ
*Mandatory Source of Supply:* Fedcap Rehabilitation Services, Inc., New York, NY
*Contracting Activity:* FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS

**Deletions**

The following products are proposed for deletion from the Procurement List:

*Products*

*NSN(s)—Product Name(s):*
8415–01–043–4036—Drawers, Flyers, Aramid, Navy, Ankle Length, Natural, XS
8415–00–467–4075—Drawers, Flyers, Aramid, Navy, Ankle Length, Natural, Small
8415–00–467–4076—Drawers, Flyers, Aramid, Navy, Ankle Length, Natural, Medium
8415–00–467–4078—Drawers, Flyers, Aramid, Navy, Ankle Length, Natural, Large
8415–00–467–4100—Drawers, Flyers, Aramid, Navy, Ankle Length, Natural, X Large
*Mandatory Source of Supply:* Peckham Vocational Industries, Inc., Lansing, MI
*Contracting Activity:* DLA TROOP SUPPORT, PHILADELPHIA, PA
*NSN(s)—Product Name(s):*
7510–01–451–2269—Refill, Ball Point Pen, Pushcap, Black Ink, Medium Point
7510–01–451–2273—Refill, Ball Point Pen, Pushcap, Blue Ink, Medium Point
*Mandatory Source of Supply:* West Texas Lighthouse for the Blind, San Angelo, TX
*Contracting Activity:* GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY
*NSN(s)—Product Name(s):*
8470–00–NIB–0026—Kit, ACH Pad, Rplcmt
8470–00–NIB–0027—Kit, ACH Retrofit
8470–00–NIB–0028—Kit, ACH Retrofit
*Mandatory Source of Supply:* Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
*Contracting Activity:* W6QK ACC–APG NATICK, NATICK, MA
*NSN(s)—Product Name(s):*
7360–00–139–1063—Wash Kit Assembly
*Mandatory Source of Supply:* St. Lawrence County Chapter, NYSARC, Canton, NY
*Contracting Activity:* DLA TROOP SUPPORT, PHILADELPHIA, PA

**Michael R. Jurkowski,**

*Deputy Director, Business & PL Operations.*

[FR Doc. 2020–12703 Filed 6–11–20; 8:45 am]

**BILLING CODE 6353–01–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Intelligence Agency National Intelligence University Board of Visitors; Notice of Federal Advisory Committee Meeting

**AGENCY:** Defense Intelligence Agency, Department of Defense (DoD).

**ACTION:** Notice of Federal Advisory Committee meeting.

**SUMMARY:** The Department of Defense is publishing this notice to announce that the following Federal Advisory Committee meeting of the National Intelligence University Board of Visitors will take place.

**DATES:** Tuesday, June 9, 2020 from 3:00 p.m. to 5:00 p.m., Eastern Time.

**ADDRESSES:** Defense Intelligence Agency 7400 Pentagon, ATTN: NIU, Washington, DC 20301–7400.

**FOR FURTHER INFORMATION CONTACT:** Dr. Terrence Markin, National Intelligence University, Bethesda, MD 20816, Phone: (301) 243–2118, *NIU_Front_Office2@dodiis.mil; melinda.rose@dodiis.mil.* Website: *https://ni-u.edu/wp/about-niu/leadership-2/board-of-visitors/.*

**SUPPLEMENTARY INFORMATION:** This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150. Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public.

*Purpose:* The Board will discuss two current issues and other matters of interest to the National Intelligence University.

*Agenda:* Tuesday, June 9. 2020, from 3:00 p.m.to 4:00 p.m. (Eastern Time): Call to Order and COVID–19/NIU Response and Plans for Fall 2020; from 4:00 p.m. to 5:00 p.m. (Eastern Time): NIU Transition to ODNI; Public Comment; and Wrap Up and Closing Remarks.

*Meeting Accessibility:* The link to the virtual meeting will be posted on the NIU Board of Visitors website at *https://ni-u.edu/wp/about-niu/leadership-2/board-of-visitors/* by June 2, one week prior to the meeting. The most up-to-date changes to the meeting agenda will also be posted there.

*Written Statements:* Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, written statements to the committee may be submitted to the committee at any time or in response to a stated planned meeting agenda by email to the NIU Front Office at *NIU_Front_Office2@dodiis.mil.*

*Meeting Announcement:* Due to circumstances beyond the control of the Department of Defense, the National Intelligence University Board of Visitors was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its June 9, 2020 meeting. 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.

Dated: June 9, 2020.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2020–12781 Filed 6–11–20; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

### National Assessment Governing Board

### Draft Reading Assessment Framework for the 2025 National Assessment of Educational Progress

**AGENCY:** National Assessment Governing Board, U.S. Department of Education.

**ACTION:** Notice of opportunity for public comment for the Reading Assessment Framework for the 2025 National Assessment of Educational Progress (NAEP).

**SUMMARY:** The National Assessment Governing Board (Governing Board) is soliciting public comment for guidance in updating the Assessment Framework for the 2025 National Assessment of Educational Progress (NAEP) in Reading. The Governing Board is authorized to formulate policy guidelines for NAEP. Section 302(e)(1)(c) of Public Law 107–279 s specifies that the Governing Board determines the content to be assessed for each NAEP Assessment. Each NAEP subject area assessment is guided by a framework that defines the scope of the domain to be measured by delineating the knowledge and skills to be tested at each grade and subject, the format of the assessment, and the achievement level definitions—guiding assessments that are valid, reliable, and reflective of widely accepted professional standards. The NAEP Reading Assessment Framework was last revised in 2004. It is anticipated that the current update of the NAEP Reading Assessment Framework will be presented for approval at the National Assessment

Governing Board quarterly meeting on November 19–21, 2020. Public and private parties and organizations are invited to provide written comments and recommendations on the draft framework. This notice sets forth the review schedule and provides information for accessing additional materials that will be informative and useful for this review.

**DATES:** Comments must be received no later than July 23, 2020.

**ADDRESSES:** Comments should be uploaded at the following URL: *https://www.naepframeworkupdate.org.* Comments may also be provided via email at *naepreading@wested.org.*

**FOR FURTHER INFORMATION CONTACT:** Michelle Blair, National Assessment Governing Board, 800 North Capitol Street NW, Suite 825, Washington, DC 20002–4233, Telephone: (202) 357–0396.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** Assessment and Item Specifications elaborate on the framework as guidance for item development conducted by the National Center for Education Statistics (NCES) and the NAEP assessment development contractor(s). The framework development and update process also produces recommendations for contextual variables, which supports NCES' development of the questionnaires administered to students, teachers, and schools to help the public understand the achievement results in each subject. By engaging NAEP's audiences, partners, and stakeholders in the panels that provide recommendations for NAEP frameworks and by seeking public comment, NAEP frameworks reflect content valued by the public as important to measure. Additional information on the Governing Board's work in developing NAEP Frameworks and Specifications can be found at *https://www.nagb.gov/naep-frameworks/frameworks-overview.html.*

All responses will be taken into consideration before finalizing the updated NAEP Reading Assessment Framework for Board adoption. Once adopted, the framework will be used to guide assessment development and reporting for the 2025 NAEP Reading Assessment.

Additional information (including the materials referenced below) can be found on the project website at *https://www.naepframeworkupdate.org.*

**Proposed Updated Reading Framework for the 2025 NAEP**

Starting on June 22, 2020, the proposed revised framework can be downloaded from the framework project website at *https://www.naepframeworkupdate.org.*

**Existing Reading Framework for the NAEP**

The existing framework (adopted in 2004) can be downloaded from the Governing Board website at *https://www.nagb.gov/naep-frameworks/reading.html.*

**Governing Board's Periodic Review and Updating of NAEP Frameworks**

Governing Board policy articulates the Board's commitment to a comprehensive, inclusive, and deliberative process to determine and update the content and format of all NAEP assessments. For each NAEP assessment, this process results in a NAEP framework, outlining what is to be measured and how it will be measured. Periodically, the Governing Board reviews existing NAEP frameworks to determine if changes are warranted. Each NAEP framework development and update process considers a wide set of factors, including but not limited to reviews of recent research on teaching and learning, changes in state and local standards and assessments, and the latest perspectives on the nation's future needs and desirable levels of achievement.

In 2018, the Board initiated a review of the NAEP Reading Framework. The Governing Board's NAEP Reading Framework review used expert commentary to determine whether a framework update was required and the type of updates that may be needed. As a result of this review, the Governing Board initiated a framework update process for the NAEP Reading Assessment. Learn more about the review at *https://www.nagb.gov/focus-areas/framework-development/framework-development-reading.html.*

**Summary of Proposed Revisions**

Compared to the existing NAEP Reading Framework for the 2009–2019 NAEP Reading Assessments, the draft updated framework proposes the following changes:

- Reporting scores in three different areas: Reading literature, reading science, and reading social studies, rather than reporting scores by literary and informational texts.
- Making all assessment tasks purpose-driven, rather than having a subset of tasks that are purpose-driven. In purpose-driven tasks, students are told why they are reading a passage and what they will be doing with it afterward, before they begin reading.
- Adding 'Use and Apply' to the three comprehension targets that are scored, meaning that students will be asked to apply their reading to a culminating task such as making a recommendation, developing a website, and the like. The four comprehension targets would be Locate and Recall, Integrate and Interpret, Analyze and Evaluate and Use and Apply.
- Providing a basis for not only reporting but also explaining student achievement by collecting and reporting data about students' engagement, effort, and experiences with reading tasks.
- Accounting for students' differential knowledge by providing necessary background knowledge on novel topics and administering short probes to determine test-takers' knowledge about topics they will read about.
- Including digital forms of text that are dynamic and multimodal and that require navigation as well as comprehension skills.
- Introducing an expanded view of vocabulary that goes beyond individual word meanings to also include knowledge of language structures.

*Electronic Access to this Document:* The official version of this document is the document published in the **Federal Register**. Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* This site allows the public to view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the Adobe website. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, the advanced search feature at this site allow searches to documents published by the Department.

**Authority:** Pub. L. 107–279, Title III—National Assessment of Educational Progress § 301.

**Lesley Muldoon,**

*Executive Director, National Assessment Governing Board (NAGB), U.S. Department of Education.*

[FR Doc. 2020–12693 Filed 6–11–20; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2020–SCC–0074]**

### Governor's Emergency Education Relief Fund Application; Correction

**AGENCY:** Office of Elementary and Secondary Education (OESE), Department of Education (ED).

**ACTION:** Correction notice.

**SUMMARY:** On May 27, 2020, the U.S. Department of Education published a 60-day comment period notice in the **Federal Register** with FR DOC# 2020–11352 (Page 31756, Column 2 and 3; Page 31757, Column 1) seeking public comment for an information collection entitled, ''Governor's Emergency Education Relief Fund Application.'' The Total Estimated Number of Annual Burden Hours of 26 is wrong, and the correct number is 130. The PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

**Kate Mullan,**

*PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.*

[FR Doc. 2020–12760 Filed 6–11–20; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### U.S. Energy Information Administration

### Agency Information Collection Extension

**AGENCY:** U.S. Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Notice and request for comments.

**SUMMARY:** EIA requests a three-year extension, with changes, to Form OE–417 *Electric Emergency Incident and Disturbance Report,* OMB Control Number 1901–0288, as required under the Paperwork Reduction Act of 1995. Form OE–417 collects information for DOE to monitor electric emergency incidents and disturbances in the United States (including all 50 States, the District of Columbia, Puerto Rico, U.S. Virgin Islands, and the U.S. Territories). The information collected allows DOE to conduct post-incident reviews examining significant interruptions of electric power or threats to the national electric system.

**DATES:** EIA must receive all comments on this proposed information collection no later than August 11, 2020. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

**ADDRESSES:** Written comments may be sent to OE–417 Recertification, C/O Matthew Tarduogno, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585 or by fax at 202–586–2623, or by email at *OE417@hq.doe.gov.*

**FOR FURTHER INFORMATION CONTACT:** Matthew Tarduogno, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, *matthew.tardugono@hq.doe.gov,* 202–586–2892.The forms and instructions are available online at: *https://www.oe.netl.doe.gov/oe417.aspx.*

**SUPPLEMENTARY INFORMATION:** This information collection request contains:

(1) *OMB No.:* 1901–0288;

(2) *Information Collection Request Title:* Electric Emergency Incident and Disturbance Report;

(3) *Type of Request:* Three-year extension with changes;

(4) *Purpose:* DOE uses Form OE–417 *Emergency Incident and Disturbance Report* to monitor electric emergency incidents and disturbances in the United States (including all 50 States, the District of Columbia, Puerto Rico, U.S. Virgin Islands, and the U.S. Territories) and to investigate significant interruptions of electric power or threats to the electric system reliability. Form OE–417 also enables DOE to meet the Department's national security responsibilities as the coordinating agency for Emergency Support Function (ESF) #12—Energy, under the National Response Framework, and the Sector-Specific Agency for the energy sector, pursuant to Presidential Policy Directive 21—*Critical Infrastructure Security and Resilience,* Presidential Policy Directive 41—*United States Cyber Incident Coordination,* and the Fixing Americas Surface Transportation (FAST) Act, Public Law 114–94. The information may also be shared with other non-regulatory federal agencies assisting in emergency response and recovery operations, or investigating the causes of an incident or disturbance to the national electric system. Public summaries are published on Form OE–417 web page at *https://www.oe.netl.doe.gov/oe417.aspx* on a monthly basis to keep the public informed.

(4a) *Proposed Changes to Information Collection:* DOE proposes to change the form number from Form OE–417 to Form DOE–417. The other changes proposed to Form OE–417 align the reporting requirements with the recently approved North American Electric Reliability Corporation (NERC) CIP–008–6 Reliability Standard, which established new definitions for a Cyber Security Incident and a Reportable Cyber Security Incident. CIP–008–6 also expanded the reporting requirements; including expanding the applicable systems to report on and adding new reporting requirements for attempted compromises of high and medium impact BES cyber systems and their associated electronic access control or monitoring systems. The continued alignment between Form OE–417 and NERC reporting requirements helps minimize confusion among industry stakeholders about where and how to file reports and enable industry stakeholders to train personnel to report using a single form. By incorporating the requirements established by NERC CIP–008–6 Reliability Standard in Form OE–417, entities may only be required to submit Form OE–417. This change reduces the reporting burden for the electric power industry. Additional changes to Form OE–417 clarify reporting criteria and allow respondents to select potentially applicable exceptions under the Freedom of Information Act. While submitters may mark information as potentially exempt, whether information is or is not exempt as part of a FOIA response will be determined by the Department at the time of processing the FOIA request. See DOE's FOIA regulations at 10 CFR part 1004 for more information. A summary of these and other changes to Form OE–417 is provided below:

- Changed the lettering or name of the form from ''Form OE–417'' to ''Form DOE–417''
- Added new reporting requirements from the North American Electric Reliability Corporation (NERC) CIP–008–6 Standard to reduce the combined burden on respondents reporting to NERC and DOE and streamline responses. It is expected that for NERC reporting entities registered in the United States; NERC will accept use of Form OE–417 to meet the submittal requirements that will be established by CIP–008–6 to the Department of Homeland Security and the Electricity Information Sharing and Analysis Center
- Updated the ''Response Due'' criteria with new line numbers and added the following:
  - ''If criterion 2 is met, also submit the Cyber Attributes on line T in Schedule 2.''

○ ''By the end of the next calendar day after a determination, submit Schedule 1 and lines N–S and the Cyber Attributes on line T in Schedule 2 as an Attempted Cyber Compromise if criterion 14 is met.''

• Renumbered reporting criteria due to the new reporting requirements.

• To align with reporting requirements established by the NERC CIP–008–06 standard:

○ Reworded Criteria 2 to ''Reportable Cyber Security Incident''

○ Added new Criteria 3 ''Cyber event that is not a Reportable Cyber Security Incident that causes interruptions of electrical system operations.''

• To align with reporting requirements established by the NERC CIP–008–06 standard

○ Added ''Attempted Cyber Compromise'' Alert Type to be filed within 1-Day

○ Added corresponding criteria ''Cyber Security Incident that was an attempt to compromise a High or Medium Impact Bulk Electric System Cyber System or their associated Electronic Access Control or Monitoring Systems''

• Updated Line Numbers throughout Schedule 1 and Schedule 2

• Added self-identified FOIA Exemption criteria for respondents to identify whether the respondent considers the information in Schedule 1 Lines C & D may be exempt FOIA due to the following:

○ ''Privileged or confidential information, *e.g.,* trade secrets, commercial, or financial information''

○ ''Critical Electric Infrastructure Information''

○ ''Other information exempt from FOIA''

• Added self-identified FOIA Exemption criteria for respondents to identify whether information in Schedule 2 may be exempt FOIA due to the following:

○ ''Privileged or confidential information, *e.g.,* trade secrets, commercial, or financial information''

○ ''Critical Electric Infrastructure Information''

○ ''Other information exempt from FOIA''

• Added the following to the direction to the Narrative Section ''Cyber Attributes: For cyber events, including attempted cyber compromises, provide the following attributes (at a minimum): (1) The functional impact, (2) the attack vector used, and (3) the level of intrusion that was achieved or attempted.''

• Added the DHS CISA Integrated Operations Coordination Center (CIOCC) or their successor(s) to Line W.

(5) *Annual Estimated Number of Respondents:* 2,515.

(6) *Annual Estimated Number of Total Responses:* 250.

(7) *Annual Estimated Number of Burden Hours:* 5,457.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $437,324.

*Comments are invited on whether or not:* (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

*Statutory Authority:* 15 U.S.C. 772(b), 764(b); 764(a); and 790a and 42 U.S.C. 7101 *et seq.* and the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601, Pub. L. 93–275.

*Signing Authority:* This document of the Department of Energy was signed on June 3, 2020, by Nicholas Andersen, Deputy Assistant Secretary, Office of Cybersecurity, Energy Security, and Emergency Response, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on June 8, 2020.

**Treena V. Garrett,**

*Federal Register Liaison Officer,U.S. Department of Energy.*

[FR Doc. 2020–12689 Filed 6–11–20; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## DOE/NSF High Energy Physics Advisory Panel

**AGENCY:** Office of Science, Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the DOE/NSF High Energy Physics Advisory Panel (HEPAP). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, July 9, 2020; 9:00 a.m. to 6:00 p.m.; Friday, July 10, 2020; 8:30 a.m. to 4:00 p.m.

**ADDRESSES:** This meeting is open to the public. This meeting will be held digitally via Zoom. Information to participate can be found on the website closer to the meeting date at *https://science.osti.gov/hep/hepap/meetings/.*

**FOR FURTHER INFORMATION CONTACT:** Michael Cooke, Executive Secretary; High Energy Physics Advisory Panel (HEPAP); U.S. Department of Energy; Office of Science; SC–35/Germantown Building, 1000 Independence Avenue SW, Washington, DC 20585; Telephone: (301) 903–4140; Email: *michael.cooke@science.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of Meeting:* To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of high energy physics research.

*Tentative Agenda:* Agenda will include discussions of the following:

**July 9–10, 2020**

- Discussion of Department of Energy High Energy Physics Program
- Discussion of National Science Foundation Elementary Particle Physics Program
- Reports on and Discussions of Topics of General Interest in High Energy Physics
- Public Comment (10-minute rule)

*Public Participation:* The meeting is open to the public. A webcast of this meeting will be available. Please check the website below for updates and information on how to view the meeting. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Michael Cooke, (301) 903–4140 or by email at: *Michael.Cooke@science.doe.gov.* You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Panel will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

*Minutes:* The minutes of the meeting will be available on the U.S. Department of Energy's Office of High Energy Physics Advisory Panel website: *https://science.osti.gov/hep/hepap/meetings/.*

Signed in Washington, DC, on June 8, 2020.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2020–12707 Filed 6–11–20; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Hydrogen and Fuel Cell Technical Advisory Committee; Notice of Open Teleconference/Webinar

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a teleconference call of the Hydrogen and Fuel Cell Technologies Technical Advisory Committee (HTAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Tuesday, July 7, 2020 from 4:00 p.m. to 5:30 p.m. (ET). To receive the call-in number and passcode, please contact the Committee's Designated Federal Officer at the address or phone number listed below.

**FOR FURTHER INFORMATION CONTACT:** Shawna McQueen, Designated Federal Officer, Office of Energy Efficiency and Renewable Energy, Fuel Cell Technologies Office, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585. Phone number 202–586–0833, and email: *shawna.mcqueen@ee.doe.gov*.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Committee:* The Hydrogen and Fuel Cell Technical Advisory Committee (HTAC) was established under section 807 of the Energy Policy Act of 2005 (EPACT), Public Law 109–58; 119 Stat. 849, to provide advice and recommendations to the Secretary of Energy on the program authorized by Title VIII of EPACT.

*Tentative Agenda:* Discuss and finalize the 2019 Annual Report of the Hydrogen and Fuel Cell Technical Advisory Committee and the HTAC Roadmap Subcommittee Report.

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. In keeping with procedures, members of the public are welcome to make oral statements during the specified period for public comment. The public comment period will take place between 4:00 p.m. and 4:10 p.m. on July 7, 2020. Requests to make oral comments must be received five days prior to the meeting. Oral comments should be limited to two minutes in length. Members of the public will be heard in the order in which they sign up for the public comment period. Reasonable provision will be made to include all scheduled oral statements on the agenda. Please send requests for oral statements or any written comments to the Designated Federal Officer at the email or telephone number listed above.

*Minutes:* The minutes of the meeting will be available for public review and copying within 60 days on the HTAC website at: *https://www.hydrogen.energy.gov/advisory_htac.html*.

Signed in Washington, DC, June 8, 2020.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2020–12708 Filed 6–11–20; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER20–1996–000]**

### Assembly Solar I, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Assembly Solar I, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is June 29, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: June 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–12723 Filed 6–11–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER20–2000–000]**

### Clyde Onsite Generation, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Clyde Onsite Generation, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for

blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is June 29, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: June 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–12724 Filed 6–11–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP20–944–000.

*Applicants:* Algonquin Gas Transmission, LLC.

*Description:* § 4(d) Rate Filing: June 2020 NRA Cleanup Filing to be effective 7/4/2020.

*Filed Date:* 6/4/20.

*Accession Number:* 20200604–5018.

*Comments Due:* 5 p.m. ET 6/16/20.

*Docket Numbers:* RP20–945–000.

*Applicants:* EnerVest Energy Institutional Fund XIII-,EnerVest Energy Institutional Fund XIII-,EnerVest Energy Institutional Fund XIII-,Wapiti Rocky Mountain, L.L.C.

*Description:* Joint Petition for Temporary Waivers of Capacity Release Regulations, et al. of EnerVest Energy Institutional Fund XIII–A, L.P., et al. under RP20–945.

*Filed Date:* 6/4/20.

*Accession Number:* 20200604–5167.

*Comments Due:* 5 p.m. ET 6/11/20.

*Docket Numbers:* RP20–946–000.

*Applicants:* EQT Production Company, EQT Energy, LLC, Diversified Production LLC.

*Description:* Joint Petition for Temporary Waivers of Capacity Release Regulations, et al. of EQT Production Company, et al. under RP20–946.

*Filed Date:* 6/4/20.

*Accession Number:* 20200604–5172.

*Comments Due:* 5 p.m. ET 6/11/20.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–12722 Filed 6–11–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER20–1980–001.

*Applicants:* Cedar Springs Wind, LLC.

*Description:* Tariff Amendment: Cedar Springs Wind, LLC Amendment to MBR Application to be effective 8/3/2020.

*Filed Date:* 6/5/20.

*Accession Number:* 20200605–5232.

*Comments Due:* 5 p.m. ET 6/26/20.

*Docket Numbers:* ER20–2008–000.

*Applicants:* Public Service Company of New Mexico.

*Description:* § 205(d) Rate Filing: Limited Modifications to Formula Rate Template to be effective 6/1/2020.

*Filed Date:* 6/5/20.

*Accession Number:* 20200605–5223.

*Comments Due:* 5 p.m. ET 6/26/20.

*Docket Numbers:* ER20–2009–000.

*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* § 205(d) Rate Filing: Amendment to Formula Rate Template in Attachment M of OATT to be effective 7/15/2020.

*Filed Date:* 6/5/20.

*Accession Number:* 20200605–5231.

*Comments Due:* 5 p.m. ET 6/26/20.

*Docket Numbers:* ER20–2010–000.

*Applicants:* Horizon West Transmission, LLC.

*Description:* Baseline eTariff Filing: Horizon West Transmission, LLC Regulatory Asset Deferred Cost Filing to be effective 12/31/9998.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5104.

*Comments Due:* 5 p.m. ET 6/29/20.

*Docket Numbers:* ER20–2011–000.

*Applicants:* New York Power Authority.

*Description:* Request for Temporary Waiver, et al of the New York Power Authority.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5105.

*Comments Due:* 5 p.m. ET 6/15/20.

*Docket Numbers:* ER20–2012–000.

*Applicants:* Orbit Bloom Energy, LLC.

*Description:* Baseline eTariff Filing: Orbit Bloom Energy, LLC Application for MBR Authority to be effective 6/20/2020.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5110.

*Comments Due:* 5 p.m. ET 6/29/20.

*Docket Numbers:* ER20–2013–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Cancellation: Notice of Cancellation of ISA No. 3608, Queue No. Y2–100 to be effective 6/1/2020.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5135.

*Comments Due:* 5 p.m. ET 6/29/20.

*Docket Numbers:* ER20–2014–000.

*Applicants:* Rattlesnake Flat, LLC.

*Description:* Baseline eTariff Filing: Application for Market-Based Rate Authorization under Section 205 of the FPA to be effective 8/1/2020.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5160.

*Comments Due:* 5 p.m. ET 6/29/20.

Take notice that the Commission received the following public utility holding company filings:

*Docket Numbers:* PH20–12–000.

*Applicants:* Nevada Gold Mines LLC, Nevada Gold Energy LLC.

*Description:* Nevada Gold Mines LLC, et al. submits FERC 65–A Updated Exemption Notification.

*Filed Date:* 6/8/20.

*Accession Number:* 20200608–5163.

*Comments Due:* 5 p.m. ET 6/29/20.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–12721 Filed 6–11–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 4428–011]**

## Walden Hydro, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 4428–011.

c. *Date filed:* May 29, 2020.

d. *Applicant:* Walden Hydro, LLC.

e. *Name of Project:* Walden Hydroelectric Project.

f. *Location:* On the Wallkill River, in the Village of Walden, Orange County, New York. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Elise Anderson, Senior Environmental Permitting Specialist, Walden Hydro, LLC, Enel Green Power North America, Inc., 100 Brickstone Square, Suite 300, Andover, MA 01810; Phone at (978) 447–4408 or email at *Elise.Anderson@enel.com.*

i. *FERC Contact:* Samantha Pollak at (202) 502–6419, or *samantha.pollak@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing additional study requests and requests for cooperating agency status: July 28, 2020.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

m. The application is not ready for environmental analysis at this time.

n. The Walden Project consists of the following existing facilities: (1) A 417-foot-long, V-shaped concrete dam topped with 2-foot-high flashboards; (2) an impoundment with a surface area of 69 acres at the normal pool elevation of 321.3 feet National Geodetic Vertical Datum of 1929 (NGVD29); (3) an intake structure consisting of a 252-foot-long, 56-foot-wide, 18-foot-deep canal forebay; (4) four 40-foot-long steel penstocks; (5) a 60-foot-long, 45-foot-wide, 29-foot-high powerhouse containing three horizontal double-runner Francis turbine units with ratings of 980 kilowatts (kW), 630 kW, and 500 kW, respectively for a total rated capacity of 2,110 kW; (6) a 30-foot-long, 37-foot-wide tailrace; (7) a 230-foot-long bypass reach consisting primarily of bedrock; (8) a transmission line; (9) a substation with a single-phase 12.5-kilovolt transformer; and (10) appurtenant facilities.

The project operates in a run-of-river mode with a minimum flow of 31 cubic feet per second. The project has an average annual generation of 3,333 megawatt-hours between 2012 and 2019.

o. A copy of the application may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document (P–4428). For assistance, contact FERC Online Support. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19) issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via

email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter (if necessary)—July 2020
Request Additional Information—July 2020
Issue Acceptance Letter—October 2020
Issue Scoping Document 1 for comments—November 2020
Request Additional Information (if necessary)—January 2021
Issue Scoping Document 2 (if necessary)—February 2021
Issue Notice of Ready for Environmental Analysis—February 2021
Commission issues EA—September 2021
Comments on EA—October 2021

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: June 8, 2020.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2020–12719 Filed 6–11–20; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–9051–3]**

### Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)
Filed June 1, 2020, 10 a.m. EST Through June 8, 2020, 10 a.m. EST
Pursuant to 40 CFR 1506.9.

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20200119, Draft, USFWS, BLM, UT, Northern Corridor—Highway Right-of-way, Issuance of an Incidental Take Permit, Draft EIS and Draft Resource Management Plan Amendments, Comment Period Ends: 09/10/2020, Contact: Gloria Tibbetts 435–865–3063.

EIS No. 20200120, Draft, FRA, DC, Washington Union Station Expansion Project, Comment Period Ends: 07/27/2020, Contact: David Valenstein 202–493–6368.

EIS No. 20200121, Draft, BIA, CA, Tejon Trust Acquisition and Casino Project, Comment Period Ends: 07/27/2020, Contact: Chad Broussard 916–978–6165.

EIS No. 20200122, Final, BLM, CO, Proposed Competitive Mineral Materials Sale (COC–078119) at Parkdale, Fremont County, CO. Review Period Ends: 07/13/2020, Contact: Stephanie Carter 719–269–8551.

EIS No. 20200123, Draft Supplement, BOEM, MA, Vineyard Wind 1 Offshore Wind Energy Project, Comment Period Ends: 07/27/2020, Contact: Michelle Morin 703–787–1722.

**Amended Notice**

EIS No. 20200118, Draft, BR, UT, Lake Powell Pipeline Project, Comment Period Ends: 09/08/2020, Contact: Rick Baxter 801–379–1078. Revision to FR Notice Published 6/5/2020; Extending the Comment Period from 9/3/2020 to 9/8/2020.

Dated: June 9, 2020.

**Cindy S. Barger,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2020–12732 Filed 6–11–20; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–10010–54–OW]**

### The National Drinking Water Advisory Council: Request for Nominations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Request for nominations.

**SUMMARY:** The Environmental Protection Agency (EPA) is inviting nominations from a diverse range of qualified candidates to be considered to fill vacancies on the National Drinking Water Advisory Council (NDWAC or Council). The 15-member Council was established by the Safe Drinking Water Act (SDWA) to provide independent advice, consultation, and recommendations to the EPA Administrator on matters relating to the activities, functions, policies, and regulations required by the SDWA. This announcement solicits nominations to fill five vacancies with three-year appointments from December 2020 through December 2023. The EPA may also consider nominations received through this solicitation in 2021 and in the event of unplanned vacancies on the Council. To enable the EPA to maintain the representation required by statute, the Agency is seeking nominees who are from appropriate state and local agencies concerned with water hygiene and public water supply; representatives of private organizations or groups demonstrating an active interest in the field of water hygiene and public water supply, including nominees associated with small, rural public water systems; and from the general public.

**DATES:** Nominations should be submitted no later than July 13, 2020.

**ADDRESSES:** We encourage you to submit nominations electronically, with the subject line ''NDWAC Membership 2020,'' to *corr.elizabeth@epa.gov,* as there may be a delay in processing U.S. mail and no hand deliveries are currently accepted due to the COVID–19 pandemic. If you have concerns about submitting your nomination electronically, you may contact Elizabeth Corr, the Designated Federal Officer (DFO) for the NDWAC, by email at **corr.elizabeth@epa.gov,** with the subject line ''NDWAC Membership 2020,'' or by phone at (202) 564–3798, to discuss a possible alternative delivery method.

**FOR FURTHER INFORMATION CONTACT:** Email your questions to Elizabeth Corr at *corr.elizabeth@epa.gov;* or call (202) 564–3798. You may also mail Elizabeth Corr, at the Office of Ground Water and Drinking Water, MC: 4601M, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, but be advised that there may be a delay in processing U.S. mail and no hand deliveries will be accepted due to the COVID–19 pandemic.

**SUPPLEMENTARY INFORMATION:**

*National Drinking Water Advisory Council:* The Council was created by Congress on December 16, 1974, as part of the Safe Drinking Water Act of 1974, Public Law 93–523, 42 U.S.C. 300j–5, and is operated in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The Council consists of 15 members, including the chairperson, all of whom are appointed by the EPA Administrator. Five members are from appropriate state and local agencies concerned with water hygiene and public water supply; five members represent private organizations or groups demonstrating an active interest in the field of water hygiene and public water supply—of which two such

members shall be associated with small, rural public water systems; and five members are from the general public. The current list of members is available on the EPA's NDWAC website at *https://www.epa.gov/ndwac* under ''NDWAC roster.''

The Council typically will meet in person once each year and may hold a second meeting, either in person or by video/teleconference, during the year. Members also may be asked to participate in ad hoc workgroups to develop policy recommendations, advice letters, and reports to address specific program issues.

*Member Nominations:* Any interested person and/or organization may nominate qualified individuals for membership. Interested candidates may self-nominate. The EPA values and welcomes diversity.

In an effort to obtain nominations of diverse candidates, the EPA encourages nominations of women and men of all racial and ethnic groups.

All nominations will be fully considered, but applicants need to be aware of the specific representation required by the SDWA: State and local agencies concerned with water hygiene and public water supply (two vacancies in 2020); private organizations or groups demonstrating an active interest in the field of water hygiene and public water supply (three vacancies in 2020—of which one will be associated with small, rural public water systems); and the general public (one vacancy in 2021). The EPA may also consider nominations received through this solicitation in the event of unplanned vacancies on the Council. Other criteria used to evaluate nominees will include:

- Demonstrated experience with drinking water issues at the national, state, or local level;
- Excellent interpersonal, oral, and written communication and consensus-building skills;
- Willingness to commit time to the Council and demonstrated ability to work constructively on committees;
- Absence of financial conflicts of interest;
- Absence of appearance of a lack of impartiality; and
- Background and experience that would help members contribute to the diversity of perspectives on the Council, *e.g.,* geographic, economic, social, cultural, educational backgrounds, professional affiliations, and other considerations.

Nominations must include a resume, which provides the nominee's background, experience, and educational qualifications, as well as a brief statement (one page or less) describing the nominee's interest in serving on the Council and addressing the other criteria previously described. Nominees are encouraged to provide any additional information that they think would be useful for consideration, such as: Availability to participate as a member of the Council; and how the nominee's background, skills, and experience would contribute to the diversity of the Council. Nominees should be identified by name, occupation, position, current business address, email address, and telephone number. The DFO will use the email address provided for the nominee to acknowledge receipt of nominations.

Persons selected for membership will receive compensation for travel and a nominal, daily compensation (if appropriate) while attending meetings. All selected candidates will be designated as Special Government Employees (SGEs) and will be required to submit the ''Confidential Financial Disclosure Form for Environmental Protection Agency Special Government Employees'' (EPA Form 3110–48). This confidential form provides information to the EPA's ethics officials, to determine whether there is a conflict between the SGE's public duties and their private interests, including an appearance of a loss of impartiality as defined by federal laws and regulations. The form may be viewed and downloaded through the ''Ethics requirements'' link on the EPA's website at *https://www.epa.gov/ndwac.*

Other sources, in addition to this **Federal Register** announcement, may also be utilized in the solicitation of nominees. To help the EPA in evaluating the effectiveness of its outreach efforts, please tell us how you learned of this opportunity.

**Jennifer L. McLain,**

*Director, Office of Ground Water and Drinking Water.*

[FR Doc. 2020–12727 Filed 6–11–20; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2019–0178; FRL–10010–58–OAR]**

## Proposed Information Collection Request; Comment Request; Information Collection; Effort for Ethylene Oxide Commercial Sterilization Facilities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Information Collection Effort for Ethylene Oxide Commercial Sterilization Facilities'' (EPA ICR No. 2623.01, OMB Control No. 2060–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comment on specific aspects of the proposed information collection as described below. This is a request for approval of a new collection. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** Comments must be submitted on or before August 11, 2020.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2019–0178, online using *https://www.regulations.gov/* (our preferred method) or by email to *a-and-r-docket@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room was closed to public visitors on March 31, 2020, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov* or email, as there is a temporary suspension of mail delivery to the EPA, and no hand deliveries are currently accepted.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** Mr. Matthew Witosky, Sector Policies and Programs Division (E143–05), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–2865; email address: *witosky.matthew@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Supporting documents explaining in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov/.* The telephone number for the Docket Center is (202) 566–1742. For additional information about EPA's Docket Center services and

the current status, please visit us online at *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to (1) evaluate whether the proposed collection of information is necessary for the proper performance of Agency functions; (2) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on responders, 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. The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** document to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

*Abstract:* The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Ethylene Oxide (EtO) Commercial Sterilization and Fumigation Operations were finalized in December 1994 (59 FR 62585) at 40 CFR part 63, subpart O. The NESHAP establishes emission standards for both major and area sources that use at least 1 ton of EtO in sterilization or fumigation operations in each 12-month period. The standards require existing and new major sources to control emissions to the level achievable by the maximum achievable control technology and require existing and new area sources to control emissions using generally available control technology. The current standards address EtO emissions originating at two of the three major emissions sources: The sterilization chamber vent and the aeration room vent. The third major EtO emissions source is the chamber exhaust vent (CEV), and while the 1994 NESHAP regulated emissions from CEVs, relevant standards were later removed due to safety concerns (66 FR 55577, November 2, 2001). To fulfill its requirements under sections 112(d) and 112(f) of the Clean Air Act (CAA), the EPA completed a residual risk and technology review for the NESHAP in 2006 and concluded, at that time, that no revisions to the standards were necessary (71 FR 17712, April 7, 2006).

More recently, in 2016, the EPA released its updated Integrated Risk Information System value for EtO, which indicated that cancer risks from EtO were significantly higher than previously understood. Subsequently, the National Air Toxics Assessment (NATA) released in August 2018, identified EtO emissions as a potential concern in several areas across the country. The latest NATA estimates that EtO significantly contributes to potential elevated cancer risks in some census tracts across the U.S. (less than 1 percent of the total number of tracts). Further investigation revealed commercial sterilization using EtO as a source category contributing to some of these risks, which has led the EPA to evaluate, in greater depth, potential options to reduce emissions of EtO from the source category.

Over the past year, the EPA has been gathering additional information to evaluate opportunities to reduce EtO emissions through potential rule revisions and more immediate emission reduction steps. The goal of the data gathering efforts is to better understand the emissions sources, measurement and monitoring techniques, and available control technologies and their associated efficiencies.

These data gathering efforts also included an advance notice of proposed rulemaking (ANPRM) and a CAA section 114 questionnaire requesting facility-specific data on process controls and operational practices that may reduce the amount of EtO released into the ambient air. The EPA published the ANPRM on December 12, 2019 (84 FR 67889). In the ANPRM, the EPA solicited comments on a range of issues including the modeling file and EtO annual usage, control of fugitive emissions, CEV control and safety considerations, other point source control options, and small business considerations. The public comments on the ANPRM were due on February 10, 2020, and comments received are available in the docket (*https://www.regulations.gov/*). Alongside the ANPRM, the EPA exercised its authority under section 114(a) of the CAA to initiate a questionnaire to gather information from nine companies in December 2019. The instructions and questionnaire were posted to the EPA web page [1] where they were accessed by facilities. Facilities were required to provide electronic responses within 60 days or by February 6, 2020. Facility responses to the initial questionnaire have been collected and compiled to create a source category database. While these data gathering efforts have been successful in identifying process controls and operational practices as possible methods for reducing the amount of EtO released into the ambient air, there are still several important information gaps that should be filled prior to any future rulemaking activity.

In reviewing the December 2019 questionnaire results, the EPA found that each EtO commercial sterilization facility's equipment, equipment configuration, processes, and pace of technological advancement is unique. The most recent sector-level data collected by the EPA was completed over 25 years ago for the development of the original NESHAP and is now outdated. The combined data from this ICR and the December 2019 questionnaire will enable the EPA to obtain an updated, comprehensive, and consistent dataset. The combined results provide the EPA with the most information possible to achieve its objectives of reducing EtO emissions and informing potential rule revisions.

Therefore, the EPA is now contemplating exercising its authority under section 114(a) of the CAA to broaden its data collection efforts through this new ICR to include all facilities subject to 40 CFR part 63, subpart O. The data collected through this new ICR, as well as the initial questionnaire, would enable the EPA to have a complete understanding of all emissions, emissions sources, processes, and control technologies in use at EtO sterilization facilities nationwide, providing the most robust foundation for a potential future rulemaking. Based on the EPA's knowledge of EtO sterilization facilities, an estimated 108 facilities have been identified within the EtO commercial sterilization source category. If OMB approves this new ICR, respondents not included in the initial questionnaire would be required to complete the questionnaire under the authority of section 114 of the CAA. The EPA anticipates issuing the CAA section 114 letters by December 2020. These letters would require owners or operators to complete and submit the questionnaire within 90 days from the date they receive the letter from the EPA. The ICR process, including the instructions and questionnaire, would be identical to the questionnaire that was initiated in December 2019. The instructions for the questionnaire are an Adobe portable document format (PDF), and the questionnaire is a Microsoft Excel workbook that is available in the docket. The questionnaire contains 14 worksheets. Each worksheet has one or

[1] *https://www.epa.gov/stationary-sources-air-pollution/ethylene-oxide-emissions-standards-sterilization-facilities.*

more tables designed to collect specific information as detailed in Table 1.

TABLE 1—QUESTIONNAIRE DATA COLLECTION FORM DESIGN

| Tab name | Description of data |
|---|---|
| Introduction | Introduction and instructions for completing and submitting the questionnaire. |
| Terms | Definitions or explanations of technical terms. |
| Facility Details | Information about facility registrations, ownership, general characteristics, facility-level data. |
| Room Area | Characteristics, inventory of components, and control of individual room areas where EtO is used or emitted. |
| EtO & EG Storage | Questions regarding EtO storage in drums and containers, and ethylene glycol (EG) tanks. |
| Sterilizer Chambers | Operation, monitoring, and control characteristics of sterilizer chambers, including chamber exhaust vents. |
| Aeration | Details of aeration equipment. |
| APCD Summary | Information about all air pollution control devices operated by the facility. |
| APCD Details | Details regarding air pollution control devices such as scrubbers, catalytic oxidizers, thermal oxidizers, and others. |
| EtO Monitoring | Information about workspace monitoring, personal monitoring, room monitoring conducted by facility. |
| Miscellaneous | Questions regarding facility's wastewater treatment and other items of EtO commercial sterilization operation. |
| Additional Info | Extra space to provide any additional information requested within the questionnaire. |
| Documents | Designated fields for reporter to attach documents requested throughout the questionnaire (*e.g.,* facility diagram; process flow diagrams; air permit; permit application documents; startup, shutdown, malfunction plan; EtO calculations and supporting information; performance tests; engineering tests; parametric monitoring; standard operating procedures; EtO monitoring results; documentation of studies done on quantifying EtO residuals in your products; and other process and instrumentation diagrams). |
| Certification | Reporter's information and certification for completing and submitting the questionnaire. |

As described in the instructions and the questionnaire, facilities may claim certain data as CBI in their response. There is a cell in each worksheet to indicate whether the worksheet contains CBI and if so, each cell containing data being claimed as CBI should be shaded red. It should be noted that CAA section 114(c) exempts emissions data from claims of confidentiality, and emissions data provided may be made available to the public. Emissions data should not be marked confidential. A definition of what the EPA considers emissions data is provided in 40 CFR 2.301(a)(2)(i). Facilities claiming CBI must submit both a non-confidential and confidential version of their response. All non-confidential responses to the ICR would be submitted to the EPA via email or on a thumb drive, CD–ROM, or DVD through the U.S. mail. All confidential responses to the ICR would be submitted on a thumb drive, CD–ROM, or DVD to the EPA through the U.S. mail. Non-confidential information collected from this ICR will be made available to the public. Any information designated as confidential by an ICR respondent that the EPA subsequently determines to constitute CBI or a trade secret under the EPA's CBI regulations at 40 CFR part 2, subpart B, will be protected pursuant to those regulations and, for trade secrets, under 18 U.S.C. 1905. If no claim of confidentiality accompanies the information when it is received by the EPA, it may be made available to the public by the EPA without further notice pursuant to the EPA regulations at 40 CFR 2.203.

*Form numbers:* None.

*Respondents/affected entities:* Facilities subject to 40 CFR part 63, subpart O.

*Respondent's obligation to respond:* Responses to the ICR are mandatory under the authority of section 114 of the CAA.

*Estimated number of respondents:* 66 (total).

*Frequency of response:* Once.

*Total estimated burden:* The estimated cumulative respondent burden is 6,201 hours. The estimated cumulative Agency burden to administer this ICR is 1,727 hours. Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* The estimated cumulative costs to respondents is $569,967, including $995 operation and maintenance costs for media and postage for submitting questionnaires containing CBI. The estimated cumulative Agency costs is $100,049 including $1,440 operation and maintenance costs for data storage.

Dated: June 5, 2020.

**Penny Lassiter,**

*Director, Sector Policies and Programs Division.*

[FR Doc. 2020–12728 Filed 6–11–20; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–3395–N]**

### Medicare Program; Virtual Meeting of the Medicare Evidence Development and Coverage Advisory Committee—July 22, 2020

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces a virtual public meeting of the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC) (''Committee'') will be held on Wednesday, July 22, 2020. This meeting will focus on the home use of noninvasive positive pressure ventilation in patients with chronic respiratory failure (CRF) consequent to chronic obstructive pulmonary disease (COPD). We are seeking the MEDCAC's recommendations regarding the characteristics that define those patient selection and usage criteria, concomitant services, and equipment parameters necessary to best achieve positive patient health outcomes in beneficiaries with CRF consequent to COPD. This meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)).

**DATES:**

*Meeting Date:* The virtual meeting will be held on Wednesday, July 22, 2020 from 8:00 a.m. until 4:30 p.m., Eastern Daylight Time (EDT).

*Deadline for Submission of Written Comments:* Written comments must be received at the email address specified in the **ADDRESSES** section of this notice by 5:00 p.m., Eastern Daylight Time (EDT), on Monday, June 22, 2020. Once submitted, all comments are final.

*Deadlines for Speaker Registration and Presentation Materials:* The deadline to register to be a speaker and to submit PowerPoint presentation materials and writings that will be used in support of an oral presentation is 5:00 p.m., EDT, on Monday, June 22, 2020. Speakers may register by phone or via email by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Presentation materials must be received at the email address specified in the **ADDRESSES** section of this notice.

*Submission of Presentations and Comments:* Presentation materials and written comments that will be presented at the meeting must be submitted via email to *MedCACpresentations@cms.hhs.gov* section of this notice by Monday June 22, 2020.

*Deadline for All Other Attendees Registration:* Individuals who want to join the meeting may register online at *https://letsmeet.webex.com/letsmeet/onstage/g.php?MTID=e6f9d4471a6f1f77e29f5c34c64ccdc4d* by 11:59 p.m. EDT, on Sunday, July 19, 2020.

*Webinar and Teleconference Meeting Information:* Teleconference dial-in instructions, and related webinar details will be posted on the meeting agenda, which will be available on the CMS website *http://www.cms.gov/medicare-coverage-database/indexes/medcac-meetings-index.aspx?bc=BAAAAAAAAAAA&.* Participants in the MEDCAC meeting will require the following: a computer, laptop or smartphone where the WebEx application needs to be downloaded; a strong Wi-Fi or an internet connection and access to use Chrome or Firefox web browser and a webcam if the meeting participant is scheduled to speak or make a presentation during the meeting.

*Deadline for Submitting a Request for Special Accommodations:* Individuals viewing or listening to the meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance, should send an email to the MEDCAC Coordinator as specified in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than 5:00 p.m., EDT on Friday, June 26, 2020.

**ADDRESSES:** Due to the current COVID–19 public health emergency, the Panel meeting will be held *virtually.*

**FOR FURTHER INFORMATION CONTACT:** Tara Hall, MEDCAC Coordinator, via email at *Tara.Hall@cms.hhs.gov* or by phone 410–786–4347.

**SUPPLEMENTARY INFORMATION:**

## I. Background

MEDCAC, formerly known as the Medicare Coverage Advisory Committee (MCAC), is advisory in nature, with all final coverage decisions resting with CMS. MEDCAC is used to supplement CMS' internal expertise. Accordingly, the advice rendered by the MEDCAC is most useful when it results from a process of full scientific inquiry and thoughtful discussion, in an open forum, with careful framing of recommendations and clear identification of the basis of those recommendations. MEDCAC members are valued for their background, education, and expertise in a wide variety of scientific, clinical, and other related fields. (For more information on MEDCAC, see the MEDCAC Charter (*http://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/Downloads/medcaccharter.pdf*) and the CMS Guidance Document, *Factors CMS Considers in Referring Topics to the MEDCAC* (*http://www.cms.gov/medicare-coverage-database/details/medicare-coverage-document-details.aspx?MCDId=10*).

## II. Meeting Topic and Format

This notice announces the Wednesday, July 22, 2020, virtual public meeting of the Committee. This meeting will focus on the home use of noninvasive positive pressure ventilation in patients with CRF consequent to COPD. Devices to be considered are home mechanical ventilators (HMVs), bi-level positive airway pressure (BPAP) devices and continuous positive airway pressure (CPAP) devices. We are seeking the MEDCAC's recommendations regarding the characteristics that define those patient selection and usage criteria, concomitant services, and equipment parameters necessary to best achieve positive patient health outcomes in beneficiaries with CRF consequent to COPD. The MEDCAC will specifically focus on the scientific evidence associated with the outcomes most pertinent to the affected patient population. Outcomes of interest will include decreased mortality, decreased frequency of exacerbations requiring ER or hospital admission, increased time to hospital re-admission for respiratory related disease, and improved function and quality of life.

Background information about this topic, including panel materials, is available at *http://www.cms.gov/medicare-coverage-database/indexes/medcac-meetings-index.aspx?bc=BAAAAAAAAAAA&.* Electronic copies of all the meeting materials will be on the CMS website no later than 2 business days before the meeting. We encourage the participation of organizations with expertise in the appraisal of the state of evidence for the use of HMV, BPAP, and CPAP equipment in the home for the affected patient population. This meeting is open to the public. The Committee will hear oral presentations from the public for approximately 60 minutes. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than what can be reasonably accommodated during the scheduled open public hearing session, we may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 29, 2020. Your comments must focus on issues specific to the list of topics that we have proposed to the Committee. The list of research topics to be discussed at the meeting will be available on the following website prior to the meeting: *http://www.cms.gov/medicare-coverage-database/indexes/medcac-meetings-index.aspx?bc=BAAAAAAAAAAA&.* We require that you declare at the meeting whether you have any financial involvement with manufacturers (or their competitors) of any items or services being discussed. Speakers presenting at the MEDCAC meeting must include a full disclosure slide as their second slide in their presentation for financial interests (for example, type of financial association—consultant, research support, advisory board, and an indication of level, such as minor association < $10,000 or major association > $10,000) as well as intellectual conflicts of interest (for example, involvement in a federal or nonfederal advisory committee that has discussed the issue) that may pertain in any way to the subject of this meeting. If you are representing an organization, we require that you also disclose conflict of interest information for that organization. If you do not have a PowerPoint presentation, you will need to present the full disclosure information requested previously at the beginning of your statement to the Committee.

The Committee will deliberate openly on the topics under consideration. Interested persons may observe the deliberations, but the Committee will

not hear further comments during this time except at the request of the chairperson. The Committee will also allow a 15-minute unscheduled open public session for any attendee to address issues specific to the topics under consideration. At the conclusion of the day, the members will vote and the Committee will make its recommendation(s) to CMS.

**III. Registration Instructions**

CMS' Coverage and Analysis Group is coordinating meeting registration. While there is no registration fee, individuals must register to attend. You may register online at *http://www.cms.gov/apps/events/upcomingevents.asp?strOrderBy=1&type=3* or by phone by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the deadline listed in the **DATES** section of this notice. Please provide your full name (as it appears on your state-issued driver's license), address, organization, telephone number(s), and email address. You will receive a registration confirmation with instructions for your participation at the virtual public meeting.

**IV. Collection of Information**

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

The Acting Director for the Center for Clinical Standards and Quality, at the Centers for Medicare & Medicaid Services, Jean Moody-Williams, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the **Federal Register** Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

**Authority:** 5 U.S.C. App. 2, section 10(a).

Dated: June 8, 2020.

**Evell J. Barco Holland,**

*Federal Register Liaison, Department of Health and Human Services.*

[FR Doc. 2020–12720 Filed 6–10–20; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Administration for Native Americans (ANA) Ongoing Progress Report (OPR) and Objective Work Plan (OWP)

**AGENCY:** Administration for Native Americans, Administration for Children and Families, HHS.

**ACTION:** Request for public comment.

**SUMMARY:** The Administration for Children and Families' (ACF) Administration for Native Americans (ANA) is requesting a revision to the information collection: Ongoing Progress Report (OPR) and the Objective Work Plan (OWP) (OMB #0970–0452). Changes are proposed to reduce the burden on the public by combining ANA's Annual Data Report (OMB #0970–0475) with the OPR.

**DATES:** *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

**ADDRESSES:** Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

**SUPPLEMENTARY INFORMATION:**

*Description:* Content changes are being made to the currently approved OPR. ANA will continue to use the currently approved OPR with minimal changes to the instructions for the remainder of fiscal year (FY) 2020 and will use the modified OPR beginning FY 2021. The modified OPR combines ANA's Annual Data Report (OMB #0970–0475) with the OPR. The information in the OPR is collected on a semi-annual basis to monitor the performance of grantees and better gauge grantee progress.

The OPR information collection is conducted in accordance with Sec. 811 [42 U.S.C. 2992] of the Native American Programs Act and will allow ANA to report quantifiable results across all program areas. It also provides grantees with parameters for reporting their progress and helps ANA better monitor and determine the effectiveness of their projects.

There are no changes proposed to the OWP. The OWP information collection is conducted in accordance with 42 U.S.C. of the Native American Programs Act of 1972, as amended. This collection is necessary to evaluate applications for financial assistance and determine the relative merits of the projects for which such assistance is requested, as set forth in Sec. 806 [42 U.S.C. 2991d–1](a)(1).

*Respondents:* Federally and state-recognized tribes, Native Pacific Islanders, Tribal Colleges and Universities, native non-profits, and consortia.

ANNUAL BURDEN ESTIMATES

| Instrument | Total number of respondents | Total number of responses per respondent | Average burden hours per response | Total burden hours | Annual burden hours * |
|---|---|---|---|---|---|
| Objective Work Plan | 300 | 1 | 3 | 900 | 300 |
| Ongoing Progress Report FY 2020 | 200 | 2 | 1 | 400 | 133 |
| Ongoing Progress Report FY 2021—Exp. Date | 200 | 4 | 2 | 1600 | 533 |

* Burden is annualized over the three year approval period.

*Estimated Total Annual Burden Hours:* 966.

*Comments:* The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information

technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

**Authority:** Sec. 806 [42 U.S.C. 2991d–1](a)(1) and Sec. 811 [42 U.S.C. 2992].

**Mary B. Jones,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2020–12739 Filed 6–11–20; 8:45 am]

**BILLING CODE 4184–34–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–D–4533]**

### Compounding Animal Drugs From Bulk Drug Substances; Draft Guidance for Industry; Availability; Extension of Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability; extension of comment period.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice of availability that published in the **Federal Register** on November 20, 2019. In that notice, FDA requested comments on the draft guidance for industry (GFI) #256 entitled ''Compounding Animal Drugs from Bulk Drug Substances.'' FDA is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

**DATES:** FDA is further extending the comment period on the document published November 20, 2019 (84 FR 64085), which was reopened in a document published February 20, 2020 (85 FR 9783). Submit either electronic or written comments on the draft guidance by October 15, 2020, to ensure that the Agency considers your comments on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

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

*Written/Paper Submissions*

Submit written/paper submissions as follows:

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

*Instructions:* All submissions received must include the Docket No. FDA–2018–D–4533 for ''Compounding Animal Drugs From Bulk Drug Substances.'' 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, 240–402–7500.

- 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, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Eric Nelson, Division of Compliance (HFV–230), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–7001, *cvmcompliance@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of November 20, 2019, FDA published a notice announcing the availability of draft GFI #256 entitled ''Compounding Animal Drugs From Bulk Drug Substances'' with a 90-day comment period. We requested comments on the draft guidance with respect to animal drug compounding from bulk drug substances under certain circumstances when no other medically appropriate treatment option exists.

Interested persons were originally given until February 18, 2020, to comment on the draft guidance. The Agency received requests to allow interested persons additional time to comment. The requests conveyed concern that the initial 90-day comment period did not allow sufficient time to develop a comprehensive response. FDA considered these requests and reopened the comment period for an additional 120 days, until June 17, 2020 (85 FR 9783).

Since then, FDA has received additional requests to further extend the comment period. FDA has considered the requests and is extending the comment period for the notice of availability for another 120 days, until October 15, 2020. The Agency believes that a further extension of 120 days allows adequate time for interested persons to submit comments.

Dated: June 8, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–12750 Filed 6–11–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0144]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Qualified Importer Program

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments (including recommendations) on the collection of information by July 13, 2020.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0840. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** 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, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

### Agency Information Collection Activities; Proposed Collection; Comment Request; FDA's Voluntary Qualified Importer Program

*OMB Control Number 0910–0840—Extension*

The FDA Food Safety Modernization Act (FSMA) (Pub. L. 111–353) enables FDA to better protect public health by helping to ensure the safety and security of the food supply. It enables FDA to focus more on preventing food safety problems rather than relying primarily on reacting to problems after they occur. FSMA recognizes the important role industry plays in ensuring the safety of the food supply, including the adoption of modern systems of preventive controls in food production. Under FSMA, those that import food have a responsibility to ensure that their suppliers produce food that meets U.S. safety standards.

FSMA also requires FDA to establish a voluntary, fee-based program for the expedited review and importation of foods by importers who achieve and maintain a high level of control over the safety and security of their supply chains. This control includes importation of food from facilities that have been certified under FDA's accredited third-party certification program, as well as other measures that support a high level of confidence in the safety and security of the food they import. Expedited entry incentivizes importers to adopt a robust system of supply chain management and further benefits public health by allowing FDA to focus its resources on food entries that pose a higher risk to public health.

Section 302 of FSMA amended the Federal Food, Drug, and Cosmetic Act (FD&C Act) by adding new section 806, Voluntary Qualified Importer Program (VQIP) (21 U.S.C. 384b). Section 806(a)(1) of the FD&C Act directs FDA to establish this voluntary program for the expedited review and importation of food, and to establish a process for the issuance of a facility certification to accompany food offered for importation by importers participating in VQIP. Section 806(a)(2) directs FDA to issue a guidance document related to participation in, revocation of such participation in, reinstatement in, and compliance with VQIP. Accordingly, in the **Federal Register** of November 14, 2016 (81 FR 79502), FDA published a notice announcing the availability of a final guidance for industry entitled ''FDA's Voluntary Qualified Importer Program.'' The guidance is available from our website at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-fdas-voluntary-qualified-importer-program.*

In the **Federal Register** of February 5, 2020 (85 FR 6556) we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received. We estimate the burden of the information collection as follows:

TABLE 1—ONE-TIME RECORDKEEPING BURDEN [1]

| Information collection activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Quality Assurance Program (QAP) preparation | 200 | 1 | 200 | 160 | 32,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our one-time recordkeeping burden estimate. On average, the preparation of a QAP by a VQIP applicant is estimated at approximately 160 hours (110 + 40 + 10). In estimation of the one-time recordkeeping burden to prepare a QAP manual, we assume that VQIP importers do not already have a similar manual in place (*e.g.,* food safety plan under the Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food regulation (21 CFR part 117); food defense plan under the Focused Mitigation Strategies to Protect Food Against Intentional Adulteration regulation (IA regulation) (21 CFR part 121)). We continue to use the recordkeeping burden of preparing a food safety plan under part 117, 110 hours, as a proxy for the burden to prepare QAP Food Safety Policies and Procedures. We continue to estimate that, on average, it would take 40 hours for an applicant to prepare the food defense portion of the VQIP QAP, similar to the estimated burden for preparing a food defense plan under the IA regulation. We also continue to

estimate it will take a VQIP applicant no longer than 10 hours to develop the portion of its QAP that includes compiling its company profile, organizational structure, corporate quality policy statement, documentation of contracts, and procedures for record retention. Therefore, the one-time recordkeeping burden for 200 VQIP applicants to prepare QAPs is estimated at 32,000 hours (200 applicants × 160 hours/applicant) (see table 1). To the extent that some importers do have QAP manuals in place, the burden would be overestimated.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| Information collection activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| QAP Modification | 200 | 1 | 200 | 16 | 3,200 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

A VQIP importer is expected to update its QAP on an ongoing basis. Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our annual recordkeeping burden estimate. We estimate it would take 10 percent of the effort to prepare the QAP, or 16 hours, to update the QAP each year. Therefore, we estimate the annual recordkeeping burden of modification of the QAP for 200 VQIP importers at 3,200 hours (200 importers × 16 hours/importer).

TABLE 3—ESTIMATED ONE-TIME REPORTING BURDEN [1]

| Information collection activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Initial VQIP application | 100 | 1 | 100 | 80 | 8,000 |
| Initial VQIP application w/ additional information | 100 | 1 | 100 | 100 | 10,000 |
| Total | | | | | 18,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The guidance informs food importers of application procedures for VQIP. Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our one-time reporting burden estimate. As we are still in the process of implementing this program, we continue to estimate that up to 200 qualified importers will be accepted in the upcoming year of VQIP. We estimate that it will take 80 person-hours to compile all the relevant information and complete the application for the VQIP program. For the purpose of this analysis, we assume that 50 percent of all applications received will require additional information and it would take an additional 20 person-hours by the importer to provide that information. Therefore, we estimate that 100 importers will spend 8,000 hours (80 hours/importer × 100 importers) and 100 importers will spend 10,000 hours (100 hours/importer × 100 importers) to submit their initial VQIP applications for a total one-time reporting burden of 18,000 hours (see table 3).

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Information collection activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Subsequent Year VQIP Application | 200 | 1 | 200 | 20 | 4,000 |
| Request to Reinstate Participation | 2 | 1 | 2 | 10 | 20 |
| Total | | | | | 4,020 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The guidance states that each VQIP participant will submit to FDA a notice of intent to participate in VQIP on an annual basis. Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our annual reporting burden estimate. We expect that each of the expected 200 importers in VQIP would apply in the subsequent year to participate in VQIP. We expect that an application to participate in VQIP in a subsequent year will take significantly less time to prepare than the initial application. We use 25 percent of the amount of effort to prepare and submit the initial application for acceptance in VQIP. Therefore, it is expected that, on average, each VQIP importer will spend 20 hours to complete and submit a VQIP application for each subsequent year. The annual burden of completing a subsequent year application to participate in VQIP status by 200 importers is estimated at 4,000 hours (200 applications × 20 hours/application) (see table 4).

Finally, we have added to the VQIP estimated annual reporting burden an estimate of the burden associated with importers' requests to reinstate participation in VQIP after their participation is revoked. We believe most participants will not need to use this provision, and we have included an

estimate that reflects this. Upon implementation of the VQIP, we will reevaluate our estimate for future OMB submission and revise it accordingly.

Dated: June 3, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–12755 Filed 6–11–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2012–N–0536]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device User Fee Cover Sheet, Form FDA 3601 and Device Facility User Fee Cover Sheet, Form FDA 3601a

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments revising the information collection by adding Form FDA 3601a, entitled ''Device Facility User Fee Cover Sheet,'' which is submitted along with registration and listing fee payments.

**DATES:** Submit either electronic or written comments on the collection of information by August 11, 2020.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before August 11, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of August 11, 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–2012–N–0536 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device User Fee Cover Sheet, Form FDA 3601 and Device Facility User Fee Cover Sheet, Form FDA 3601(a).'' 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, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of an

existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Medical Device User Fee Cover Sheet, Form FDA 3601 and Device Facility User Fee Cover Sheet, Form FDA 3601a**

*OMB Control Number 0910–0511—Revision*

The Federal Food, Drug, and Cosmetic Act, as amended by the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), and the Medical Device User Fee Amendments of 2007 (Title II of the Food and Drug Administration Amendments Act of 2007), authorizes FDA to collect user fees for certain medical device applications. Under this authority, companies pay a fee for certain new medical device applications or supplements submitted to the Agency for review. Because the submission of user fees concurrently with applications and supplements is required, the review of an application cannot begin until the fee is submitted. Form FDA 3601, the ''Medical Device User Fee Cover Sheet,'' is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference between the fees submitted for an application with the actual submitted application by using a unique number tracking system. The information collected is used by FDA's Center for Devices and Radiological Health and FDA's Center for Biologics Evaluation and Research to initiate the administrative screening of new medical device applications and supplemental applications.

We are revising the information collection to add Form FDA 3601a, the ''Device Facility User Fee Cover Sheet.'' Owners or operators of places of business (also called establishments or facilities) that are involved in the production and distribution of medical devices intended for use in the United States are required to register annually with FDA, a process known as establishment registration (21 CFR part 807, subparts A through D). (The information collection for medical device establishment registration and listing is approved under OMB control number 0910–0625.) All establishments required to register must pay a user fee. Form FDA 3601a, the ''Device Facility User Fee Cover Sheet,'' is designed to collect payments for the annual establishment registration fee for medical device establishments.

The total number of annual responses for Form FDA 3601 is based on the average number of cover sheet submissions received by FDA in recent years. The number of received annual responses includes cover sheets for applications that were qualified for small businesses and fee waivers or reductions. The estimated hours per response are based on past FDA experience with the various cover sheet submissions and range from 5 to 30 minutes. For this analysis, we estimate 18 minutes per coversheet.

The total number of annual responses for Form FDA 3601a is based on the average number of cover sheet submissions received by FDA in recent years. Based on past FDA experience with various cover sheet submissions, we estimate 10 minutes per response.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1] [2]

| FDA Form No. | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| 3601 | 6,182 | 1 | 6,182 | 0.30 (18 minutes) .. | 1,855 |
| 3601a | 24,086 | 1 | 24,086 | 0.17 (10 minutes) .. | 4,095 |
| Total | ..... | ..... | 30,268 | ..... | 5,950 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Numbers have been rounded.

Our estimated burden for the information collection reflects an overall increase of 4,036 hours and a corresponding increase of 23,889 responses/records. We attribute these increases to two factors: we have revised the burden estimate to include Form FDA 3601a and we have adjusted the number of respondents for Form FDA 3601 to reflect our current data.

Dated: June 1, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–12768 Filed 6–11–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Evaluation of the Maternal and Child Health Bureau's Autism CARES Act Initiative, OMB No. 0915–0335—Revision

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this Notice has closed.

**DATES:** Comments on this ICR must be received no later than July 13, 2020.

**ADDRESSES:** 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 Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the ICR title for reference.

*Information Collection Request Title:* Evaluation of the Maternal and Child Health Bureau's Autism CARES Act Initiative, OMB No. 0915–0335–Revision.

*Abstract:* In response to the growing need for research and resources devoted to autism spectrum disorder and other developmental disabilities, the U.S. Congress passed the Combating Autism Act of 2006 (Pub. L. 109–416); it was reauthorized by the Combating Autism Reauthorization Act of 2011 (Pub. L. 112–32), the Autism Collaboration, Accountability, Research, Education, and Support (Autism CARES) Act of 2014 (Pub. L. 113–157) and the Autism CARES Act of 2019 (Pub. L. 116–60). Through these Autism CARES public laws, HRSA has been tasked with increasing awareness of autism spectrum disorder and developmental disabilities, reducing barriers to screening and diagnosis, promoting evidence-based interventions, and training healthcare professionals in the use of valid and reliable diagnostic tools.

*Need and Proposed Use of the Information:* The purpose of this information collection is to design and implement an impact evaluation to assess the effectiveness of HRSA's Maternal and Child Health Bureau's activities in meeting the goals and objectives of the Autism CARES Act. This ICR is a revision to an existing package; this study is the fourth evaluation of HRSA's autism activities and employs similar data collection methodologies as the prior studies. Grantee interviews remain the primary form of data collection. Minor proposed revisions to the data collection process include (1) modifications to the interview questions based on the current legislation and HRSA's Notices of Funding Opportunity and (2) the creation of a new Grantee Survey to collect common data elements across the three program areas that focus on training, research, and state systems.

*Likely Respondents:* Grantees funded by HRSA's Autism programs will be the respondents for this data collection activity. The grantees are from the following HRSA programs: Leadership Education in Neurodevelopmental and Related Disabilities Training Program; Developmental Behavioral Pediatrics Training Program; State Innovation in Care Integration Program; State Innovation in Care Coordination Program; Research Network Program; Research Program; Interdisciplinary Technical Assistance Center; and the State Public Health Autism Center Resource Center.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Grant Program/form name | Number of respondents | Average number of responses per respondent | Total responses | Average hours per response | Total hour burden |
|---|---|---|---|---|---|
| Grantee Survey (Training and Research Grantees) | 80 | 3 | 240 | 0.5 | 120 |
| Grantee Survey (State Systems Grantees) | 5 | 3 | 15 | | 7.5 |
| Training Interview Guide | 64 | 1.5 | 96 | 1.25 | 120 |
| State Systems Interview Guide | 5 | 1.5 | 7.5 | 1.25 | 9.375 |
| Research Interview Guide | 24 | 1.5 | 36 | 1 | 36 |
| Research Quantitative Data Collection Form | 6 | 1 | 6 | 1 | 6 |
| Interdisciplinary Technical Assistance Center Interview Guide | 1 | 2 | 2 | 1 | 2 |
| State Public Health Autism Center Interview Guide | 1 | 2 | 2 | 1 | 2 |
| Total | 186 | | 404.5 | | 302.9 |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2020–12730 Filed 6–11–20; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The cooperative agreement applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the cooperative agreement applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Implementation Cooperative Agreement (U01 Clinical Trial Required).

*Date:* June 30, 2020.

*Time:* 10:00 a.m. to 12:00 p.m.

*Agenda:* To review and evaluate cooperative agreement applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5600 Fishers Lane, Room 3F21B, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Maryam Feili-Hariri, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F21B, Bethesda, MD 20892–9834, (240) 669–5026, *haririmf@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12679 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; CEIRR Influenza Data Processing and Communication Center (N01).

*Date:* July 9, 2020.

*Time:* 10:00 a.m. to 1:30 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room #3E72A, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Frank S. De Silva, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room #3E72A, Rockville, MD 20892–9823, (240) 669–5023, *fdesilva@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12678 Filed 6–11–20; 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; Chronic Disease Disparities competing supplements.

*Date:* July 20, 2020.

*Time:* 10:00 a.m. to 5:00 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:* Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Chronic Disease Disparities RFA Kidney and Urology.

*Date:* July 21, 2020.

*Time:* 10:00 a.m. to 5:00 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:* Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Chronic Disease Disparities RFA Endocrine and GI.

*Date:* July 28, 2020.

*Time:* 9:00 a.m. to 5:00 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:* Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.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: June 8, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12682 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; 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 National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

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 Biomedical Imaging and Bioengineering Special Emphasis Panel; BTRC Review B–SEP.

*Date:* July 7, 2020.

*Time:* 8:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ruixia Zhou, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 957, Bethesda, MD 20892, (301) 496–4773, *zhour@mail.nih.gov.*

*Name of Committee:* National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel P41 BTRC Review D–SEP.

*Date:* July 8–10, 2020.

*Time:* 9:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Plaza, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* John K. Hayes, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 959, Bethesda, MD 20892, (301) 451–3398, *hayesj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12680 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Human Genome Research Institute; 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 Human Genome Research Institute Special Emphasis Panel; eCEGS—SEP.

*Date:* July 23, 2020.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3192, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Ken D. Nakamura, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3192, Bethesda, MD 20892, 301–402–0838, *nakamurk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12677 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Biological Chemistry, Biophysics, and Assay Development.

*Date:* July 9–10, 2020.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* John Harold Laity, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–8254, *john.laity@nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Biological Chemistry and Macromolecular Biophysics.

*Date:* July 13–14, 2020.

*Time:* 8:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Sergei Ruvinov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892 301–435–1180, *ruvinser@csr.nih.gov.*

*Name of Committee:* AIDS and Related Research Integrated Review Group; Population and Public Health Approaches to HIV/AIDS Study Section.

*Date:* July 13–14, 2020.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jose H. Guerrier, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222,

MSC 7852, Bethesda, MD 20892, 301–435–1137, *guerriej@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Chemistry and Chemical Biology.

*Date:* July 13–14, 2020.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* David R. Jollie, Ph.D., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4156, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *jollieda@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Infectious Diseases and Microbiology Fellowship Panel II.

*Date:* July 13–14, 2020.

*Time:* 9:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Tamara Lyn McNealy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3188, Bethesda, MD 20892, 301–827–2372, *tamara.mcnealy@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Health Informatics.

*Date:* July 13–14, 2020.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Mark A. Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, Bethesda, MD 20892, 301–402–4128, *mark.vosvick@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Infectious Diseases and Microbiology AREA and REAP Review.

*Date:* July 13, 2020.

*Time:* 9:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Liangbiao Zheng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3202, MSC 7808, Bethesda, MD 20892, 301–996–5819, *zhengli@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; RFA RM20–009 Molecular Transducers of Physical Activity (MoTrPac), Phase 2 Animal Studies.

*Date:* July 13, 2020.

*Time:* 12:30 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Srikanth Ranganathan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7802, Bethesda, MD 20892, 301–435–1787, *srikanth.ranganathan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12673 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; 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 Drug Abuse Special Emphasis Panel; Summer Research Education Experience Program (R25).

*Date:* July 1, 2020.

*Time:* 12:00 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neurosciences Center Building, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Yvonne Owens Ferguson, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 6001 Executive Blvd., Rm. 4234, Bethesda, MD 20892, (301) 402–7371, *yvonne.ferguson@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12681 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–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 Musculoskeletal, Oral and Skin Sciences Integrated Review Group, Skeletal Muscle and Exercise Physiology Study Section, June 11, 2020, 08:00 a.m. to June 12, 2020, 07:00 p.m., National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on May 12, 2020, 85 FR 28022.

This notice is being amended to change the meeting time from 08:00 a.m. to 07:00 p.m. to 09:00 a.m. to 02:00 p.m. The meeting is closed to the public.

Dated: June 8, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12674 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Human Genome Research Institute; 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 Human Genome Research Institute Special Emphasis Panel; COVID Supplements.

*Date:* July 13, 2020.

*Time:* 12:00 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3189, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Rudy O. Pozzatti, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3189, Bethesda, MD 20892, (301) 402–0838, *pozzattr@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12676 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Immune Responses and Vaccines to Non-HIV Microbial Infections.

*Date:* July 8–10, 2020.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Sarita Kandula Sastry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20782, (301) 402–4788, *sarita.sastry@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Genes, Genomes, and Genetics.

*Date:* July 13, 2020.

*Time:* 9:00 a.m. to 1:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael L. Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, (301) 451–0132, *bloomm2@mail.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Cell Biology, Developmental Biology, and Bioengineering.

*Date:* July 14–15, 2020.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Alexander Gubin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, (301) 435–2902, *gubina@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Cell and Molecular Biology.

*Date:* July 14–15, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Amy Kathleen Wernimont, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6198, Bethesda, MD 20892, (301) 827–6427, *amy.wernimont@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Topics in Bacterial Pathogenesis.

*Date:* July 14, 2020.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Richard G. Kostriken, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, (240) 519–7808, *kostrikr@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Discovery, Analysis and Validation of Biomarkers, Biomarker Signature and Endpoints for Pain.

*Date:* July 14, 2020.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* M. Catherine Bennett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892, (301) 435–1766, *bennettc3@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiovascular Sciences.

*Date:* July 14, 2020.

*Time:* 11:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7818, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Firearm Injury and Mortality Prevention.

*Date:* July 14, 2020.

*Time:* 12:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Tasmeen Weik, DRPH, MPH, Scientific Review Officer Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, (301) 827–6480, *weikts@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 8, 2020.

**Miguelina Perez,**

*Program Analyst,Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–12675 Filed 6–11–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2020–0097]**

### Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0087

**AGENCY:** Coast Guard, DHS.

**ACTION:** Thirty-day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs

(OIRA), requesting an extension of its approval for the following collection of information: 1625–0087, U.S. Coast Guard International Ice Patrol (IIP) Customer Survey; without change.

Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

**DATES:** You may submit comments to the Coast Guard and OIRA on or before July 13, 2020.

**ADDRESSES:** Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2020–0097]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–6P), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2703 MARTIN LUTHER KING JR. AVE. SE, STOP 7710, WASHINGTON, DC 20593–7710.

**FOR FURTHER INFORMATION CONTACT:** A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection. The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2020–0097], and must be received by July 13, 2020.

## Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0087.

## Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (85 FR 17898, March 31, 2020) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

## Information Collection Request

*Title:* U.S. Coast Guard International Ice Patrol (IIP) Customer Survey.

*OMB Control Number:* 1625–0087.

*Summary:* This information collection provides feedback on the processes of delivery and products distributed to the mariner by the International Ice Patrol.

*Need:* In accordance with Executive Order 12862, the U.S. Coast Guard is directed to donduct surveys (both qualitative and quantitative) to determine the kind and quality of services our customers want and expect, as well as their satisfaction with USCG's existing services. This survey will be limited to data collections that solicit strictly voluntary opinions and will not collect information that is required or regulated.

*Forms:* CG–16700, North American Ice Service (NAIS) Customer Survey.

*Respondents:* Owners and operators of vessels transiting the North Atlantic.

*Frequency:* Annually.

*Hour Burden Estimate:* The burden is estimated to be 120 hours.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: June 8, 2020.

**Kathleen Claffie,**

*Chief, Office of Privacy Management, U.S. Coast Guard.*

[FR Doc. 2020–12738 Filed 6–11–20; 8:45 am]

**BILLING CODE 9110–04–P**

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2020–0190]**

### Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0106

**AGENCY:** Coast Guard, DHS.

**ACTION:** Sixty-day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and

Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0106, Unauthorized Entry Into Cuban Territorial Waters; without change.

Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

**DATES:** Comments must reach the Coast Guard on or before August 11, 2020.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number [USCG–2020–0190] to the Coast Guard using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public participation and request for comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–6P), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2703 MARTIN LUTHER KING JR. AVE. SE, STOP 7710, WASHINGTON, DC 20593–7710.

**FOR FURTHER INFORMATION CONTACT:** A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2020–0190], and must be received by August 11, 2020.

## Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

## Information Collection Request

*Title:* Unauthorized Entry Into Cuban Territorial Waters.

*OMB Control Number:* 1625–0106.

*Summary:* The Coast Guard, pursuant to Presidential proclamation and order of the Secretary of Homeland Security, is requiring U.S. vessels, and vessels without nationality, less than 100 meters, located within the internal waters or the 12 nautical mile territorial sea of the United States, that thereafter enter Cuban territorial waters, to apply for and receive a Coast Guard permit.

*Need:* The information is collected to regulate departure from U.S. territorial waters of U.S. vessels, and vessels without nationality, and entry thereafter into Cuban territorial waters. The need to regulate this vessel traffic supports ongoing efforts to enforce the Cuban embargo, which is designed to bring about an end to the current government and a peaceful transition to democracy. Accordingly, only applicants that demonstrate prior U.S. government approval for exports to and transactions with Cuba will be issued a Coast Guard permit.

The permit regulation requires that applicants hold United States Department of Commerce, Bureau of Industry and Security (BIS) and U.S. Department of Treasury the Office of Foreign Assets Control (OFAC) licenses that permit exports to and transactions with Cuba. The USCG permit process thus allows the agency to collect information from applicants about their status vis-à-vis BIS and OFAC licenses and monitor compliance with BIS and OFAC regulations. These two agencies administer statutes and regulations that proscribe exports to (BIS) and transactions with (OFAC) Cuba. Accordingly, in order to assist BIS and OFAC in the enforcement of these license requirements, as directed by the President and the Secretary of Homeland Security, the Coast Guard is requiring certain U.S. vessels, and vessels without nationality, to demonstrate that they hold these licenses before they depart for Cuban waters.

*Forms:* CG–3300, Application for Permit to Enter Cuban Territorial Seas.

*Respondents:* Owners and operators of vessels.

*Frequency:* On occasion.

*Hour Burden Estimate:* The estimated burden has been decreased to 5 hours per year due to the reinforced restrictions and current status of diplomatic relations between the United States and Cuban governments resulting in fewer individuals are attempting to travel to Cuba via the maritime realm.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

**Kathleen Claffie,**

*Chief, Office of Privacy Management, U.S. Coast Guard.*

[FR Doc. 2020–12729 Filed 6–11–20; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

**[201A2100DD/AAKC001030/ A0A501010.999900]**

### Draft Environmental Impact Statement and Draft Conformity Determination for the Tejon Indian Tribe's Proposed Fee-to-Trust Acquisition and Casino Resort Project, Kern County, California

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** This notice advises the public that the Bureau of Indian Affairs (BIA), as lead agency, with the Tejon Indian Tribe (Tribe), Kern County (County), National Indian Gaming Commission (NIGC), and the U.S. Environmental Protection Agency (EPA) serving as cooperating agencies, intends to file a Draft Environmental Impact Statement (DEIS) with the EPA in connection with the Tribe's application for acquisition in trust by the United States of approximately 306 acres for gaming and other purposes to be located west of the Town of Mettler, Kern County, California. This notice also announces that the DEIS is now available for public review and that a public hearing will be held to receive comments on the DEIS.

**DATES:** Comments on the DEIS must arrive no later than 45 days after publication of this notice in the **Federal Register**. The date and time of the public hearing will be announced at least 15 days in advance through a notice to be published in a local newspaper (the *Bakersfield Californian*) and online at *http://www.tejoneis.com.*

**ADDRESSES:** You may submit written comments:

- *By mail or hand-delivery to:* Amy Dutschke, Regional Director, Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Sacramento, CA 95825. Please include your name, return address, and ''DEIS Comments, Tejon Indian Tribe Casino Project'' on the first page of your written comments.
- *By email to:* Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, at *chad.broussard@bia.gov,* using ''DEIS Comments, Tejon Indian Tribe Casino Project'' as the subject of your email.

The DEIS will be available for public review at:

- BIA Pacific Region, 2800 Cottage Way, Sacramento, CA 95825
- Kern County Public Library, Lamont Branch, 8304 Segrue Road, Lamont, CA 93241
- *http://www.tejoneis.com.*

The location of the public hearing will be announced at least 15 days in advance through a notice to be published in a local newspaper (the *Bakersfield Californian*) and online at *http://www.tejoneis.com.*

**FOR FURTHER INFORMATION CONTACT:** Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, Pacific Regional Office, telephone: (916) 978–6165; email: *chad.broussard@bia.gov.*

**SUPPLEMENTARY INFORMATION:** Public review of the DEIS is part of the administrative process for the evaluation of the Tribe's application to the BIA for the placement of approximately 306 acres of fee land in trust in Kern County, California. The Tribe proposes to construct a casino resort on the trust property. A Notice of Intent (NOI) to prepare an EIS was published in the *Bakersfield Californian* and **Federal Register** on August 13, 2015. The BIA held a public scoping meeting for the project on September 1, 2015, at the East Bakersfield Veteran's Building, in Bakersfield, California.

#### Background

The Tribe's proposed project consists of the following components: (1) The Department's transfer of the approximately 306-acre fee property into trust status; (2) issuance of a determination by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.;* (3) the approval of a management contract by the Chairman of the National Indian Gaming Commission under 25 U.S.C. 2711; and (4) the Tribe's proposed development of the trust parcel and the off-site improvement areas. The proposed casino resort would include a hotel, convention center, multipurpose event space, several restaurant facilities, parking facilities, a recreational vehicle (RV) park, fire, and sheriff stations and associated facilities.

The following alternatives are considered in the DEIS: (1) Proposed Project; (2) Reduced Intensity Hotel and Casino; (3) Organic Farm; (4) Alternate Site for the Proposed Project; and (5) No Action Alternative. Environmental issues addressed in the DEIS include geology and soils, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomic conditions (including environmental justice), transportation and circulation, land use, public services, noise, hazardous materials, aesthetics, cumulative effects, and indirect and growth inducing effects. In accordance with Section 176 of the Clean Air Act, 42 U.S.C. 7506, and the EPA general conformity regulations 40 CFR part 93, subpart B, a Draft Conformity Determination (DCD) has been prepared for the proposed project. The Clean Air Act requires Federal agencies to ensure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards for criteria air pollutants. The BIA has prepared a DCD for the proposed action/project described above. The DCD is included in Appendix N of the DEIS.

*Locations Where the DEIS Is Available for Review:* The DEIS is available for review during regular business hours at the BIA Pacific Regional Office at the address noted above in the **ADDRESSES** section of this notice. To obtain a compact disc copy of the DEIS, please provide your name and address in writing or by phone to Chad Broussard, Bureau of Indian Affairs, Pacific Regional Office. Contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individual paper copies of the DEIS will be provided upon payment of applicable printing expenses by the requestor for the number of copies requested.

*Public Comment Availability:* Comments, including names and addresses of respondents, will be available for public review at the BIA address shown in the **ADDRESSES** section, during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment that your personal identifying information be withheld from public review, the BIA cannot guarantee that this will occur.

*Authority:* This notice is published pursuant to Sec. 1503.1 of the Council of Environmental Quality Regulations (40 CFR parts 1500 through 1508) and Sec. 46.305 of the Department of the Interior Regulations (43 CFR part 46), implementing the procedural requirements of the National Environmental Policy Act of l969, as amended (42 U.S.C. 4371, *et seq.*), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8. This notice is also published in accordance with 40 CFR 93.155, which provides reporting

requirements for conformity determinations.

**Tara Sweeney,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 2020–12697 Filed 6–11–20; 8:45 am]

**BILLING CODE 4337–15–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCOF02000 L51100000.GL0000 LVEMC2000600 20X]**

### Notice of Availability of the Final Environmental Impact Statement for the Proposed Competitive Mineral Materials Sale (COC–078119) at Parkdale, Fremont County, CO

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Bureau of Land Management (BLM) Royal Gorge Field Office, Canon City, Colorado, has prepared a Final Environmental Impact Statement (EIS) for a proposed competitive mineral materials sale at Parkdale, Freemont County, Colorado, and by this notice is announcing its availability.

**DATES:** The BLM will not issue a final decision until July 13, 2020.

**ADDRESSES:** Copies of the Final EIS for the Proposed Competitive Mineral Materials Sale (COC–078119) at Parkdale, Fremont County, Colorado are available for review by appointment at the BLM Royal Gorge Field Office, 3028 East Main Street, Canon City, CO 81212. Please call (719) 269–8500 to request an appointment. The Final EIS is also available online at *https://go.usa.gov/xy6tn.* Click the ''Documents'' link on the left side of the screen to find the electronic version of the document.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Carter, Geologist; telephone: (719) 269–8551; address: 3028 East Main Street, Canon City, CO 81212; email: *sscarter@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Ms. Carter during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM has prepared a Final EIS to evaluate an application from Martin Marietta Materials, Inc. for a contract to mine 400-million net tons of aggregate reserves located on BLM managed lands, adjacent to their existing hard rock quarry northwest of Canon City, Colorado. The aggregate reserves consist of a granodiorite bedrock that will be mined utilizing blasting, crushing, and screening methods. The mining activity would be conducted on up to approximately 700 acres of BLM lands for up to 100 years, at a production of 4-million tons annually. The aggregate would be used in the production of asphalt and concrete, as well as a source of railroad ballast.

On July 31, 2019, the BLM published a Notice of Intent to prepare an EIS, initiating public scoping to identify issues through public participation and collaboration with partners (84 FR 37334). Initial scoping with internal staff, cooperating agencies and the public identified concerns related to air quality, inventoried lands with wilderness characteristics, wildlife and plant habitat, visual resources, as well as local and regional economies.

The purpose of this action is to respond to the applicant's request to obtain a renewable competitive contract to sell mineral materials located immediately adjacent to the existing Parkdale Quarry in Fremont County, Colorado. The need for the action is based on the BLM's multiple-use mission as set forth in FLPMA, which mandates that the public land resources be managed for a variety of uses, including mining. Pursuant to 30 U.S.C. 1602, the project would assist in the pursuit of measures that would assure the availability of materials critical to commerce, the economy and national security, and facilitate development of domestic resources to meet critical materials needs.

The BLM published a Notice of Availability on February 7, 2020, announcing the public comment period for the Draft EIS (85 FR 7329). The Draft EIS included alternatives that responded to the purpose and need, quantified the impacts to visual resources and air quality, and addressed strategies to minimize impacts to bighorn sheep populations. The Draft EIS was available for a 45-day public comment period. The BLM hosted a public meeting on February 26, in Canon City, Colorado, and received 145 comment submissions.

The Draft EIS evaluated in detail the Proposed Action (Alternative A), the No Action Alternative (Alternative B) and one action alternative (Alternative C). After the public comment period closed, the BLM prepared a Final EIS, which reflects changes and adjustments based on information received during both internal and public comment on the Draft EIS. These changes specifically target surface and groundwater monitoring, design features, the mitigation framework, a more detailed performance-based reclamation protocol and revocation of two federal water reserve withdrawals.

In all alternatives, reclamation would be ongoing, following mining activity in an area, as soon as conditions would be feasible. Details of Alternative A include: Mined material would be used for concrete, asphalt, and railroad ballast products and would take place on approximately 700 acres of BLM-administered public lands for up to 100 years; the southwestern boundary of the proposed mining area would border the Arkansas River Canyonlands Area of Critical Environmental Concern (ACEC); surface mining would progress in five phases; mining direction for each phase would be from northwest to southeast, creating a ''mine from behind'' visual scenario from the Highway 50 corridor. Alternative B (no action) does not include any Federal interests and involves the continuation of surface mining on the existing private aggregate reserves, anticipated to last 15–30 years, with aggregate produced only for concrete and asphalt products. Alternative B consists of three phases, with the mining direction for phases 1 and 2 being west to east and phase 3 being north to south. Details on Alternative C include: Mined material would be used for concrete, asphalt, and railroad ballast products and would take place on approximately 633 acres of BLM-administered public lands for up to 100 years; the boundary of this footprint would not border the Arkansas River Canyonlands ACEC; surface mining would progress in six phases; mining direction for each phase would vary, so a ''mine from behind'' visual scenario from the Highway 50 corridor may not always be achieved.

The BLM did not identify a preferred alternative in the Draft EIS, but has identified a preferred alternative (Alternative A) in the Final EIS, as required by the Council on Environmental Quality regulations. Alternative A includes the footprint that appears to minimize the effects to visual resources from key observation points, and groundwater in areas to the south, as it relates to the proposed mining.The BLM considered comments on the Draft EIS received from the public, cooperating agencies and internal BLM review, and made changes in the Final EIS as appropriate. Public comments resulted in adding clarifying text and

correcting data discrepancies in the EIS but did not significantly change the alternatives.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

**Jamie E. Connell,**

*Colorado State Director.*

[FR Doc. 2020–12608 Filed 6–11–20; 8:45 am]

**BILLING CODE 4310–JB–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

### Fish and Wildlife Service

**[20XL1109AF LLUTC03000 L16100000.DS0000 LXSSJ0740000; UTU–93620; 13–08807]**

## Notice of Availability of the Draft Environmental Impact Statement to Consider a Highway Right-of-Way, Draft Amended Habitat Conservation Plan and Issuance of an Incidental Take Permit for the Mojave Desert Tortoise, and Resource Management Plan Amendments, Washington County, UT and Notice of Intent for the Proposed Closure of Certain Federal Lands to Recreational Target Shooting, Washington County, UT

**AGENCY:** Bureau of Land Management, Interior; Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; notice of ESA Section 10(a)(1)(B) permit application; and notice of intent.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Omnibus Public Land Management Act of 2009 (OPLMA), and the Endangered Species Act of 1973 (ESA), as amended, the Bureau of Land Management (BLM), and the Fish and Wildlife Service (USFWS), as co-lead agencies, announce the availability of the Draft Environmental Impact Statement (EIS) to consider a right-of-way (ROW) application submitted by the Utah Department of Transportation (UDOT) (referred to henceforth as the Northern Corridor Project), and potential amendments to the St. George Field Office and Red Cliffs National Conservation Area (NCA) Resource Management Plans (RMPs).

**DATES:** To ensure comments will be considered, the BLM and USFWS must receive written comments on the proposed Northern Corridor Project Draft EIS, including potential amendments to the St. George Field Office and Red Cliffs NCA RMPs, the Draft Amended HCP and ITP application, and the potential closure of certain Federal lands to recreational target shooting by September 10, 2020. The BLM and USFWS will announce public involvement opportunities at least 15 days in advance through media releases, mailed notifications and/or the project website set out in the **ADDRESSES** section.

**ADDRESSES:** The Draft EIS, Draft Amended HCP, and ESA section 10 ITP application are available for review on the BLM ePlanning project website at *https://go.usa.gov/xw8TX.* Click the Documents and Reports link on the left side of the screen to find the electronic versions of these materials.

You may submit written comments related to the Northern Corridor Project Draft EIS, Draft Amended HCP, and proposed closure of certain Federal lands to recreational target shooting by either of the following methods:

- *Email: BLM_UT_NorthernCorridor@blm.gov.*
- *Mail:* Bureau of Land Management, Attn: Northern Corridor, 345 East Riverside Drive, St. George, UT 84790.

**FOR FURTHER INFORMATION CONTACT:** Gloria Tibbetts, BLM Color Country District Planning and Environmental Coordinator, telephone (435) 865–3063; address 176 DL Sargent Dr., Cedar City, UT 84721; email *BLM_UT_NorthernCorridor@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours. If you would like to request to view a hard copy, please call the St. George Field Office for more information at (435) 688–3200, Monday through Friday, except holidays. For information on the Draft Amended HCP or ITP application, contact Laura Romin, Acting Field Supervisor, U.S. Fish and Wildlife Service, telephone (801) 554–7660; email *utahfieldoffice_esa@fws.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with section 10(a)(1)(B) of the ESA, the USFWS is considering the issuance of an Incidental Take Permit (ITP) to Washington County, Utah. The ITP would authorize the take of the federally threatened Mojave desert tortoise incidental to covered activities such as residential and commercial development for a 25-year permit term. The application for the permit requires the County to amend their 1995 Habitat Conservation Plan (HCP) to current standards and ensure impacts are avoided, minimized, and mitigated to the maximum extent practicable. The 62,000-acre Red Cliffs Desert Reserve (Reserve), of which approximately 70 percent is now a National Conservation Area (NCA), was established pursuant to commitments in the 1995 HCP.

In accordance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Public Law 116–9, 16 U.S.C. 7913, and 43 CFR 8364.1, this notice also announces the opening of a concurrent public comment period regarding the proposed permanent closure of recreational target shooting within the proposed Reserve Zone 6 area southwest of St. George, Utah.

On September 4, 2018, UDOT submitted an application for a ROW grant for the Northern Corridor Project north of the City of St. George, Utah, on non-Federal and BLM-administered public lands across the NCA and Reserve, which was established for the Mojave desert tortoise under the 1995 Washington County HCP. The 1995 HCP expired in 2016 and was extended by the USFWS to allow Washington County (County) to amend the HCP pursuant to Section 10(a)(1)(B) of the ESA. The Draft amended HCP includes the proposed Northern Corridor as a changed circumstance, with Zone 6 as the primary proposed addition to the conservation strategy. The USFWS received an application for an ITP dated January 30, 2015. The BLM is also considering amendments to the St. George Field Office and Red Cliffs NCA RMPs that would allow consideration of and mitigation (Zone 6) for the proposed Northern Corridor Project.

The Draft EIS considers four proposed actions: (1) Whether the BLM will approve a 1.9-mile ROW section of the approximately four-mile long Northern Corridor project that crosses the 62,000-acre Reserve, of which 45,000-acres were congressionally established as the Red Cliffs NCA; (2) Whether the BLM will amend the Red Cliffs NCA RMP to allow for a transportation ROW and/or corridor within the NCA; (3) Whether the USFWS will issue an ITP for the Mojave desert tortoise for specific land use and land development activities in Washington County; and (4) Whether the BLM will amend the St. George Field Office RMP to modify management on approximately 3,471 acres within a 6,800-acre area (Zone 6) outside the Reserve and NCA to offset the ROW impacts. The other half of Zone 6 is owned by the Utah School and Institutional Trust Lands Administration.

The BLM is required to respond to UDOT's application for a ROW under

Title V of the FLPMA, 43 Code of Federal Regulations (CFR) part 2800, and other applicable Federal laws. The BLM will consider UDOT's ROW application through the analysis in the Draft EIS. The BLM will approve, approve with modifications, or deny issuance of a ROW grant to UDOT for the Northern Corridor.

The purpose of the BLM's Red Cliffs NCA RMP amendment Federal action is to consider changes to current management within the NCA in conjunction with its review of the pending ROW application.

The need for the USFWS's proposed action is to respond to the County's application for an ITP that addresses covered activities which have the potential to result in take of the Mojave desert tortoise, pursuant to ESA Section (10)(a)(1)(B) and its implementing regulations and policies. USFWS must review the applicant's Draft amended HCP to ensure that the elements required by Sections 10(a)(2)(A) and 10(a)(2)(B) of the ESA are satisfied.

The purpose of the BLM's St. George Field Office RMP amendment Federal action is to allow for possible management changes to Federal lands in the proposed Reserve Zone 6 to offset impacts if a ROW is granted within the Red Cliffs NCA and Reserve. This amendment potentially includes permanently closing approximately 3,471 acres of Federal lands within Zone 6 to recreational target shooting.

Scoping was initiated with the publication of a Notice of Intent in the **Federal Register** on December 5, 2019 (84 FR 66692). The scoping period was open through January 6, 2020. A public scoping meeting was held in St. George, Utah, on December 17, 2019. Other public outreach methods included a news release distributed on December 2, 2019, and scoping notifications sent to the BLM and USFWS interested party lists on December 10, 2019. The BLM considered all input received during the scoping period. A summary of the comments received during the scoping period can be found in the Scoping Report posted on the project website at *https://go.usa.gov/xw8TX.*

The Draft EIS considers the impacts of the proposed action, four other alternative highway alignments, and a no action alternative. Under Alternative 1, the No Action Alternative, the BLM would deny UDOT's application for a ROW across the Red Cliffs NCA for the Northern Corridor and would not amend the Red Cliffs NCA and St. George Field Office RMPs. The USFWS would deny the County's application for an ITP. This alternative reflects all of the roadway and transit improvements from the applicable local, regional, and statewide transportation plans that would be completed by 2050, absent the Northern Corridor. It provides a baseline against which to compare the action alternatives in the EIS.

Under Alternative 2, the T-Bone Mesa Alignment, the BLM would issue a ROW grant to UDOT for the Northern Corridor across the NCA skirting the southern edge of T-Bone Mesa. This alignment would connect Green Spring Drive on the east to Red Hills Parkway on the west just north of the Pioneer Hills trailhead parking area. The Northern Corridor would be approximately four miles long, and approximately 2.2 miles of the corridor would cross BLM-administered lands. The Red Cliffs NCA RMP would be amended to allow for the ROW and consider designation of a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation measures outlined for Zone 6 in the amended HCP. This amendment potentially includes permanently closing the lands in Zone 6 to recreational target shooting in order to achieve those conservation measures and managing Zone 6 consistent with the rest of the Reserve.

Under Alternative 3, the UDOT Application Alignment, the BLM would issue a ROW grant to UDOT across the Red Cliffs NCA for the Northern Corridor for the alignment included in UDOT's ROW application. This alignment would connect Green Spring Drive on the east to Red Hills Parkway on the west just north of the Pioneer Hills trailhead parking area. Under this alternative, the Northern Corridor would be approximately 4.3 miles long, and approximately 1.9 miles would cross BLM-administered lands. The Red Cliffs NCA RMP would be amended to allow for the ROW and consider a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation measures outlined for Zone 6 in the revised HCP. This amendment potentially includes permanently closing the lands in Zone 6 to recreational target shooting in order to achieve those conservation measures and managing the area consistent with the rest of the Reserve.

Under Alternative 4, the Southern Alignment, the BLM would issue a ROW grant to UDOT across the NCA for the Northern Corridor on the Southern Alignment. Under this alternative, the Northern Corridor would follow the southern border of the NCA, connecting Green Spring Drive on the east to Red Hills Parkway on the west just south of the Pioneer Hills trailhead parking area. The Northern Corridor would be approximately 5.3 miles long, and approximately 1.5 miles would cross BLM-administered lands. The Red Cliffs NCA RMP would be amended to allow for the ROW and to consider a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation measures outlined for Zone 6 in the revised HCP. This amendment potentially includes permanently closing the lands in Zone 6 to recreational target shooting in order to achieve those conservation measures and managing the area consistent with the rest of the Reserve.

Under Alternative 5, the Red Hills Parkway Expressway Alignment, the BLM would grant necessary ROW amendments to the existing UDOT ROW for the Red Hills Parkway for UDOT to convert Red Hills Parkway into a grade-separate expressway between Highland Drive and Bluff Street. Improvements would include converting existing intersections at 200 East (Skyline Drive) and 1000 East to grade-separated interchanges, and necessary modifications to the mainline roadway to accommodate the new interchange with Interstate 15 (I–15). The intersections at 900 East and Industrial Road would be closed and/or converted to right-in-right-out movements only. Existing driveways along the corridor to public and private properties would either be closed or converted to right-in-right-out movements only. The ITP would be issued subject to the conservation measures in the amended HCP. The Red Cliffs NCA RMP and the St. George Field Office RMPs would not be amended because Zone 6 would not be needed to mitigate for impacts to desert tortoises; this alternative changes the existing Red Hills Parkway to an expressway in the same ROW.

Under Alternative 6, the St. George Boulevard/100 South One-Way Couplet, the BLM would deny UDOT's application for a ROW across the Red Cliffs NCA for the Northern Corridor. Rather, this analyzes a scenario where the City of St. George would convert St. George Boulevard and 100 South to one-way streets. The two roadways would be converted between I–15 and Bluff Street, wherein St. George Boulevard would only accommodate westbound traffic and 100 South would only accommodate eastbound traffic. The St.

George Boulevard would be converted from its existing two lanes in each direction (with a raised center median and turn pockets) to three westbound lanes. Modifications to the cross streets between I–15 and Bluff Street would discontinue eastbound left and right turns from the cross streets. Similarly, 100 South would be converted from its existing two lanes in each direction, with a center turn lane, to three eastbound lanes, and modifications to the intersections at cross streets between I–15 and Bluff Street would discontinue westbound left and right turns from the cross streets. In addition, the existing interchange with I–15 at St. George Boulevard would be reconfigured and combined with a new interchange at 100 South to provide a split interchange between these two roadways connected by one-way ramps. Southbound I–15 traffic would exit I–15 at St. George Boulevard and enter I–15 from 100 South. Similarly, northbound I–15 traffic would exit I–15 at 100 South and enter I–15 from St. George Boulevard. The ITP would be issued subject to the conservation measures in the amended HCP. The Red Cliffs NCA RMP and the St. George Field Office RMP would not be amended.

The BLM and USFWS have identified Alternative 3 as the agencies' preferred ROW alignment and ITP issuance alternative for the purposes of public comment and review, with Alternative B identified as the preferred for the two RMP amendments. However, the identification of this preferred alternative does not represent the agencies' final decision, and following the public comment period, there may be changes or adjustments based on information received during the public comment period. In the Final EIS, the BLM and USFWS may develop the agencies' proposed actions (ROW and ITP) and the BLM's proposed RMP amendments by using components from any alternative considered in the range of alternatives in the Draft EIS. For this reason, the BLM and USFWS invite and encourage comments on all alternatives, alignments, and actions described in the Draft EIS and Draft Amended HCP.

The BLM and USFWS will continue to provide and coordinate public participation opportunities to assist the agencies in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed actions will assist the BLM and USFWS in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM and USFWS will continue to consult with Indian tribes on a government-to government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, Tribes, and stakeholders—that may be interested in or affected by the decision on this proposed project—are encouraged to review and comment on the Draft EIS, Draft Amended HCP, and ITP application.

The BLM and USFWS are soliciting comments on the entire Draft EIS to include comments about how the proposed permanent closure of Zone 6 lands to recreational target shooting and other management will affect the public. The USFWS is also soliciting comments on the Draft Amended HCP and the ITP application. Please note that public comments and information submitted can be made available for public review and disclosure upon request and in coordination with the points of contact provided in the **ADDRESSES** section of this notice during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays. The BLM and USFWS will respond to substantive comments by making appropriate revisions to the documents or by explaining why a comment did not warrant a change.

Before including your phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority:** 40 CFR 1502.9, 40 CFR 1506.6, 43 CFR 46.435, 43 CFR 1610.2, 43 CFR 8364.1 and 16 U.S.C. 7913. For USFWS, we provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for incidental take permits (50 CFR 17.22).

**Anita Bilbao,**

*Acting State Director.*

**Noreen Walsh,**

*Regional Director.*

[FR Doc. 2020–12748 Filed 6–11–20; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management

**[Docket No. BOEM–2020–0005]**

### Notice of Availability of a Supplement to the Draft Environmental Impact Statement for Vineyard Wind LLC's Proposed Wind Energy Facility Offshore Massachusetts and Public Meetings

**AGENCY:** Bureau of Ocean Energy Management, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with National Environmental Policy Act (NEPA) regulations, the Bureau of Ocean Energy Management (BOEM) is announcing the availability of a supplement to the Vineyard Wind Offshore Wind Energy Project Draft Environmental Impact Statement (Supplement) prepared for the Construction and Operation Plan (COP) submitted by Vineyard Wind LLC (Vineyard Wind). The Supplement analyzes reasonably foreseeable effects from an expanded cumulative activities scenario for offshore wind development, previously unavailable fishing data, a new transit lane alternative, and changes to the COP since publication of the Draft Environmental Impact Statement (EIS). This notice of availability (NOA) announces the start of the public review and comment period, as well as the time and dates for virtual public meetings on the Supplement. After BOEM holds the public meetings and addresses comments provided, BOEM will prepare a final EIS.

**DATES:** Comments should be submitted no later than July 27, 2020. BOEM's virtual public meetings will be held at the following dates and times (Eastern):

Friday, June 26, 2020; 5 p.m.;
Tuesday, June 30, 202; 1 p.m.;
Thursday, July 2, 2020; 5 p.m.;
Tuesday, July 7, 2020; 1 p.m.; and
Thursday, July 9, 2020; 5 p.m.

**ADDRESSES:** The Supplement and detailed information about the proposed wind energy facility, including the COP and the Draft EIS, can be found on a project specific page on BOEM's website at: *https://www.boem.gov/Vineyard-Wind/.* Comments can be submitted in any of the following ways:

- In written form by mail, enclosed in an envelope labeled ''Vineyard Wind COP Supplement to the Draft EIS'' and addressed to Program Manager, Office of Renewable Energy, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166. Comments must be received or

postmarked no later than July 27, 2020; or

• Through the regulations.gov web portal: Navigate to *htttp://www.regulations.gov* and search for Docket No. BOEM–2020–0005. Click on the ''Comment Now!'' button to the right of the document link. Enter your information and comment, then click ''Submit.''

**FOR FURTHER INFORMATION CONTACT:** For information on the EIS or BOEM's policies associated with this notice, please contact: Michelle Morin, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787–1722 or *michelle.morin@boem.gov.*

**SUPPLEMENTARY INFORMATION:** BOEM is announcing the availability of a supplement to the Vineyard Wind Offshore Wind Energy Project Draft Environmental Impact Statement (Supplement) prepared COP submitted by Vineyard Wind, in accordance with NEPA regulations, 40 CFR parts 1500–1508.

Details about the live virtual public meetings, including a virtual meeting room web page, can be found at: *https://www.boem.gov/Vineyard-Wind/.* BOEM will provide call-in information for participants both with and without internet access when they register as well as on the website. Registration for online or phone-in participation in any of the virtual public meetings may be completed here: *https://www.boem.gov/Vineyard-Wind-SEIS-Virtual-Meeting* or by calling (847) 258–8992. If you require a paper copy of the public meeting materials, please call the number above and BOEM will provide this information upon request, as long as copies are available. The virtual meeting room web page will be available throughout the 45-day comment period and will include fact sheets, posters, pre-recorded presentations, and the opportunity to submit questions and comments to BOEM. Early submission of questions is encouraged so that BOEM may incorporate them into frequently asked questions on the web page and the public meetings, where practicable.

Each live virtual public meeting will begin with a presentation by BOEM and be recorded and posted on the website listed above. All comments received during the meeting will be part of the public record. After the presentation, attendees will have the opportunity to provide comments/statements and ask questions. BOEM will answer questions throughout the meeting.

The queue for stakeholder comments and oral testimony will begin with participants who indicated in their registration that they plan to provide oral testimony and will subsequently be opened to other participants. This process will be managed by an online or phone operator and each participant will have five minutes to give testimony. Any participant who wishes to provide longer than five minutes of testimony is encouraged to do so as a written comment.

*Proposed Action:* Vineyard Wind seeks to construct, operate, maintain, and eventually decommission an 800-megawatt wind energy facility on the Outer Continental Shelf offshore Massachusetts (the ''Project''). The Project and associated export cables would be developed within the range of design parameters outlined in the Vineyard Wind COP, subject to applicable mitigation measures. The COP proposes installing up to 100 wind turbine generators and one or two offshore substations or electrical service platforms. As currently proposed, the Project would be located approximately 14 statute miles from the southeast corner of Martha's Vineyard and a similar distance from the southwest side of Nantucket. The turbines would be located in water depths ranging from approximately 37 to 49 meters (121 to 161 feet). The COP proposes one export cable landfall near the town of Barnstable, Massachusetts. Onshore construction and staging are proposed to take place at the New Bedford Marine Commerce Terminal facility.

The Supplement analyzes reasonably foreseeable effects from an expanded cumulative activities scenario for offshore wind development, previously unavailable fishing data, a new transit lane alternative, and changes to the COP since publication of the Draft EIS. The Supplement reviews resource-specific baseline conditions, considers future offshore wind activities, and, using the methodology and assumptions outlined in the document, assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives as defined in the Draft EIS when combined with past, present, or reasonably foreseeable activities, including other future offshore wind activities.

*Alternatives:* BOEM considered 15 alternatives during the preparation of the Draft EIS and carried forward six for further analysis. These alternatives included five action alternatives (one of which has two sub-alternatives) and the No Action Alternative. This Supplement addresses these five alternatives and an additional Vessel Transit Lane Alternative. There are 13 alternatives in the Supplement that were not further analyzed because they did not meet the purpose and need for the proposed action or did not meet screening criteria. Nine of these alternatives were in the DEIS and an additional 4 alternatives were a result of input received during the DEIS comment period. The screening criteria used included consistency with law and regulations; operational, technical, and economic feasibility; environmental impact; and geographical considerations.

*Availability of the Supplement:* The Supplement, Vineyard Wind COP, updated visual simulations, and associated information are available on BOEM's website at: *https://www.boem.gov/Vineyard-Wind/.* BOEM distributed digital copies of the Draft EIS to all parties listed in Appendix F of the Supplement, which includes the location of all libraries receiving a copy. If you require a paper copy, BOEM will provide one upon request, as long as copies are available. You may request a DVD or paper copy of the Supplement by calling (847) 258–8992.

*Cooperating Agencies:* Nine agencies or governmental entities have participated as cooperating agencies in preparing the EIS: The Bureau of Safety and Environmental Enforcement; the U.S. Environmental Protection Agency; the National Oceanic and Atmospheric Administration; the U.S. Army Corps of Engineers; the U.S. Coast Guard; the Massachusetts Office of Coastal Zone Management; the Rhode Island Department of Environmental Management; the Rhode Island Coastal Resource Management Council; and the Narragansett Indian Tribe.

BOEM does not consider anonymous comments. Please include your name and address as part of your submittal. BOEM makes all comments, including the name and addresses of respondents, available for public review during regular business hours. Individual respondents may request that BOEM withhold their names or addresses from the public record; however, BOEM cannot guarantee that it will be able to do so. If you wish your name or address to be withheld, you must state your preference prominently at the beginning of your comment. All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public inspection in their entirety.

**Authority:** This NOA was prepared under NEPA, as amended (42 U.S.C. 4231 *et seq.*),

and published in accordance with 40 CFR 1506.6 and 43 CFR 46.435.

**William Yancey Brown,**

*Chief Environmental Officer, Bureau of Ocean Energy Management.*

[FR Doc. 2020–12822 Filed 6–11–20; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF JUSTICE

**[OMB Number: 1121–0148]**

### Agency Information Collection Activities: Request Reinstatement of a Previously Approved Collection

**AGENCY:** Office of Justice Programs, Bureau of Justice Assistance, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Assistance has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995.

**DATES:** The Department of Justice encourages public comment and will accept input until August 11, 2020.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments on the estimated public burden, the associated response time, suggestions, a copy of the proposed instrument with instructions, or need additional information please contact M.A. Berry, Project Director at 202–598–2000 or *DFB-DPFD@ojp.usdoj.gov,* at the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street NW, Washington, DC 20531. Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the Bureau of Justice Assistance, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

**Overview of This Information Collection**

(1) *Type of Information Collection:* Reinstatement, without change of a previously approved collection.

(2) *The Title of the Form/Collection:* Denial of Federal Benefits/Defense Procurement and Fraud Debarment Programs (DFB).

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* The applications process is managed electronically by a web based program which can be accessed at: *https://dfb.bja.ojp.gov.*

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* All United States federal and state district court judges and prosecutors, the U.S. Department of Defense, defense contractors and subcontractors as well as federal agencies that issue federal benefits.

*Abstract:* The Anti-Drug Abuse Act of 1988, Public Law 100–690, Section 5301 (21 U.S.C. Section 862) provides federal, state, and local courts with a central clearinghouse vehicle to deny certain federal benefits to individuals convicted of any federal or state offense involving the distribution or possession of a controlled substance.

In response to the Anti-Drug Abuse Act of 1988, the President directed the Department of Justice, Office of Justice Programs, to act as an Information Clearinghouse for the federal and state courts. Specifically, DOJ has been charged with collecting all incoming information generated by the courts regarding those individuals to whom benefits were to be denied pursuant to 21 U.S.C. Section 862. The names of the sanctioned individuals are then submitted to the General Service Administration for inclusion in the List of Parties Excluded from Federal Procurement or Non-procurement Programs, better known as the ''Debarment List'' at *SAM.gov.* The Defense Procurement Fraud Debarment Clearinghouse is also operated by the Bureau of Justice Assistance. It was established by Section 815, Subsection 10, of the National Defense Authorization Act for fiscal year (FY) 1993 [Public Law 102–484, 10 United States Code, Section 2408 (c)]. This provision requires the U.S. Attorney General to establish a single point of contact for contractors or subcontractors of the United States Department of Defense (DOD) to promptly confirm whether an individual has been convicted of fraud or any other felony arising out of a contract with the Department of Defense. Such individuals may be prohibited from engaging in certain activities including but not limited to receiving or working on any defense contracts, or any first tier subcontracts, for a period of 5 years. This list is also compiled and maintained in the Denial of Federal Benefits database and forwarded by BJA to GSA for inclusion in the Debarment List at *SAM.gov.*

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* As of December, 2019 DOJ has received approximately 19,951 cases for debarment. In the last 3 years (2017 to 2019 inclusive) 1,490 cases were received. This is an average of 497 cases per year. Each application takes approximately 20 minutes to complete, scan and upload. This number includes cases received as a result of marketing and social media outreach directed to Courts which have a high personnel turn-over rate.

(6) *An estimate of the total public burden (in hours) associated with the collection:* Based upon the average number of submissions over the last 3 years, and the estimated time required to complete each submission, the estimated annual public burden would be 208 hours.

a. 497 cases × 25 minutes = 12,425 minutes/60 = 208 hours.

*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: June 8, 2020

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2020–12684 Filed 6–11–20; 8:45 am]

**BILLING CODE 4410–14–P**

## DEPARTMENT OF LABOR

### Office of the Workers' Compensation Programs

### Agency Information Collection Activities; Comment Request; Notice of Recurrence (CA–2a)

**AGENCY:** Office of Workers' Compensation, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Notice of Recurrence (CA–2a)'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Consideration will be given to all written comments received by August 11, 2020.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free by contacting Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Office of Workers' Compensation Programs, Room S3323, 200 Constitution Avenue NW, Washington, DC 20210; by email: *suggs.anjanette@dol.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

**SUPPLEMENTARY INFORMATION:** The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

*Background:* The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act, which provides for continuation of pay or compensation for work related injuries or disease that result from Federal employment. Under 5 U.S.C. 8149, the Secretary of Labor may prescribe rules and regulations necessary for the administration and enforcement of this subchapter. Regulation 20 CFR 10.104 designates form CA–2a as the form to be used to request information from claimants with previously-accepted injuries, who claim a recurrence of disability, and from their supervisors. The form requests information relating to the specific circumstances leading up to the recurrence as well as information about their employment and earnings. The information provided is used by OWCP claims examiners to determine whether a claimant has sustained a recurrence of disability related to an accepted injury and, if so, the appropriate benefits payable. This information collection is currently approved for use through November 30, 2020.

DOL authorizes this information collection. This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Written comments will receive consideration, and summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB# 1240–0009.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* DOL-Office of Workers' Compensation Programs

*Type of Review:* EXTENSION WITHOUT CHANGES.

*Title of Collection:* Notice of Recurrence.

*Agency Form Number:* CA–2a.

*OMB Control Number:* 1240–0009.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 133.

*Frequency:* Annually.

*Total Estimated Annual Responses:* 133.

*Estimated Average Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 67.

*Total Estimated Annual Other Cost Burden:* $19.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

**Authority:** 44 U.S.C. 3506(c)(2)(A).

**Anjanette Suggs,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.*

[FR Doc. 2020–12771 Filed 6–11–20; 8:45 am]

**BILLING CODE 4510–CH–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Humanities

### Meeting of Humanities Panel

**AGENCY:** National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Endowment for the Humanities (NEH) will hold twelve

meetings, by videoconference, of the Humanities Panel, a federal advisory committee, during July 2020. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

**DATES:** See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5:00 p.m. on the dates specified below.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. DATE: July 20, 2020

This video meeting will discuss applications for Fellowships for Advanced Social Science Research on Japan, submitted to the Division of Research Programs.

2. DATE: July 23, 2020

This video meeting will discuss applications on the topics of Social Sciences and History, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

3. DATE: July 24, 2020

This video meeting will discuss applications on the topics of Global Studies and Politics, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

4. DATE: July 27, 2020

This video meeting will discuss applications on the topics of American History and Religion, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

5. DATE: July 27, 2020

This video meeting will discuss applications on the topics of American History, Communication, and Media, for the Fellowships grant program, submitted to the Division of Research Programs.

6. DATE: July 28, 2020

This video meeting will discuss applications on the topics of Arts and Literature, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

7. DATE: July 28, 2020

This video meeting will discuss applications on the topics of Literature, Philosophy, and European History, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

8. DATE: July 29, 2020

This video meeting will discuss applications on the topics of Literature, Media, and Communications, for the Awards for Faculty grant program, submitted to the Division of Research Programs.

9. DATE: July 30, 2020

This video meeting will discuss applications on the topics of African, Middle Eastern, and Asian Studies, for the Fellowships grant program, submitted to the Division of Research Programs.

10. DATE: July 30, 2020

This video meeting will discuss applications on the topics of American History and Environmental Studies, for the Fellowships grant program, submitted to the Division of Research Programs.

11. DATE: July 31, 2020

This video meeting will discuss applications on the topics of Latin American Studies and American History, for the Fellowships grant program, submitted to the Division of Research Programs.

12. DATE: July 31, 2020

This video meeting will discuss applications on the topics of Social Sciences and History of Science, for the Fellowships grant program, submitted to the Division of Research Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: June 8, 2020.

**Caitlin Cater,**

*Attorney-Advisor, National Endowment for the Humanities.*

[FR Doc. 2020–12694 Filed 6–11–20; 8:45 am]

**BILLING CODE 7536–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–1051; NRC–2018–0052]**

## Holtec International HI-STORE Consolidated Interim Storage Facility Project

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft environmental impact statement; public meeting; request for comments.

**SUMMARY:** On March 20, 2020, the U.S. Nuclear Regulatory Commission (NRC) published in the **Federal Register** (FR) a notice issuing the draft Environmental Impact Statement (EIS) for Holtec International's (Holtec's) application to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel and Greater-Than Class C waste, along with a small quantity of mixed oxide fuel in Lea County, New Mexico. The NRC is announcing a public comment webinar to receive comments on the draft report. The public meeting will allow interested members of the public to submit their comments.

**DATES:** The NRC staff will hold a webinar on June 23, 2020. The staff will present the findings of the draft report and will receive public comments during transcribed public meeting. Members of the public are invited to submit comments by July 22, 2020. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date.

**FOR FURTHER INFORMATION CONTACT:** Jill Caverly, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7674; email: *Jill.Caverly@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2018–0052 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this action by the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2018–0052.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the

ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The draft EIS is available in ADAMS under Accession No. ML20269G420.

- *NRC'S PDR:* The public may submit requests to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.
- *Project Web Page:* Information related to the Holtec HI-STORE CISF project can be accessed on the NRC's Holtec HI-STORE CISF web page at *https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html.* Scroll down to EIS, Draft Report for Comment.
- *Public Libraries:* A copy of the staff's draft EIS can be accessed at the following public libraries (library access and hours are determined by local policy):
  - Carlsbad Public Library, 101 S Halagueno Street, Carlsbad, NM 88220.
  - Hobbs Public Library, 509 N Shipp St., Hobbs, NM 88240.
  - Roswell Public Library, 301 N Pennsylvania, Roswell, NM 88201.

*B. Submitting Comments*

Please include Docket ID NRC–2018–0052 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

**II. Meeting Information**

On March 20, 2020 (85 FR 16150), the NRC published a notice of availability of a draft EIS for Holtec's proposed CISF for spent nuclear fuel and requested public comments on the draft report. On April 27, 2020 (85 FR 23382) the NRC published a notice extending the comment period to July 22, 2020. The NRC is announcing that staff will hold a public webinar. The webinar will be held online and will offer a telephone line for members of the public to submit comments. A court reporter will be recording all comments received during the webinar. The dates and times for the public webinar are as follow:

| Date | Time | Location |
|---|---|---|
| 6/23/2020 ..... | 5:00 PM to 9:00 PM (EDT), 3:00 PM to 7:00 PM (MDT). | Webinar Information: *https://usnrc.webex.com.* Event Number: 199 800 0026. Password: HOLTEC. Telephone Bridge Line: 1–888–454–7496. Participant Passcode: 5790355. |

Persons interested in attending this meeting should monitor the NRC's Public Meeting Schedule web page at *https://www.nrc.gov/pmns/mtg* for additional information, agenda for the meeting, information on how to provide verbal comments, and access information for the meeting. Participants should register in advance of the meeting by visiting the website page (*https://usnrc.webex.com*) and using the event number provided above. A confirmation email will be generated providing additional details and a link to the meeting. Those wishing to make verbal comments at the meeting should follow instructions listed at the NRC's Public Meeting Schedule.

Dated: June 8, 2020.

For the Nuclear Regulatory Commission.

**Diana B. Diaz Toro,**

*Acting Chief, Environemental Review Materials Branch, Division of Rulemaking, Environmental and Financial Review, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2020–12688 Filed 6–11–20; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket Nos. MC2020–155 and CP2020–168]**

## New Postal Product

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* June 16, 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:**

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**I. Introduction**

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any,

can be accessed through compliance with the requirements of 39 CFR 3011.301.[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 3030, and 39 CFR part 3040, 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 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

## II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2020–155 and CP2020–168; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 6 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 8, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* June 16, 2020.

This Notice will be published in the **Federal Register**.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2020–12767 Filed 6–11–20; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2020–167; Order No. 5536]**

## Inbound Competitive Multi-Service Agreements With Foreign Postal Operators

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is acknowledging a recent filing by the Postal Service that it has entered into the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators (FPOs). This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* June 18, 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:**

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## I. Introduction

On June 8, 2020, the Postal Service filed a notice with the Commission pursuant to 39 CFR 3035.105 and Order No. 546,[1] giving notice that it has entered into an Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator (FPO). The Notice concerns the inbound portions of the competitive multi-product agreement entered into by the Postal Service and a FPO, referred to as ''FPO–USPS Agreement FY20–2.'' Notice at 1. The Postal Service seeks to include the FPO–USPS Agreement FY20–2 within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 (MC2010–34) product. *Id.*

The Postal Service asserts that FPO–USPS Agreement FY20–2 ''is functionally equivalent to the baseline agreement filed in Docket No. MC2010–34 because the terms of this agreement are similar in scope and purpose to the terms of the CP2010–95 Agreement.'' *Id.* at 3. Concurrent with the Notice, the Postal Service filed supporting financial documentation and the following documents:

- Attachment 1—an application for non-public treatment;
- Attachment 2—the FPO–USPS Agreement FY20–2;
- Attachment 3—Governors' Decision No. 19–1;
- Attachment 4—a certified statement required by 39 CFR 3035.105(c)(2).

*Id.* at 4.

The Postal Service states it intends for FPO–USPS Agreement FY20–2 to take effect on July 1, 2020. *Id.* at 1, 5. The Postal Service notes that FPO–USPS Agreement FY20–2 provides rates for inbound packets. *Id.* at 5.

The Postal Service states that FPO–USPS Agreement FY20–2 is in compliance with 39 U.S.C. 3633 and is functionally equivalent to the inbound competitive portions of the CP2010–95 agreement, which was included in the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product. *Id.* at 8–9. For these reasons, the Postal Service states that FPO–USPS Agreement FY20–2 should be added to the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product. *Id.* at 9.

## II. Commission Action

The Commission establishes Docket No. CP2020–167 to consider the Notice. Interested persons may submit comments on whether the FPO–USPS Agreement FY20–2 is consistent with 39 U.S.C. 3633 and 39 CFR 3035.105 and whether it is functionally equivalent to the inbound competitive portions of the Docket No. CP2010–95 agreement, which was included in the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product. Comments are due by June 18, 2020.

The Notice and related filings are available on the Commission's website (*http://www.prc.gov*). The Commission encourages interested persons to review the Notice for further details.

The Commission appoints Natalie R. Ward to serve as Public Representative in this proceeding.

## III. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2020–167 for consideration of the matters raised by the Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY20–2, filed on June 8, 2020.

2. Pursuant to 39 U.S.C. 505, Natalie R. Ward is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons are due by June 18, 2020.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

[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).

[1] Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY20–2, June 8, 2020 (Notice). Docket Nos. MC2010–34 and CP2010–95, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Service Operators 1 to the Competitive Product List and Approving Included Agreement, September 29, 2010 (Order No. 546).

By the Commission.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2020–12769 Filed 6–11–20; 8:45 am]

**BILLING CODE 7710–FW–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2020–166; Order No. 5535]**

## Changes in Rates of General Applicability

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently filed Postal Service Notice regarding changes in rates of general applicability and associated classification changes for Priority Mail Express and Priority Mail to implement a new Loyalty Program. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* June 19, 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:**

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### I. Introduction and Overview

On June 5, 2020, the Postal Service filed notice with the Commission concerning changes in rates of general applicability and associated classification changes for Priority Mail Express and Priority Mail to implement a new Loyalty Program.[1] The Postal Service represents that, as required by 39 CFR 3035.102(b), the Notice includes an explanation and justification for the changes, the effective date, and a schedule showing new prices and related classification changes.[2] The changes are scheduled to take effect on August 1, 2020. Notice at 1.

Attached to the Notice is Governors' Decision No. 20–2, which states the new prices are in accordance with 39 U.S.C. 3632 and 3633 and 39 CFR 3035.102(b).[3] The attachment to the Governors' Decision sets forth the price changes and includes draft Mail Classification Schedule (MCS) language for Priority Mail Express and Priority Mail related to the Loyalty Program. *Id.*

The Postal Service includes a non-public annex showing FY 2020 projected volumes, revenues, attributable costs, contribution, and cost coverage for Priority Mail Express and Priority Mail. Notice at 1. The Postal Service states that a full rollforward forecast is not available, but it is filing supporting data for the affected products in accordance with Order No. 1062. *Id.* The Notice includes an application for non-public treatment of the attributable costs, contribution, and cost coverage data in the unredacted version of the annex, as well as the supporting materials for the data. Notice at 1–2. The Postal Service filed a redacted, public version of the annex with the Notice.[4]

### II. Loyalty Program

The Notice states that the Loyalty Program applies to Postal Service business customers using Click-N-Ship for Priority Mail Express and Priority Mail shipping at Retail rates. Notice at 2. Beginning on August 1, 2020, the Postal Service will automatically enroll these customers in the Basic tier of the Loyalty Program. *Id.* On January 1, 2021, the Loyalty Program will expand to a three-tiered program based on each customer's shipping spending at Retail rates in the previous calendar year. *Id.* The three tiers are:

- Basic (no minimum spending): Earn $40 credit for every $500 spent
- Silver (at least $10,000 spent): Earn $50 credit for every $500 spent
- Gold (at least $20,000 spent): Qualify for Commercial Base pricing

*Id.* To help customers whose volume declined because of the ongoing COVID–19 pandemic, all Loyalty Program participants will receive an additional one-time $20 credit for shipping during the first two months of the program once participants ship at least $500 combined at Priority Mail Express and Priority Mail Retail rates. *Id.* During the first year of the Loyalty Program, any new Postal Service Click-N-Ship business customers will receive a one-time $40 ''Welcome Bonus'' credit upon shipping at least $500 at Priority Mail Express and Priority Mail Retail rates. *Id.*

### III. Initial Administrative Actions

The Commission establishes Docket No. CP2020–166 to consider the Postal Service's Notice. Interested persons may express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR 3040 subparts B and E. Comments are due no later than June 19, 2020. For specific details of the planned price changes, interested persons are encouraged to review the Notice, which is available on the Commission's website at *www.prc.gov.*

Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as Public Representative to represent the interests of the general public in this docket.

### IV. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2020–166 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, and 3642, 39 CFR part 3035, and 39 CFR 3040 subparts B and E.

2. Comments are due no later than June 19, 2020.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth R. Moeller to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2020–12756 Filed 6–11–20; 8:45 am]

**BILLING CODE 7710–FW–P**

[1] United States Postal Service Notice of Changes in Rates of General Applicability for Loyalty Program, June 5, 2020 (Notice). Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates.

[2] *See* Notice at 1. In the Notice, the Postal Service cites to 39 CFR 3015.2(b). *Id.* The rules appearing in title 39 of the Code of Federal Regulations were re-organized effective April 20, 2020. *See* Docket No. RM2019–13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407); Docket No. RM2019–13, Notice of Errata, April 23, 2020. Prior to this reorganization, rules on rates for competitive products appeared in 39 CFR part 3015. This Order cites to the re-organized rules.

[3] Notice, Decision of the Governors of the United States Postal Service on Changes in Rates of General Applicability for Competitive Products (Governors' Decision No. 20–2), at 1 (Governors' Decision No. 20–2).

[4] Notice at 2; *see* Excel file ''loyaltypgm annex.redacted.xls''.

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. SIPA–182; File No. SIPC–2019–02]**

## Securities Investor Protection Corporation; Order Approving Proposed Bylaw Change Relating to SIPC Member Assessments

June 9, 2020.

Pursuant to Section 3(e)(1) of the Securities Investor Protection Act of 1970 (''SIPA''),[1] the Securities Investor Protection Corporation (''SIPC'') filed with the Securities and Exchange Commission (''Commission'') on November 19, 2019 proposed bylaw changes relating to annual assessments on its broker-dealer members. On December 10, 2019, SIPC consented to a 90-day extension of time before the proposed bylaw changes would take effect pursuant to Section 3(e)(1) of SIPA.[2] Pursuant to Section 3(e)(1)(B) of SIPA, the Commission found that the proposed bylaw changes involved a matter of such significant public interest that public comment should be obtained.[3] Consequently, pursuant to Section 3(e)(2)(A) of SIPA,[4] a notice soliciting comment on the proposed bylaw changes was published in the **Federal Register** on January 30, 2020.[5] On February 24, 2020, SIPC consented to an extension until May 14, 2020, and on April 1, 2020, SIPC consented to an additional extension until June 15, 2020, for the Commission to approve or institute proceedings to determine whether the proposed bylaw change should be disapproved.[6] The Commission received no comments regarding the proposed bylaw changes. For the reasons described below, the Commission finds that the proposed bylaw changes are in the public interest and consistent with the purposes of SIPA.[7] Therefore, this order approves the proposed bylaw changes under Section 3(e)(2) of SIPA.[8]

### I. Description of the Proposed Bylaw Changes

#### *A. Member Assessment Rate*

SIPC administers a fund (''SIPC Fund'') that is financed through assessments on SIPC's broker-dealer members and interest on U.S. government securities held in the fund. The SIPC Fund is used to make advances (subject to limits) to trustees administering SIPA liquidations of failed broker-dealer members to cover customer claims for securities or cash that cannot be satisfied by customer property of the firm recovered by the trustee.[9] The SIPC Fund also is used to pay the administrative expenses of a SIPA liquidation when the general estate of the failed broker-dealer member is insufficient to cover the expenses. Additionally, the SIPC Fund is used to finance the day-to-day operations of SIPC.

Under Article 6 of SIPC's Bylaws, the annual assessment rate is a percent of each broker-dealer member's gross or net operating revenues from the securities business.[10] Several variables relating to the balance and projected balance of the SIPC Fund and the balance of SIPC's unrestricted net assets determine whether the assessment rate is a percent of *gross* or *net* operating revenues and the amount of the percent multiplier (*i.e.,* 0.50%, 0.25%, 0.15%, or 0.02% of gross or net revenues). For example, the current assessment rate is 0.15% of net operating revenues from the SIPC member's securities business for each calendar year or part thereof (''net operating revenue''). This assessment rate applies when SIPC determines that the SIPC Fund balance is $2.5 billion or more, will remain at or above $2.5 billion or more for at least six months, and SIPC's unrestricted net assets are *less* than $2.5 billion.[11] This rate will drop to 0.02% of net operating revenues if SIPC determines that the SIPC Fund balance is $2.5 billion or more, will remain at or above $2.5 billion or more for at least six months, and SIPC's unrestricted net assets are equal to or greater than $2.5 billion.[12]

SIPC proposed to amend its bylaws so that an assessment rate of 0.15% of a broker-dealer member's net operating revenues will remain in effect until SIPC's unrestricted net assets reach and are reasonably likely to remain above $5 billion, unless SIPC determines that its unrestricted net assets are less than $2.5 billion, in which case, the assessment rate would rise to 0.25% of a broker-dealer member's net operating revenues. In the event that SIPC reasonably anticipates that its unrestricted net assets have reached and are reasonably likely to remain above $5 billion, SIPC would commission a study to consider the adequacy of the SIPC Fund, and would do so every four years thereafter. After consideration of the study, and after consultation with the Commission and self-regulatory organizations (''SROs''), SIPC could increase or decrease the assessment rate by up to 25%.

SIPC stated that the proposed bylaw change will accomplish a few things: (1) Provide a larger cushion for unknown contingencies; (2) reduce the potential volatility of member assessments during periods of economic downturn or individual member crisis; and (3) promote sound financial management in light of SIPC's statutory mission.[13] Moreover, SIPC noted that the proposed bylaw changes should have a limited impact on member firms. SIPC estimated that approximately two-thirds of the total difference in annual assessments resulting from the proposal would be paid by only 30 broker-dealer members and this would, on average, equal approximately 0.091% of their total revenue.

#### *B. Collection Agent*

Section 13(a) of SIPA provides that each SRO shall act as collection agent for SIPC to collect the assessments payable by broker-dealer members for which the SRO is the examining authority.[14] However, SIPC cites other sections of SIPA as supporting its authority to collect assessments directly.[15] According to SIPC, broker-

[1] 15 U.S.C. 78ccc(e)(1).

[2] *See id.*

[3] *See* 15 U.S.C. 78ccc(e)(1)(B).

[4] *See* 15 U.S.C. 78ccc(e)(2)(A).

[5] *See* Securities Investor Protection Corporation; Notice of Filing of Proposed Bylaw Changes Relating to SIPC Member Assessments; Correction, Release No. SIPA–179A (Jan. 24, 2020), 85 FR 5519 (Jan. 30, 2020) (''Notice'').

[6] *See* 15 U.S.C. 78ccc(e)(2)(B).

[7] *See* 15 U.S.C. 78ccc(e)(2)(D).

[8] *See* 15 U.S.C. 78ccc(e)(2).

[9] *See* 15 U.S.C. 78fff–3(a). Currently, the limits of protection are $500,000 per customer except that claims for cash are limited to $250,000 per customer.

[10] Section 16(9) of SIPA defines ''gross revenues from the securities business'' to mean the sum of a number of revenue items, including certain commissions on securities transactions, charges for executing or clearing securities transactions for other broker-dealers, net realized gain from principal transactions in securities in trading accounts, net profits from the management of or participation in the underwriting or distribution of securities, and interest earned on customers' securities accounts. *See* 15 U.S.C. 78lll(9). Article 6, section 1(g) of the SIPC Bylaws defines ''net operating revenues from the securities business'' as gross revenues from the securities business less interest and dividend expenses.

[11] *See* Article 6, section 1(a)(1)(B) of the SIPC Bylaws. SIPC's unrestricted net assets are SIPC's total assets (including the SIPC Fund) less liabilities, which include estimated costs to complete ongoing SIPA liquidations.

[12] *See* Article 6, section 1(a)(1)(C) of the SIPC Bylaws.

[13] SIPC's full rationale for why the assessment rate should be adjusted in this manner is set forth in its narrative accompanying the proposed bylaw changes. *See Notice,* 85 FR at 5519–5523.

[14] *See* 15 U.S.C. 78iii(a).

[15] *See, e.g.,* 15 U.S.C. 78ddd(c)(1) (''Each member of SIPC shall pay to SIPC, *or* the collection agent for SIPC . . .'' an initial assessment) (emphasis added); 15 U.S.C. 78ccc(b)(8) (SIPC has the power ''to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the

dealer members have paid their assessments directly to SIPC for more than 20 years. In keeping with current practice, SIPC proposes a bylaw change to remove references to broker-dealer members paying assessments to collection agents.[16]

*C. Elimination of Grace Period for Past-Due Payments*

Currently, the SIPC Bylaws provide that if a broker-dealer member's assessment payment has not been received within 15 days of the due date (the grace period), the stated interest rate for late payments applies to unpaid amounts. In January 2019, SIPC developed an internet payment portal, whereby members can pay SIPC directly online. SIPC also is working on the development of a portal through which, among other things, members can file assessment forms. SIPC stated that the creation of a mechanism for members to make immediate payment obviates the need for a grace period. SIPC proposed to amend the SIPC Bylaws to eliminate the 15 day grace period before interest begins accruing on past-due payments.[17]

## II. Comments Received

The Commission received no comments regarding the proposal.

## III. Commission Findings

Section 3(e) of SIPA sets forth the procedures for addressing proposed SIPC rules and bylaws.[18] Pursuant to Section 3(e)(1)(B) of SIPA, the Commission found that the proposed bylaw changes involved a matter of such significant public interest that public comment should be obtained and required that the procedures applicable to SIPC proposed rule changes in section 3(e)(2) of SIPA be followed.[19] Section 3(e)(2) of SIPA sets forth the procedures for proposed rules and provides that the Commission shall approve a proposed rule change if it finds the change is in the public interest and is consistent with the purposes of SIPA. As discussed below, the Commission finds, pursuant to Section 3(e)(2)(D) of SIPA, that the proposed bylaw change is in the public interest and consistent with the purposes of SIPA.[20]

*A. Member Assessments*

As described in further detail above, SIPC proposed to continue to charge its members an assessment rate of 0.15% of a member's net operating revenues from the securities business until SIPC's unrestricted net assets reach $5 billion (instead of $2.5 billion, as the SIPC Bylaws currently provide). Moreover, once the SIPC Fund reaches $5 billion, the proposal would enable SIPC to adjust the member assessment rate up or down by as much as 25% every four years following the completion of a study on the topic and after consulting with the Commission and with SROs.

The SIPC Fund, which is built from assessments on its members and the interest earned on the SIPC Fund, is used for the protection of customers of members liquidated under SIPA to maintain investor confidence in the securities markets.[21] The proposed bylaw change provides a larger cushion in the SIPC Fund for unknown contingencies and to promote sound financial management of the SIPC Fund in light of SIPC's statutory mission. The proposed bylaw change also reduces the potential volatility of member assessments during periods of economic downturn or individual member crisis, which should facilitate SIPC members' ability to plan for future payments of SIPC assessments. Moreover, SIPC's new limited authority to adjust the assessment rate, after a study and consultation with the Commission and the SROs, gives SIPC appropriate discretion to keep the SIPC Fund appropriately sized, while preserving oversight over the SIPC Board's activity.

*B. Collection Agent*

The SIPC Bylaws currently include references to the practice of SROs collecting assessments on behalf of SIPC as agents. These Bylaw sections relate to the provisions in SIPA establishing the authority of SROs to serve as collection agents on behalf of SIPC.[22] However, other provisions of SIPA suggest that SIPC can collect assessments directly from members [23] and grant broad reservations of power to SIPC.[24] In addition, for over 20 years, SIPC has collected its member assessments directly rather than by using an SRO to serve as collection agent. Therefore, SIPC proposed bylaw changes to conform to current practice and to remove references that assumed SROs continued to act as collection agents on behalf of SIPC.

The Commission believes that SIPC's proposed bylaw change will clarify to SIPC members and to the public that it collects member assessments directly rather than through an SRO. In finding that this proposed bylaw change is consistent with the public interest, the Commission notes that SIPC has developed an enhanced means to pay assessments through an internet portal and is continuing to develop an electronic means for members to file their assessment forms.

*C. Elimination of Grace Period for Past-Due Payments*

SIPC also proposed to eliminate the 15 day grace period before interest begins accruing on past-due assessment payments. As described above, SIPC has recently developed an online payment portal, which should reduce the ambiguity about the date payment is received by SIPC if it is transmitted on a timely basis, thereby obviating the need for a grace period.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 3(e)(2) of SIPA, that the proposed bylaw change (SIPA 2019–02) is approved.[25]

By the Commission.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–12733 Filed 6–11–20; 8:45 am]

**BILLING CODE 8011–01–P**

conduct of its business and the exercise of all other rights and powers granted to SIPC by this chapter'').

[16] *See* Article 6, sections 1(c)–(e) of the SIPC Bylaws. Under the proposed bylaw change, section 1(c) would be deleted and sections 1(d) and 1(e) are re-designated sections 1(c) and 1(d), respectively.

[17] *See* Article 6, section 1(e) of the SIPC Bylaws. Under the proposed bylaw change, section 1(e) is re-designated section 1(d).

[18] See 15 U.S.C. 78ccc(e).

[19] *See Notice,* 85 FR 5519.

[20] *See* 15 U.S.C. 78ccc(e)(2)(D).

[21] *See, e.g., Securities Investor Protection Corporation; Order Approving a Proposed Bylaw Change Relating to SIPC Fund Assessments on SIPC Members,* Release No. SIPA–178 (Aug. 30, 2016), 81 FR 61263, 61264 (Sept. 6, 2016).

[22] *See* 15 U.S.C. 78iii(a) (''[e]ach self-regulatory organization shall act as collection agent for SIPC . . .'').

[23] *See* 15 U.S.C. 78ddd(f) (referencing future assessments pledged by SIPC that are ''. . . thereafter received by SIPC, or any collection agent for SIPC . . .'')

[24] *See* 15 U.S.C. 78ccc(b) (granting SIPC the power, among other things, to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things as may be necessary or incidental to the conduct of its business).

[25] *See* 15 U.S.C. 78ccc(e)(2).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89027; File No. SR–NASDAQ–2020–027]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets

June 8, 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 May 29, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' 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 apply additional initial listing criteria for companies primarily operating in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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

Nasdaq's listing requirements include a number of criteria which, in the aggregate, are designed to ensure that a security listed on Nasdaq has sufficient liquidity and public interest to support a listing on a U.S. national securities exchange. These requirements are intended to ensure that there are sufficient shares available for trading to facilitate proper price discovery in the secondary market. In recent years, U.S. investors have increasingly sought exposure to emerging markets companies as part of a diversified portfolio. As a result of this interest, emerging market companies have sought to raise funds in the U.S. and list on Nasdaq. While many of these listings have similar trading attributes and rates of compliance concerns compared to U.S. companies with similar profiles, the lack of transparency from certain emerging markets raises concerns about the accuracy of disclosures, accountability, and access to information, particularly when a company is based in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a ''Restrictive Market'').

These concerns can be compounded when the company lists on Nasdaq through an initial public offering (''IPO'') or business combination with a small offering size or a low public float percentage because such companies may not attract market attention and develop sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly trading. As a result, the securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. In addition, foreign issuers are more likely to issue a portion of an offering to investors in their home country, which raises concerns that such investors will not contribute to the liquidity of the security in the U.S. secondary market.

Less liquid securities may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices. The risk of price manipulation due to insider trading is more acute when a company principally administers its business in a Restrictive Market (a ''Restrictive Market Company'') because regulatory investigations into price manipulation, insider trading and compliance concerns may be impeded. In such cases, investor protections and remedies may be limited due to obstacles encountered by U.S. authorities in bringing or enforcing actions against the companies and insiders.[3]

Currently, Nasdaq may rely upon its discretionary authority provided under Rule 5101[4] to deny initial listing or to apply additional and more stringent criteria when Nasdaq is concerned that a small offering size for an IPO may not reflect the company's initial valuation or ensure sufficient liquidity to support trading in the secondary market. Nasdaq is proposing to adopt new Rules 5210(l)(i) and (ii) that would require a minimum offering size or public float for Restrictive Market Companies listing on Nasdaq in connection with an IPO or a business combination (as described in Rule 5110(a) or IM–5101–2). Nasdaq is also proposing to adopt a new Rule 5210(l)(iii) to provide that Restrictive Market Companies would be permitted to list on the Nasdaq Global Select or Nasdaq Global Markets if they are listing in connection with a Direct Listing (as defined in IM–5315–1), but would not be permitted to list on the Nasdaq Capital Market, which has lower requirements for Unrestricted Publicly Held Shares, in connection with a Direct Listing.

#### I. Definition of Restrictive Market

Nasdaq proposes to adopt a new definition of Restrictive Market in Rule 5005(a)(37) to define a Restrictive

[3] *See* SEC Chairman Jay Clayton, PCAOB Chairman William D. Duhnke III, SEC Chief Accountant Sagar Teotia, SEC Division of Corporation Finance Director William Hinman, SEC Division of Investment Management Director Dalia Blass, *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited* (April 21, 2020), available at *https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting.*

[4] Listing Rule 5101 provides Nasdaq with broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

Market as a jurisdiction that Nasdaq determines to have secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction. Nasdaq also proposes to renumber the remainder of Rule 5005(a) to ensure consistency in its rulebook.

In determining whether a company's business is principally administered in a Restrictive Market, Nasdaq may consider the geographic locations of the company's: (a) Principal business segments, operations or assets; (b) board and shareholders' meetings; (c) headquarters or principal executive offices; (d) senior management and employees; and (e) books and records.[5] Nasdaq will consider these factors holistically, recognizing that a company's headquarters may not be the office from which it conducts its principal business activities.

For example, Company X's headquarters could be located in Country Y, while the majority of its senior management, employees, assets, operations and books and records are located in Country Z, which is a Restrictive Market. If Company X applies to list its Primary Equity Security on Nasdaq in connection with an IPO, Nasdaq would consider Company X's business to be principally administered in Country Z, and Company X would therefore be subject to the proposed additional requirements applicable to a Restrictive Market Company.

## II. Minimum Offering Size or Public Float Percentage for an IPO

As proposed, Rule 5210(l)(i) would require a company that is listing its Primary Equity Security[6] on Nasdaq in connection with its IPO, and that principally administers its business in a Restrictive Market, to offer a minimum amount of securities in a Firm Commitment Offering[7] in the U.S. to Public Holders[8] that: (i) Will result in gross proceeds to the company of at least $25 million; or (ii) will represent at least 25% of the company's post-offering Market Value[9] of Listed Securities,[10] whichever is lower. For example, Company X is applying to list on Nasdaq Global Market. Company X principally administers its business in a Restrictive Market and its post-offering Market Value of Listed Securities is expected to be $75,000,000. Since 25% of $75,000,000 is $18,750,000, which is lower than $25,000,000, it would be eligible to list under the proposed rule based on a Firm Commitment Offering in the U.S. to Public Holders of at least $18,750,000. However, Company X would also need to comply with the other applicable listing requirements of the Nasdaq Global Market, including a Market Value of Unrestricted Publicly Held Shares[11] of at least $8 million.[12]

In contrast, Company Y, which also principally administers its business in a Restrictive Market, is applying to list on the Nasdaq Global Select Market and its post-offering Market Value of Listed Securities is expected to be $200,000,000. Since 25% of $200,000,000 is $50,000,000, which is higher than $25,000,000, it would be eligible to list under the proposed rule based on a Firm Commitment Offering in the U.S. to Public Holders that will result in gross proceeds of at least $25,000,000. However, Company Y would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least $45 million.[13]

The Exchange believes that the proposal to require a Restrictive Market Company conducting an IPO to offer a minimum amount of securities in the U.S. to Public Holders in a Firm Commitment Offering will provide greater support for the company's price, as determined through the offering, and will help assure that there will be sufficient liquidity, U.S. investor interest and distribution to support price discovery once a security is listed. Nasdaq believes there is a risk that substantial participation by foreign investors in an offering, combined with insiders retaining significant ownership, does not promote sufficient investor base and trading interest to support trading in the secondary market. The risk to U.S. investors is compounded when a company is located in a Restrictive Market due to barriers on access to information and limitations on the ability of U.S. regulators to conduct investigations or bring or enforce actions against the company and non-U.S. persons, which create concerns about the accuracy of disclosures, accountability and access to information. Further, the Exchange has observed that Restrictive Market Companies listing on Nasdaq in connection with an IPO with an offering size below $25 million or public float ratio below 25% have a high rate of compliance concerns.

Nasdaq believes that these concerns may be mitigated by the company conducting a Firm Commitment Offering of at least $25 million or 25% of the company's post-offering Market Value of Listed Securities, whichever is lower. Firm Commitment Offerings typically involve a book building process that helps to generate an investor base and trading interest that promotes sufficient depth and liquidity to help support fair and orderly trading on the Exchange. Such offerings also typically involve more due diligence by the broker-dealer than would be done in connection with a best-efforts offering, which helps to ensure that third parties subject to U.S. regulatory oversight are conducting significant due diligence on the company, its registration statement and its financial statements.[14] The

[5] This threshold would capture both foreign private issuers based in Restrictive Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restrictive Markets. The factors that Nasdaq would consider when determining whether a business is principally administered in a Restrictive Market is supported by SEC guidance regarding foreign private issuer status, which suggests that a foreign company may consider certain factures including the locations of: The company's principal business segments or operations; its board and shareholders' meetings; its headquarters; and its most influential key executives (potentially a subset of all executives). *See* Division of Corporation Finance of the SEC, *Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers* (February 13, 2013), available at *https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml#IIA2c.*

[6] Rule 5005(a)(33) defines ''Primary Equity Security'' as ''a Company's first class of Common Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts (ADR) or Shares (ADS).''

[7] Rule 5005(a)(17) defines ''Firm Commitment Offering'' as ''an offering of securities by participants in a selling syndicate under an agreement that imposes a financial commitment on participants in such syndicate to purchase such securities.''

[8] Rule 5005(a)(36) defines ''Public Holders'' as ''holders of a security that includes both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an Executive Officer, director, or the beneficial holder of more than 10% of the total shares outstanding.''

[9] Rule 5005(a)(23) defines ''Market Value'' as ''the consolidated closing bid price multiplied by the measure to be valued (*e.g.,* a Company's Market Value of Publicly Held Shares is equal to the consolidated closing bid price multiplied by a Company's Publicly Held Shares).''

[10] Rule 5005(a)(22) defines ''Listed Securities'' as ''securities listed on Nasdaq or another national securities exchange.''

[11] *See* Rule 5005(a)(45) (definition of ''Unrestricted Publicly Held Shares''), Rule 5005(a)(46) (definition of ''Unrestricted Securities''), and Rule 5005(a)(37) (definition of ''Restricted Securities'').

[12] *See* Rule 5405(b)(1)(C).

[13] *See* Rule 5315(f)(2)(C).

[14] Certain Restrictive Markets impose national barriers on access to information that limit the ability of U.S. regulators to effectively conduct regulatory oversight of U.S.-listed companies with operations in such countries, including the PCAOB's ability to inspect the audit work and practices of auditors in those countries. *See* SEC Chairman Jay Clayton, SEC Chief Accountant Wes

Continued

Exchange believes that the proposal will help ensure that Restrictive Market Companies seeking to list on the Exchange have sufficient investor base and public float to support fair and orderly trading on the Exchange.

### III. Minimum Market Value of Publicly Held Shares for a Business Combination

Nasdaq believes that a business combination, as described in Rule 5110(a) or IM–5101–2, involving a Restrictive Market Company presents similar risks to U.S. investors as IPOs of Restrictive Market Companies. However, such a business combination would typically not involve an offering. Therefore, Nasdaq proposes to adopt a new Rule 5210(l)(ii) that would impose a similar new requirement as applicable to IPOs, but would reflect that the listing would not typically be accompanied by an offering. Specifically, proposed Rule 5210(l)(ii) would require the listed company to have a minimum Market Value of Unrestricted Publicly Held Shares following the business combination equal to the lesser of: (i) $25 million; or (ii) 25% of the post-business combination entity's Market Value of Listed Securities.

For example, Company A is currently listed on the Nasdaq Capital Market and plans to acquire a company that principally administers its business in a Restrictive Market, in accordance with IM–5101–2. Following the business combination, Company A intends to transfer to the Nasdaq Global Select Market. Company A expects the post-business combination entity to have a Market Value of Listed Securities of $250,000,000. Since 25% of $250,000,000 is $62,500,000, which is higher than $25,000,000, to qualify for listing on the Nasdaq Global Select Market the post-business combination entity must have a minimum Market Value of Unrestricted Publicly Held Shares of at least $25,000,000. However, Company A would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least $45,000,000.[15]

In contrast, Company B is currently listed on Nasdaq Capital Market and plans to combine with a non-Nasdaq entity that principally administers its business in a Restrictive Market, resulting in a change of control as defined in Rule 5110(a), whereby the non-Nasdaq entity will become the Nasdaq-listed company. Following the change of control, Company B expects the listed company to have a Market Value of Listed Securities of $50,000,000. Since 25% of $50,000,000 is $12,500,000, which is lower than $25,000,000, the listed company must have a minimum Market Value of Unrestricted Publicly Held Shares following the change of control of at least $12,500,000. However, the company would also need to comply with the other applicable listing requirements of the Nasdaq Capital Market, including a Market Value of Unrestricted Publicly Held Shares of at least $5 million.[16]

Market Value of Unrestricted Publicly Held Shares excludes securities subject to resale restrictions from the calculation of Publicly Held Shares because securities subject to resale restrictions are not freely transferrable or available for outside investors to purchase and therefore do not truly contribute to a security's liquidity upon listing. Nasdaq believes that requiring the post-business combination entity to have a minimum Market Value of Unrestricted Publicly Held Shares of at least $25 million or 25% of its Market Value of Listed Securities, whichever is lower, would help to provide an additional assurance that there are sufficient freely tradable shares and investor interest to support fair and orderly trading on the Exchange when the target company principally administers its business in a Restrictive Market. Nasdaq believes that this will help mitigate the unique risks that Restrictive Market Companies present to U.S. investors due to barriers on access to information and limitations on the ability of U.S. regulators to conduct investigations or bring or enforce actions against the company and non-U.S. persons, which create concerns about the accuracy of disclosures, accountability and access to information.

### IV. Direct Listings of Restrictive Market Companies

Nasdaq proposes to adopt Rule 5210(l)(iii) to provide that a Restrictive Market Company would be permitted to list on the Nasdaq Global Select Market or Nasdaq Global Market in connection with a Direct Listing (as defined in IM–5315–1), provided that the company meets all applicable listing requirements for the Nasdaq Global Select Market and the additional requirements of IM–5315–1, or the applicable listing requirements for the Nasdaq Global Market and the additional requirements of IM–5405–1. However, such companies would be not be permitted to list on the Nasdaq Capital Market in connection with a Direct Listing notwithstanding the fact that such companies may meet the applicable initial listing requirements for the Nasdaq Capital Market and the additional requirements of IM–5505–1.

Direct Listings are currently required to comply with enhanced listing standards pursuant to IM–5315–1 (Nasdaq Global Select Market) and IM–5405–1 (Nasdaq Global Market). If a company's security has had sustained recent trading in a Private Placement Market,[17] Nasdaq may attribute a Market Value of Unrestricted Publicly Held Shares equal to the lesser of (i) the value calculable based on a Valuation [18] and (ii) the value calculable based on the most recent trading price in the Private Placement Market.[19] Nasdaq believes that the price from such sustained trading in the Private Placement Market for the company's securities is predictive of the price in the market for the common stock that will develop upon listing of the securities on Nasdaq and that qualifying a company based on the lower of such trading price or the Valuation helps assure that the company satisfies Nasdaq's requirements.

Nasdaq may require a company listing on the Nasdaq Global Select Market that has not had sustained recent trading in a Private Placement Market to satisfy the applicable Market Value of Unrestricted Publicly Held Shares requirement and provide a Valuation evidencing a Market Value of Publicly Held Shares of at least $250,000,000.[20] For a company that has not had sustained recent trading in a Private Placement Market

Bricker and PCAOB Chairman William D. Duhnke III, *Statement on the Vital Role of Audit Quality and Regulatory Access to Audit and Other Information Internationally—Discussion of Current Information Access Challenges with Respect to U.S.-listed Companies with Significant Operations in China* (December 7, 2018), available at *https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other* (''Some of these laws, for example, act to prohibit foreign-domiciled registrants in certain jurisdictions from responding directly to SEC requests for information and documents or doing so, in whole or in part, only after protracted delays in obtaining authorization. Other laws can prevent the SEC from being able to conduct any type of examination, either onsite or by correspondence . . . Positions taken by some foreign authorities currently prevent or significantly impair the PCAOB's ability to inspect non-U.S. audit firms in certain countries, even though these firms are registered with the PCAOB.'').

[15] *See* Rule 5315(f)(2)(C).

[16] *See* Rule 5505(b)(3)(C).

[17] *See* Rule 5005(a)(34).

[18] *See* IM–5315–1(a)(1).

[19] *See* IM–5315–1(a)(1) (Nasdaq Global Select Market) and IM–5405–1(a)(1) (Nasdaq Global Market).

[20] *See* IM–5315–1(b).

and that is applying to list on the Nasdaq Global Market, Nasdaq will generally require the company to provide a Valuation that demonstrates a Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares that exceeds 200% of the otherwise applicable requirement.[21] Nasdaq believes that in the absence of recent sustained trading in the Private Placement Market, the requirement to demonstrate a Market Value of Publicly Held Shares of at least $250 million for a company seeking to list on Nasdaq Global Select Market, or that the company exceeds 200% of the otherwise applicable price-based requirement for a company seeking to list on Nasdaq Global Market, helps assure that the company satisfies Nasdaq's requirement by imposing a standard that is more than double the otherwise applicable standard.

Thus, companies listing in connection with a Direct Listing on the Nasdaq Global or Global Select Market tiers are already subject to enhanced listing requirements and Nasdaq believes it is appropriate to permit Restrictive Market Companies to list through a Direct Listing on the Nasdaq Global Select Market or Nasdaq Global Market. On the other hand, while companies ayaylisting [sic] in connection with a Direct Listing on the Capital Market are also subject to enhanced listing requirements, Nasdaq does not believe that these enhanced requirements are sufficient to overcome concerns regarding sufficient liquidity and investor interest to support fair and orderly trading on the Exchange with respect to Restrictive Market Companies.[22] Nasdaq believes that Restrictive Market Companies present unique risks to U.S. investors due to barriers on access to information and limitations on the ability of U.S. regulators to conduct investigations or bring or enforce actions against the company and non-U.S. persons, which create concerns about the accuracy of disclosures, accountability and access to information. Therefore, Nasdaq believes that precluding a Restrictive Market Company from listing through a Direct Listing on the Capital Market will help to ensure that the company has sufficient public float, investor base, and trading interest likely to generate depth and liquidity necessary to promote fair and orderly trading on the secondary market.

## V. Conclusion

Nasdaq believes that the U.S. capital markets can provide Restrictive Market Companies with access to additional capital to fund ground-breaking research and technological advancements. Further, such companies provide U.S. investors with opportunities to diversify their portfolio by providing exposure to Restrictive Markets. However, as discussed above, Nasdaq believes that Restrictive Market Companies present unique potential risks to U.S. investors due to national barriers on access to information and limitations on the ability of U.S. regulators to conduct investigations or bring or enforce actions against the company and non-U.S. persons, which create concerns about the accuracy of disclosures, accountability and access to information.[23] Nasdaq believes that the proposed rule changes will help to ensure that Restrictive Market Companies have sufficient investor base and public float to support fair and orderly trading on the Exchange.

*2. Statutory Basis*

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[24] in general, and furthers the objectives of Section 6(b)(5) of the Act,[25] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Further, the Exchange believes that this proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission has previously opined on the importance of meaningful listing standards for the protection of investors and the public interest.[26] In particular, the Commission stated:

> Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.[27]

Nasdaq believes that requiring a minimum offering size or public float percentage for Restrictive Market Companies seeking to list on Nasdaq through an IPO or business combination will ensure that a security to be listed on Nasdaq has adequate liquidity, distribution and U.S. investor interest to support fair and orderly trading in the secondary market, which will reduce trading volatility and price manipulation, thereby protecting investors and the public interest.

Similarly, Nasdaq believes that permitting Restrictive Market Companies to list on Nasdaq Global Select Market or Nasdaq Global Market, rather than the Nasdaq Capital Market, in connection with a Direct Listing will ensure that such companies satisfy more rigorous listing requirements, including the minimum amount of Publicly Held Shares and Market Value of Publicly Held Shares, which will help to ensure that the security has sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly trading, thereby protecting investors and the public interest.

While the proposal applies only to Restrictive Market Companies, the Exchange believes that the proposal is not designed to permit unfair discrimination among companies because Nasdaq believes that Restrictive Market Companies present unique potential risks to U.S. investors due to national barriers on access to information and limitations on the ability of U.S. regulators to conduct investigations or bring or enforce actions against the company and non-U.S. persons, which create concerns about the accuracy of disclosures, accountability and access to information. In addition, such companies may not develop sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly trading, resulting in a security that is illiquid. Nasdaq is concerned because illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of

[21] *See* IM–5405–1(a)(2) (Nasdaq Global Market).

[22] For example, the Nasdaq Global Select Market and Nasdaq Global Market require a company to have at least 1,250,000 and 1.1 million Unrestricted Publicly Held Shares, respectively, and a Market Value of Unrestricted Publicly Held Shares of at least $45 million and $8 million, respectively. In contrast, the Nasdaq Capital Market requires a company to have at least 1 million Unrestricted Publicly Held Shares and a Market Value of Unrestricted Publicly Held Shares of at least $5 million.

[23] *See supra* note 3.

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(5).

[26] Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (approving SR–Nasdaq–2011–073 adopting additional listing requirements for companies applying to list after consummation of a ''reverse merger'' with a shell company).

[27] *Id* at 70802.

which may result in trading at a price that may not reflect their true market value.

Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices. Price manipulation is a particular concern when insiders retain a significant ownership portion of the company. The risk of price manipulation due to insider trading is more acute when a company principally administers its business in a Restrictive Market and management lacks familiarity or experience with U.S. securities laws. Therefore, Nasdaq believes that it is not unfairly discriminatory to treat Restrictive Market Companies differently under this proposal because it will help ensure that securities of a Restrictive Market Company listed on Nasdaq have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets, thereby promoting investor protection and the public interest.

*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 not necessary or appropriate in furtherance of the purposes of the Act. While the proposed rule changes will apply only to companies primarily operating in Restrictive Markets, Nasdaq and the SEC have identified specific concerns with such companies that make the imposition of additional initial listing criteria on such companies appropriate to enhance investor protection, which is a central purpose of the Act. Any impact on competition, either among listed companies or between exchanges, is incidental to that purpose.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–027 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–027. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–027 and should be submitted on or before July 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–12685 Filed 6–11–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 2:00 p.m. on Wednesday, June 17, 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.

[28] 17 CFR 200.30–3(a)(12).

Dated: June 10, 2020.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2020–12888 Filed 6–10–20; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89028; File No. SR–NASDAQ–2020–026]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets

June 8, 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 May 29, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' 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 adopt a new requirement related to the qualification of management for certain companies.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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

Under federal securities laws, a company's management is responsible for preparing financial statements and for establishing and maintaining disclosure controls and procedures and internal control over financial reporting.[3] Nasdaq's listing requirements include transparent quantitative criteria, which are based on the company's financial statements and market information. They also impose disclosure obligations (along with applicable federal securities laws) and establish minimum corporate governance requirements, which are designed to protect investors and the public interest. A company's management is also responsible for ensuring compliance with these listing requirements on an ongoing basis.[4] For these reasons, Nasdaq believes that it is critically important for companies to have management that is familiar with these responsibilities, or an advisor to guide the company in fulfilling these obligations, in order to protect investors and the public interest.

Accordingly, Nasdaq has observed instances where it appears that management lacked familiarity with the requirements to be a Nasdaq-listed public company in the U.S. or was otherwise unprepared for the rigors of operating as a public company. The risks arising from these situations are heightened when a company's business is principally administered in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a ''Restrictive Market'').[5]

Accordingly, Nasdaq proposes to adopt a new listing standard in Rule 5210(c) to require that listing applicants from Restrictive Market countries have, and certify to Nasdaq that they will continue to have, a member of senior management or a director with relevant past employment experience at a U.S.-listed public company or other experience, training or background which results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws. Alternatively, in the absence of such an individual, the company could retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the company.

It is expected that the member of senior management, director or advisor would be a resource to the company on matters such as the Nasdaq corporate governance requirements, disclosure of material information, SEC reporting obligations including financial reporting obligations, internal controls over financial reporting, related party transactions, insider trading restrictions, whistleblower protections and investor communications. As such, Nasdaq expects this proposed requirement will heighten compliance by companies from Restrictive Markets and enhance investor protection. The proposed requirement is similar to the requirements of other global markets, which also include qualification requirements for management.[6]

[3] *See, e.g.,* SEC Chairman Jay Clayton, PCAOB Chairman William D. Duhnke III, SEC Chief Accountant Sagar Teotia, SEC Division of Corporation Finance Director William Hinman, SEC Division of Investment Management Director Dalia Blass, *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited* (April 21, 2020), available at *https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting* (''Emerging Market Risks Statement'') (''Management is responsible for the preparation of the financial statements, including responsibility for establishing and maintaining disclosure controls and procedures (''DCP'') and internal control over financial reporting (''ICFR''), and for maintaining accountability for the company's assets, among other things . . . Management . . . must determine that the financial statements, and other financial information included in the report filed with the SEC, fairly present in all material respects the financial condition, results of operations and cash flows of the company.'') *See also* Section 404(b) of the Sarbanes Oxley Act, 15 U.S.C. 7262(b).

[4] For example, Nasdaq Rules require prompt notification to Nasdaq after an executive officer of the company, or a person performing an equivalent role, becomes aware of any noncompliance with Nasdaq's corporate governance requirements. Rule 5625. Similarly, SEC rules and the Sarbanes-Oxley Act impose a heightened obligation on the CEO and CFO of a public company, including the requirement to certify the company's periodic financial statements. *See, e.g.,* Section 302 of the Sarbanes Oxley Act, Public Law 107–204, 116 Stat. 745 (2002), and Rules 13a–14 and 15d–14 under the Act, 17 CFR 240.13a–14 and 240.15d–14. *See also* Section 906 of the Sarbanes Oxley Act.

[5] *See* Emerging Market Risks Statement (''As a result, in many emerging markets, including China, there is substantially greater risk that disclosures will be incomplete or misleading and, in the event of investor harm, substantially less access to recourse, in comparison to U.S. domestic companies.'')

[6] For example, the Toronto Stock Exchange requires management to have ''adequate public company experience which demonstrates that they are able to satisfy all of their reporting and public company obligations.'' *See* Section 311 of the TSX Company Manual. The Hong Kong Stock Exchange requires business experience and management continuity, which can achieve similar objectives to the proposed requirement. *See* Rule 8.05A of the Hong Kong Stock Exchange Main Board Listing Rules. Nasdaq's main markets in the Nordics

Continued

In determining whether a company's business is principally administered in a Restrictive Market, Nasdaq may consider the geographic locations of the company's: (a) Principal business segments, operations or assets; (b) board and shareholders' meetings; (c) headquarters or principal executive offices; (d) senior management and employees; and (e) books and records.[7] For example, a company's headquarters could be located in Country A, while the majority of its senior management, employees, assets, operations and books and records are located in Country B, which is a Restrictive Market. In this case, Nasdaq would consider the company's business to be principally administered in Country B, which is a Restrictive Market, and Nasdaq would require the company to meet the criteria set forth in Rule 5210(c).

Once listed, a company subject to proposed Rule 5210(c) will be subject to proposed Rule 5250(g). This rule will contain the continuing obligations for a Restricted Market Company listed on Nasdaq to have at least one member of senior management or director who has relevant past employment experience at a U.S.-listed public company or other experience, training or background which results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws or, in the absence of such an individual, to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company.

Nasdaq proposes changes to Rule 5810 to allow a company from a Restrictive Market that is subject to, but does not maintain compliance with, this requirement to provide Nasdaq Staff with a plan to regain compliance. Based on its review of the company's plan, Nasdaq Staff generally would be able to allow the company up to 180 days to regain compliance.[8] Companies would be required under Rule 5810(b) to disclose that they do not meet this requirement, which would alert investors to the heightened risk during this time.

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 prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Further, the Exchange believes that this proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq believes that requiring applicants from Restrictive Market countries to satisfy the proposed requirement will help ensure that the company has at least one member of senior management or director or an advisor who serves as a resource for the company to assist in compliance with the company's reporting and public company obligations in the U.S. on an ongoing basis. This will better enable the company to satisfy the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws, which will enhance investor protection and the public interest.

The proposed rule changes would apply to companies from Restrictive Market countries that apply to list on Nasdaq after the date of effectiveness, but would not apply to companies from other countries or to companies already listed on Nasdaq. Notwithstanding, the Exchange believes that the proposal does not unfairly discriminate among companies. With respect to the discrimination between companies from Restrictive Markets and other companies, Nasdaq believes that the distinction is fair because Nasdaq and the SEC have identified additional concerns around companies from Restrictive Markets,[11] which the proposed rule change is designed to address. With respect to the discrimination between newly listing companies from Restrictive Markets and companies from Restrictive Markets that are already listed before this rule is effective, Nasdaq believes that this is an appropriate distinction because this requirement was not in place when the later group of companies listed and these companies have structured alternative mechanisms to comply with the requirements to be a U.S-listed public company. To the extent there are future concerns about such a listed company that arise from an apparent unfamiliarity with the requirements to be a U.S.-listed public company, however, Nasdaq would exercise its regulatory authority and could consider that lack of familiarity when determining whether to allow the company to remain listed.

*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. While the proposed rule change will apply only to companies from Restrictive Markets, Nasdaq and the SEC have identified specific concerns with such companies that make the imposition of a heightened requirement on such companies appropriate to enhance investor protection, which is a central purpose of the Act. Any impact on competition, either among listed companies or between exchanges, is incidental to that purpose.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine

require management to be familiar with the way the company has structured its internal reporting lines, the management pertaining to financial reporting, its investor relation management and its procedures for disclosing ad hoc and regular information to the stock market. *See* Section 2.15.2 of the Nordic Main Market Rulebook for Issuers of Shares.

[7] This threshold would capture both foreign private issuers based in Restrictive Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restrictive Markets. The factors that Nasdaq would consider when determining whether a business is principally administered in a Restrictive Market is supported by SEC guidance regarding foreign private issuer status, which suggests that a foreign company may consider certain factors including the locations of: The company's principal business segments or operations; its board and shareholders' meetings; its headquarters; and its most influential key executives (potentially a subset of all executives). *See* Division of Corporation Finance of the SEC, *Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers* (February 13, 2013), available at *https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml#IIA2c.*

[8] *See* Rule 5810(c)(2)(B). Staff cannot grant additional time if the company is currently under review by an Adjudicatory Body for a Staff Delisting Determination.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* Emerging Market Risks Statement, *supra* note 3.

whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–026 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–026. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–026 and should be submitted on or before July 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–12686 Filed 6–11–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89030; File No. SR–GEMX–2020–13]**

## Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 7, Types of Orders, To Add Other Existing Order Types to the List of Order Types

June 8, 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 May 26, 2020, Nasdaq GEMX, LLC (''GEMX'' 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 amend Options 3, Section 7, ''Types of Orders,'' to add other existing order types to the list of order types.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqgemx.cchwallstreet.com/*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Options 3, Section 7, ''Types of Orders,'' to add other existing order types to the list of order types. The Exchange proposes to add to Options 3, Section 7, at proposed (u)–(x), references to various existing order types that may be entered into various auction mechanisms on GEMX. Specifically, the Exchange proposes to add a reference to orders entered into the Block Order Mechanism, Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism. These order types exist today within the GEMX Rules, however, unlike other order types, they are not mentioned within Options 3, Sections 7, which list the order types available for trading on GEMX. The Exchange proposes to add the following rule text into Options 3, Section 7:

(u) Block Order. A Block Order is an order entered into the Block Order Mechanism as described in Options 3, Section 11(a).

(v) Facilitation Order. A Facilitation Order is an order entered into the Facilitation Mechanism as described in Options 3, Section 11(b).

(w) SOM Order. A SOM Order is an order entered into the Solicited Order Mechanism as described in Options 3, Section 11(d).

(x) A PIM Order. A PIM Order is an order entered into the Price Improvement Mechanism as described in Options 3, Section 13(a).

The Exchange believes the addition of this rule text will make clear that these order types are available on GEMX. Today, ISE and MRX similarly list these order types within ISE and MRX Options 3, Section 7, respectively.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[3] in general, and furthers the objectives of Section 6(b)(5) of the Act,[4] 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. Adding references to all existing order types that may be entered

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

into auctions into Options 3, Sections 7 is consistent with the Act. The Exchange believes the addition of the Block Order type, Facilitation Order type, SOM Order type and PIM Order types into Options 3, Section 7 will make clear to market participants the various types of order types that may be transacted on GEMX. The descriptions of these order types merely point at the existing mechanisms.

*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 proposal to add the Block Order type, Facilitation Order type, SOM Order type and PIM Order types into Options 3, Section 7 does not impose an undue burden on competition. The addition of these order types would complete the list of order types, which are available to all market participants, and are merely being referenced within the order type rule for greater transparency.

*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)(iii) of the Act[5] and subparagraph (f)(6) of Rule 19b–4 thereunder.[6]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii)[7] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission notes that waiver of the operative delay would allow the Exchange to clarify within Options 3, Section 7 the complete list of order types that are available on GEMX. For this reason, and because the proposal does not raise any novel issues, 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 waives the 30-day operative delay and designates the proposed rule change operative upon filing.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–GEMX–2020–13 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–GEMX–2020–13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–GEMX–2020–13, and should be submitted on or before July 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–12683 Filed 6–11–20; 8:45 am]

**BILLING CODE 8011–01–P**

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 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.

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. SIPA–181; File No. SIPC–2019–01]**

## Securities Investor Protection Corporation; Order Approving Proposed Bylaw Change, as Revised by Amendment No. 1, Relating to SIPC Board Compensation

June 9, 2020.

Pursuant to Section 3(e)(1) of the Securities Investor Protection Act of 1970 (''SIPA''),[1] the Securities Investor Protection Corporation (''SIPC'') filed with the Securities and Exchange Commission (''Commission'') on October 8, 2019 proposed bylaw changes relating to the compensation of SIPC's Board of Directors (''SIPC Board''). On October 24, 2019, SIPC consented to a 90-day extension of time before the proposed bylaw change would take effect pursuant to Section

[1] *See* 15 U.S.C. 78ccc(e)(1).

3(e)(1) of SIPA.[2] On November 19, 2019, SIPC filed a revised version of the proposed bylaw change (the ''proposed bylaw change''). The proposed bylaw change replaced and superseded the original filing in its entirety. On December 10, 2019, SIPC consented to a 90-day extension of time before the proposed bylaw change would take effect pursuant to Section 3(e)(1) of SIPA.[3] Pursuant to Section 3(e)(1)(B) of SIPA, the Commission found that the proposed bylaw change involved a matter of such significant public interest that public comment should be obtained.[4] Consequently, pursuant to Section 3(e)(2)(A) of SIPA,[5] notice soliciting comment on the proposed bylaw change was published in the **Federal Register** on January 30, 2020.[6] On February 24, 2020, SIPC consented to an extension until May 14, 2020, and on April 1, 2020, SIPC consented to an additional extension until June 15, 2020, for the Commission to approve or institute proceedings to determine whether the proposed bylaw change should be disapproved.[7] The Commission received one comment regarding the proposed bylaw change.[8] For the reasons described below, the Commission finds that the proposed bylaw change is in the public interest and is consistent with the purposes of SIPA.[9] Therefore, this order approves the proposed bylaw change under Section 3(e)(2) of SIPA.[10]

## I. Description of the Proposed Bylaw Change

### *A. Background*

Under SIPA, the SIPC Board shall consist of seven members: Five private sector directors and two public sector directors.[11] The five private sector directors are appointed by the President of the United States and confirmed by the Senate. Of the five private sector directors, three must be associated with, and representative of, the securities industry, and two must not be associated with the securities industry. SIPA provides that one of the public sector directors must be an officer or employee of the Department of the Treasury and the other must be an officer or employee of the Federal Reserve Board. Only directors from outside of the securities industry can serve as Chairperson and Vice Chairperson of the SIPC Board.

Under SIPA, all matters relating to director compensation are governed by the SIPC Bylaws.[12] The private sector directors are entitled to receive an honorarium, which is paid from the SIPC Fund.[13] Since 1994, when the position of Chairperson ceased to be a full-time position, the honoraria paid to the private sector directors have been increased once (in 2006). The following chart shows the honoraria for the Chairperson, Vice Chairperson, and other private sector directors from 1994 to 2006 and from 2006 to the present.

| Bylaw date | Bylaw | Chairperson | Vice chairperson | Industry directors |
|---|---|---|---|---|
| 1994–2006 | Art. 2, § 6 | $1,000/meeting, $500/day for official business + expenses. | $500/meeting, $500/day for official business + expenses. | Expenses only. |
| 2006–Present | Art. 2, § 6 | $15,000 honorarium + expenses | $6,250 honorarium + expenses | $6,250 honorarium + expenses. |

### *B. The Proposed Bylaw Change*

SIPC proposes to modify Section 6 of Article 2 of the SIPC Bylaws to: (1) Raise the Chairperson's yearly honorarium from $15,000 to $28,000; (2) raise the other private sector directors' yearly honorarium from $6,250 to $12,000; (3) authorize a $28,000 yearly honorarium for a Vice Chairperson who temporarily serves as acting Chairperson for a continuous twelve month period while the position of Chairperson remains vacant; and (4) authorize a $28,000 yearly honorarium for a private sector director to whom the SIPC Board delegates authority to perform certain functions of the Chairperson and who performs those functions for a continuous twelve month period while the positions of Chairperson and Vice Chairperson remain vacant. SIPC justified its proposed bylaw change by describing the enhanced responsibilities and risk assumed by members of the SIPC Board. SIPC explained the level of time commitment required of directors and noted the need to attract and retain qualified directors.[14]

In addition, SIPC explained that the SIPC Board, through its public sector directors (who do not receive an honorarium), commissioned Korn/Ferry International (''Korn/Ferry''), a global management and executive consulting firm, to provide recommendations with respect to compensation for SIPC Board members.[15] Independent of the Korn/Ferry study, the public sector directors formulated a separate approach to the matter, using the *per diem* pay of a Senior Executive Service (''SES'') government employee as a benchmark. Using this measure, the public sector directors concluded that the private sector directors should receive an honorarium of $12,000 per year. Applying the current ratio of Chair versus non-Chair honoraria, the public sector directors concluded that the honorarium of the Chair should be $28,000. SIPC proposed that the bylaw change, if approved, would take effect six months from the date of approval or non-disapproval by the Commission.[16]

## II. Comments Received

The Commission received one comment on the proposed bylaw change.[17] The commenter—an individual—supported it.

[2] *See id.*

[3] *See id.*

[4] *See* 15 U.S.C. 78ccc(e)(1)(B).

[5] *See* 15 U.S.C. 78ccc(e)(2)(A).

[6] *See* Securities Investor Protection Corporation; Notice of Filing of Proposed Bylaw Change, as Revised by Amendment No. 1, Relating to SIPC Board Compensation; Correction, Release No. SIPA–180A (Jan. 24, 2020), 85 FR 5513 (Jan. 30, 2020) (''Notice'').

[7] *See* 15 U.S.C. 78ccc(e)(2)(B).

[8] *See* Email from Martha C. Chemas, Esq., dated February 5, 2020 (''Chemas Email''). The comment on the proposed bylaw change is available at *https://www.sec.gov/comments/sipc-2019-01/sipc201901.htm.*

[9] *See* 15 U.S.C. 78ccc(e)(2)(D).

[10] *See* 15 U.S.C. 78ccc(e)(2).

[11] *See* 15 U.S.C. 78ccc(c).

[12] *See* 15 U.S.C. 78ccc(c)(5).

[13] All expenditures from SIPC are required to be made out of the SIPC Fund. *See* 15 U.S.C. 78ddd(a)(1).

[14] SIPC's full rationale for why the honoraria should be increased is set forth in its narrative accompanying the proposed bylaw changes. *See Notice,* 85 FR at 5513–5515.

[15] Based upon a study of director compensation of a peer group of 23 organizations comparable to SIPC, Korn/Ferry recommended that: (1) Director compensation consist of an annual retainer paid quarterly and ranging between $30,000 and $50,000; (2) the Vice Chair receive an additional amount of $3,000 to $5,000 per year; and (3) the Chair receive an additional $10,000 to $15,000 per year. By comparison, SIPC proposes that: (1) Private directors receive $12,000 a year; and (2) the Chair receives an additional amount of $14,000 more than other directors.

[16] Although the proposed bylaw change references May 6, 2020 as the date the quarterly installments of the honoraria begin, the proposed bylaw change, including the increases in Board honoraria, takes effect six months after the Commission's approval.

[17] *See* Chemas Email.

### III. Commission Findings

Section 3(e) of SIPA sets forth the procedures for addressing proposed SIPC rules and bylaws.[18] Pursuant to Section 3(e)(1)(B) of SIPA, the Commission found that the proposed bylaw changes involved a matter of such significant public interest that public comment should be obtained and required that the procedures applicable to SIPC proposed rule changes in section 3(e)(2) of SIPA be followed.[19] Section 3(e)(2) of SIPA sets forth the procedures for proposed rule changes and provides that the Commission shall approve a proposed rule change if it finds the change is in the public interest and is consistent with the purposes of SIPA. As discussed below, the Commission finds, pursuant to Section 3(e)(2)(D) of SIPA, that the proposed bylaw change is in the public interest and consistent with the purposes of SIPA.[20]

As noted above, the SIPC Board's honoraria have not increased since 2006. However, SIPC states that the responsibility of the SIPC Board members has increased since the 2008 financial crisis. For example, since 2006, SIPC has been responsible for three major SIPA liquidations: Bernard L. Madoff Investment Securities LLC; Lehman Brothers, Inc.; and MF Global Inc. Moreover, Congress designated SIPC to serve as trustee in the orderly liquidation of certain systemically important broker-dealers in the Dodd-Frank Wall Street Reform and Customer Protection Act of 2010.[21] SIPC reports that these additional responsibilities have coincided with an increase in the time commitment for the role, including travel to attend SIPC Board meetings. In addition, SIPC Board members have been sued in their capacity as Board members.[22] Finally, the Commission believes it is important to SIPC's customer protection mission to recruit well-qualified individuals to serve on the SIPC Board. SIPC directors should serve the public interest and carry out its mission of protecting investors.

The Commission also believes that the proposed increases in the honoraria are reasonable. In particular, the amount of the proposed honoraria for the private sector directors that do not serve as Chair ($12,000 annually) is in line with the maximum compensation paid to an SES government employee, after pro rating for the estimated number of days worked per year.[23] Using the SES government employee salary as a benchmark is appropriate given the similarity in the seniority and public mission of both SES government employees and SIPC Board members. The proposed increase in the Chairperson's, acting Chairperson's, or the SIPC Board-delegated Chairperson's honorarium from $15,000 to $28,000 maintains the same approximate ratio between the current private sector directors' honoraria and that of the Chairperson, acting Chairperson, or the SIPC Board-delegated Chairperson.

For these reasons, the Commission finds, pursuant to Section 3(e)(2)(D) of SIPA, that it is in the public interest and is consistent with the purposes of SIPA to increase the honoraria of the private sector directors to account for the increased responsibilities and time commitments associated with the positions and the potential legal risk the private sector directors face, as well as to provide an incentive to recruit well-qualified directors.[24]

### IV. Conclusion

*It is therefore ordered,* pursuant to Section 3(e)(2) of SIPA, that the proposed bylaw change (SIPA 2019–01) is approved.[25]

By the Commission.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–12735 Filed 6–11–20; 8:45 am]

**BILLING CODE 8011–01–P**

[18] *See* 15 U.S.C. 78ccc(e).

[19] *See Notice,* 85 FR 5513.

[20] *See* 15 U.S.C. 78ccc(e)(2)(D).

[21] *See* 12 U.S.C. 5385(a)(1).

[22] *See, e.g., Canavan* v. *Harbeck,* Case No. 2:10–cv–00954–FSH–PS (D.N.J. 2010).

[23] The maximum SES salary in 2019 was $192,300. *See* Salary Table No. 2019–ES: Rates of Basic Pay for Members of the Senior Executive Service (SES), available at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/ES.pdf* (effective January 2019). When pro rating that salary for 16 days of service a year on the SIPC Board, the equivalent amount earned equals $12,307 (*i.e.,* $192,300 * 16 days/250-day work year). Therefore, the proposed honoraria of $12,000 approximates a pro-rated version the current maximum SES salary.

[24] *See* 15 U.S.C. 78ccc(e)(2)(D).

[25] *See* 15 U.S.C. 78ccc(e)(2).

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting; Cancellation

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 85 FR 34669, June 5, 2020.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Wednesday, June 10, 2020 at 2:00 p.m.

**CHANGES IN THE MEETING:** The Closed Meeting scheduled for Wednesday, June 10, 2020 at 2:00 p.m., has been cancelled.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: June 10, 2020.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2020–12842 Filed 6–10–20; 11:15 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF STATE

**[Public Notice 11136]**

### Updating the State Department's List of Entities and Subentities Associated With Cuba (Cuba Restricted List)

**ACTION:** Updated publication of list of entities and subentities; notice.

**SUMMARY:** The Department of State is publishing an update to its List of Restricted Entities and Subentities Associated with Cuba (Cuba Restricted List) with which direct financial transactions are generally prohibited under the Cuban Assets Control Regulations (CACR). The Department of Commerce's Bureau of Industry and Security (BIS) generally will deny applications to export or reexport items for use by entities or subentities identified by the Department of State in the **Federal Register** or at *https://www.state.gov/cuba-sanctions/cuba-restricted-list/,* unless such transactions are determined to be consistent with sections 2 and 3(a)(iii) of NSPM–5.

**DATES:** Applicable on June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Emily Belson, Office of Economic Sanctions Policy and Implementation, 202–647–6526; Robert Haas, Office of the Coordinator for Cuban Affairs, tel.: 202–453–8456, Department of State, Washington, DC 20520.

**SUPPLEMENTARY INFORMATION:**

### Background

On June 16, 2017, the President signed National Security Presidential Memorandum-5 on Strengthening the Policy of the United States toward Cuba (NSPM–5). As directed by NSPM–5, on November 9, 2017, the Department of the Treasury's Office of Foreign Assets Control (OFAC) published a final rule in the **Federal Register** amending the CACR, 31 CFR part 515, and the Department of Commerce's Bureau of Industry and Security (BIS) published a final rule in the **Federal Register** amending, among other sections, the section of the Export Administration Regulations (EAR) regarding Cuba, 15 CFR 746.2. The regulatory amendment

to the CACR added § 515.209, which generally prohibits direct financial transactions with certain entities and subentities identified on the State Department's Cuba Restricted List. The regulatory amendment to 15 CFR 746.2, notes BIS will generally deny applications to export or re-export items for use by entities or subentities identified on the Cuba Restricted List. The State Department is now updating the Cuba Restricted list, as published below and available on the State Department's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*).

This update includes seven additional subentities. This is the sixth update to the Cuba Restricted List since it was published November 9, 2017 (82 FR 52089). Previous updates were published November 15, 2018 (see 83 FR 57523), March 9, 2019 (see 84 FR 8939), April 24, 2019 (see 84 FR 17228), July 26, 2019 (see 84 FR 36154) and November 19, 2019 (see 84 FR 63953). The State Department will continue to update the Cuba Restricted List periodically.

The publication of the updated Cuba Restricted List further implements the directive in paragraph 3(a)(i) of NSPM–5 for the Secretary of State to identify the entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel, and publish a list of those identified entities and subentities with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.

**Electronic Availability**

This document and additional information concerning the Cuba Restricted List are available from the Department of State's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*).

**List of Restricted Entities and Subentities Associated With Cuba as of June 12, 2020**

Below is the U.S. Department of State's list of entities and subentities under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services or personnel with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba. For information regarding the prohibition on direct financial transactions with these entities, please see 31 CFR 515.209. All entities and subentities were listed effective November 9, 2017, unless otherwise indicated.

* * * *Entities or subentities owned or controlled by another entity or subentity on this list are not treated as restricted unless also specified by name on the list.* * * *

*Ministries*

MINFAR—Ministerio de las Fuerzas Armadas Revolucionarias
MININT—Ministerio del Interior

*Holding Companies*

CIMEX—Corporación CIMEX S.A.
Compañía Turística Habaguanex S.A.
GAESA—Grupo de Administración Empresarial S.A.
Gaviota—Grupo de Turismo Gaviota
UIM—Unión de Industria Militar

*Hotels in Havana and Old Havana*

Aparthotel Montehabana
Gran Hotel Bristol Kempinski *Effective November 15, 2019*
Gran Hotel Manzana Kempinski
H10 Habana Panorama
Hostal Valencia
Hotel Ambos Mundos
Hotel Armadores de Santander
Hotel Beltrán de Santa Cruz
Hotel Conde de Villanueva
Hotel del Tejadillo
Hotel el Bosque
Hotel el Comendador
Hotel el Mesón de la Flota
Hotel Florida
Hotel Habana 612
Hotel Kohly
Hotel Los Frailes
Hotel Marqués de Prado Ameno
Hotel Marqués de Cardenas de Montehermoso *Effective June 12, 2020*
Hotel Palacio Cueto *Effective July 26, 2019*
Hotel Palacio del Marqués de San Felipe y Santiago de Bejucal
Hotel Palacio O'Farrill
Hotel Park View
Hotel Raquel
Hotel Regis *Effective June 12, 2020*
Hotel San Miguel
Hotel Santa Isabel *Effective April 24, 2019*
Hotel Telégrafo
Hotel Terral
Iberostar Grand Packard Hotel *Effective November 15, 2018*
Memories Miramar Havana
Memories Miramar Montehabana
SO/Havana Paseo del Prado *Effective November 15, 2018*

*Hotels in Santiago de Cuba*

Villa Gaviota Santiago

*Hotels in Varadero*

Blau Marina Varadero Resort
also Fiesta Americana Punta Varadero *Effective November 15, 2018*
also Fiesta Club Adults Only *Effective March 12, 2019*
Grand Aston Varadero Resort *Effective November 15, 2019*
Grand Memories Varadero
Hotel El Caney Varadero *Effective April 24, 2019*
Hotel Las Nubes *Effective November 15, 2018*
Hotel Oasis *Effective November 15, 2018*
Iberostar Bella Vista *Effective November 15, 2018*
Iberostar Laguna Azul
Iberostar Playa Alameda
Meliá Marina Varadero
Meliá Marina Varadero Apartamentos *Effective April 24, 2019*
Meliá Peninsula Varadero
Memories Varadero
Naviti Varadero
Ocean Varadero El Patriarca
Ocean Vista Azul
Paradisus Princesa del Mar
Paradisus Varadero
Sol Sirenas Coral

*Hotels in Pinar del Rio*

Hotel Villa Cabo de San Antonio
Hotel Villa Maria La Gorda y Centro Internacional de Buceo

*Hotels in Baracoa*

Hostal 1511
Hostal La Habanera
Hostal La Rusa
Hostal Rio Miel
Hotel El Castillo
Hotel Porto Santo
Villa Maguana

*Hotels in Cayos de Villa Clara*

Angsana Cayo Santa María *Effective November 15, 2018*
Dhawa Cayo Santa María
Grand Aston Cayo Las Brujas Beach Resort and Spa *Effective November 15, 2019*
Golden Tulip Aguas Claras *Effective November 15, 2018*
Hotel Cayo Santa María
Hotel Playa Cayo Santa María
Iberostar Ensenachos
Las Salinas Plana & Spa *Effective November 15, 2018*
La Salina Noreste *Effective November 15, 2018*
La Salina Suroeste *Effective November 15, 2018*
Meliá Buenavista
Meliá Cayo Santa María
Meliá Las Dunas
Memories Azul
Memories Flamenco
Memories Paraíso
Ocean Casa del Mar
Paradisus Los Cayos *Effective November 15, 2018*

Royalton Cayo Santa María
Sercotel Experience Cayo Santa María *Effective November 15, 2018*
Sol Cayo Santa María
Starfish Cayo Santa María *Effective November 15, 2018*
Valentín Perla Blanca *Effective November 15, 2018*
Villa Las Brujas
Warwick Cayo Santa María
also Labranda Cayo Santa María Hotel *Effective November 15, 2018*

*Hotels in Holguín*

Blau Costa Verde Beach & Resort
also Fiesta Americana Holguín Costa Verde *Effective November 15, 2018*
Hotel Playa Costa Verde
Hotel Playa Pesquero
Memories Holguín
Paradisus Río de Oro Resort & Spa
Playa Costa Verde
Playa Pesquero Premium Service
Sol Rio de Luna y Mares
Villa Cayo Naranjo
Villa Cayo Saetia
Villa Pinares de Mayari

*Hotels in Jardines del Rey*

Cayo Guillermo Resort Kempinski *Effective July 26, 2019*
Grand Muthu Cayo Guillermo *Effective November 15, 2018*
Gran Muthu Imperial Hotel *Effective November 15, 2019*
Gran Muthu Rainbow Hotel *Effective November 15, 2019*
Hotel Playa Coco Plus
Iberostar Playa Pilar
Meliá Jardines del Rey
Memories Caribe
Pestana Cayo Coco
also Hotel Playa Paraiso *Effective June 12, 2020*

*Hotels in Topes de Collantes*

Hostal Los Helechos
Kurhotel Escambray *Effective November 15, 2018*
Los Helechos
Villa Caburni

*Tourist Agencies*

Crucero del Sol
Gaviota Tours

*Marinas*

Marina Gaviota Cabo de San Antonio (Pinar del Rio)
Marina Gaviota Cayo Coco (Jardines del Rey)
Marina Gaviota Las Brujas (Cayos de Villa Clara)
Marina Gaviota Puerto Vita (Holguín)
Marina Gaviota Varadero (Varadero)

*Stores in Old Havana*

Casa del Abanico
Colección Habana
Florería Jardín Wagner
Joyería Coral Negro—Additional locations throughout Cuba
La Casa del Regalo
San Ignacio 415
Soldadito de Plomo
Tienda El Navegante
Tienda Muñecos de Leyenda
Tienda Museo El Reloj Cuervo y Sobrinos

*Entities Directly Serving the Defense and Security Sectors*

ACERPROT—Agencia de Certificación y Consultoría de Seguridad y Protección alias Empresa de Certificación de Sistemas de Seguridad y Protección *Effective November 15, 2018*
AGROMIN—Grupo Empresarial Agropecuario del Ministerio del Interior
APCI—Agencia de Protección Contra Incendios
CAHOMA—Empresa Militar Industrial Comandante Ernesto Che Guevara
Casa Editorial Verde Olivo *Effective July 26, 2019*
CASEG—Empresa Militar Industrial Transporte Occidente
CID NAV—Centro de Investigación y Desarrollo Naval
CIDAI—Centro de Investigación y Desarrollo de Armamento de Infantería
CIDAO—Centro de Investigación y Desarrollo del Armamento de Artillería e Instrumentos Ópticos y Ópticos Electrónicos
CORCEL—Empresa Militar Industrial Emilio Barcenas Pier
CUBAGRO—Empresa Comercializadora y Exportadora de Productos Agropecuarios y Agroindustriales
DATYS—Empresa Para El Desarrollo De Aplicaciones, Tecnologías Y Sistemas
DCM TRANS—Centro de Investigación y Desarrollo del Transporte
DEGOR—Empresa Militar Industrial Desembarco Del Granma
DSE—Departamento de Seguridad del Estado
Editorial Capitán San Luis *Effective July 26, 2019*
EMIAT—Empresa Importadora Exportadora de Abastecimientos Técnicos
Empresa Militar Industrial Astilleros Astimar
Empresa Militar Industrial Astilleros Centro
Empresa Militar Industrial Yuri Gagarin
ETASE—Empresa de Transporte y Aseguramiento
Ferretería TRASVAL
GELCOM—Centro de Investigación y Desarrollo Grito de Baire
Impresos de Seguridad
MECATRONICS—Centro de Investigación y Desarrollo de Electrónica y Mecánica
NAZCA—Empresa Militar Industrial Granma
OIBS—Organización Integración para el Bienestar Social
PLAMEC—Empresa Militar Industrial Ignacio Agramonte
PNR—Policía Nacional Revolucionaria
PROVARI—Empresa de Producciones Varias
SEPSA—Servicios Especializados de Protección
SERTOD—Servicios de Telecomunicaciones a los Órganos de la Defensa *Effective November 15, 2018*
SIMPRO—Centro de Investigación y Desarrollo de Simuladores
TECAL—Empresa de Tecnologías Alternativas
TECNOPRO—Empresa Militar Industrial ''G.B. Francisco Cruz Bourzac''
TECNOTEX—Empresa Cubana Exportadora e Importadora de Servicios, Artículos y Productos Técnicos Especializados
TGF—Tropas de Guardafronteras
UAM—Unión Agropecuaria Militar
ULAEX—Unión Latinoamericana de Explosivos
XETID—Empresa de Tecnologías de la Información Para La Defensa
YABO—Empresa Militar Industrial Coronel Francisco Aguiar Rodríguez

*Additional Subentities of CIMEX*

ADESA/ASAT—Agencia Servicios Aduanales (Customs Services)
Cachito (Beverage Manufacturer)
Contex (Fashion)
Datacimex
ECUSE — Empresa Cubana de Servicios
Inmobiliaria CIMEX (Real Estate)
Inversiones CIMEX
Jupiña (Beverage Manufacturer)
La Maisón (Fashion)
Najita (Beverage Manufacturer)
Publicitaria Imagen (Advertising)
Residencial Tarara S.A. (Real Estate/Property Rental) *Effective November 15, 2018*
Ron Caney (Rum Production)
Ron Varadero (Rum Production)
Telecable (Satellite Television)
Tropicola (Beverage Manufacturer)
Zona Especializada de Logística y Comercio (ZELCOM)

*Additional Subentities of GAESA*

Aerogaviota *Effective April 24, 2019*
Almacenes Universales (AUSA)
ANTEX—Corporación Antillana Exportadora
Compañía Inmobiliaria Aurea S.A. *Effective November 15, 2018*
Dirección Integrada Proyecto Mariel (DIP)
Empresa Inmobiliaria Almest (Real Estate)

GRAFOS (Advertising)
RAFIN S.A. (Financial Services)
Sociedad Mercantin Inmobiliaria Caribe (Real Estate)
TECNOIMPORT
Terminal de Contenedores de la Habana (TCH)
Terminal de Contenedores de Mariel, S.A.
UCM—Unión de Construcciones Militares
Zona Especial de Desarrollo Mariel (ZEDM)
Zona Especial de Desarrollo y Actividades Logísticas (ZEDAL)

*Additional Subentities of Gaviota*

AT Comercial
Centro de Buceo Varadero *Effective June 12, 2020*
Centro Internacional de Buceo Gaviota Las Molas *Effective June 12, 2020*
Delfinario Cayo Naranjo *Effective June 12, 2020*
Diving Center—Marina Gaviota *Effective April 24, 2019*
Gaviota Hoteles Cuba *Effective March 12, 2019*
Hoteles Habaguanex *Effective March 12, 2019*
Hoteles Playa Gaviota *Effective March 12, 2019*
Manzana de Gomez
Marinas Gaviota Cuba *Effective March 12, 2019*
PhotoService
Plaza La Estrella *Effective November 15, 2018*
Plaza Las Dunas *Effective November 15, 2018*
Plaza Las Morlas *Effective November 15, 2018*
Plaza Las Salinas *Effective November 15, 2018*
Plaza Las Terrazas del Atardecer *Effective November 15, 2018*
Plaza Los Flamencos *Effective November 15, 2018*
Plaza Pesquero *Effective November 15, 2018*
Producciones TRIMAGEN S.A. (Tiendas Trimagen)

*Additional Subentities of Habaguanex*

Sociedad Mercantil Cubana Inmobiliaria Fenix S.A. (Real Estate)

* * * Activities in parentheticals are intended to aid in identification, but are only representative. All activities of listed entities and subentities are subject to the applicable prohibitions. * *

**Manisha Singh,**

*Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.*

[FR Doc. 2020–12746 Filed 6–11–20; 8:45 am]

**BILLING CODE 4710–29–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**[Docket No. USTR–2020–0001]**

## Rescission of the October 2019 Withdrawal of the Bifacial Solar Panels Exclusion From the Safeguard Measure on Solar Products

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** The U.S. Trade Representative is expressly rescinding the withdrawal, issued in October 2019 (the October Withdrawal), of the exclusion of bifacial solar panels from application of the safeguard measure on imports of certain solar products pursuant to a Section 201 investigation. The October Withdrawal is superseded by the withdrawal determination made by the U.S. Trade Representative in April 2020 that the bifacial solar panel exclusion is undermining the objectives of the safeguard measure (the April Withdrawal).

**DATES:** Rescission of the October Withdrawal is effective June 12, 2020.

**FOR FURTHER INFORMATION CONTACT:** Victor Mroczka, Office of WTO and Multilateral Affairs, at *vmroczka@ustr.eop.gov* or (202) 395–9450, or Dax Terrill, Office of General Counsel, at *Dax.Terrill@ustr.eop.gov* or (202) 395–4739.

**SUPPLEMENTARY INFORMATION:**

### A. Background

On January 23, 2018, the President issued Proclamation 9693 (83 FR 3541) to impose a safeguard measure under section 201 of the Trade Act of 1974 (19 U.S.C. 2251) with respect to certain crystalline silicon photovoltaic (CSPV) cells and other products (CSPV products) containing these cells. The Proclamation directed the U.S. Trade Representative to establish procedures for interested persons to request product-specific exclusions from the safeguard measure. He did so in February 2018. *See* 83 FR 6670. The Proclamation also authorized the U.S. Trade Representative, after consultation with the Secretaries of Commerce and Energy, to exclude products upon publication of a notice in the **Federal Register** modifying the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to the exclusion process, the U.S. Trade Representative excluded certain bifacial solar panels from application of the safeguard measure in June 2019. *See* 84 FR 27684. In October 2019 (84 FR 54244), after evaluating newly available information and consultations with the Secretaries of Commerce and Energy, the U.S. Trade Representative withdrew the exclusion because it would undermine the objectives of the safeguard measure. This withdrawal was challenged by Invenergy, Inc. in the U.S. Court of International Trade. In response, the U.S. Trade Representative sought comments on whether to maintain, withdraw, or take some other action concerning the exclusion of bifacial solar panels from the safeguard measure. *See* 85 FR 4756.

### B. Determination Regarding the Bifacial Exclusion

In April 2020 (85 FR 21497), the U.S. Trade Representative determined, based on information and comments provided in response to its **Federal Register** notice, that the bifacial exclusion is undermining the objectives of the safeguard measure. After consultation with the Secretaries of Commerce and Energy, the U.S. Trade Representative issued the April Withdrawal, which was a determination that the bifacial exclusion is undermining the objective of the safeguard measure on solar products, does not meet the criteria for a legitimate exclusion, and should be withdrawn.

### C. The Effect of This Notice and the April Withdrawal on the October Withdrawal

This notice confirms that the findings and determination in the April Withdrawal supersede the findings and determination in the October Withdrawal. With publication of the April Withdrawal, USTR no longer seeks to take any action with regard to the bifacial exclusion based upon the findings and determination in the October Withdrawal. The October Withdrawal is rescinded.

**Jeffrey Gerrish,**

*Deputy United States Trade Representative, Office of the United States Trade Representative.*

[FR Doc. 2020–12734 Filed 6–11–20; 8:45 am]

**BILLING CODE 3290–F0–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

## Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice of product exclusions.

**SUMMARY:** On August 20, 2019, at the direction of the President, the U.S. Trade Representative determined to modify the action being taken in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation by imposing additional duties of 10 percent *ad valorem* on goods of China with an annual trade value of approximately $300 billion. The additional duties on products in List 1, which is set out in Annex A of that action, became effective on September 1, 2019. On August 30, 2019, at the direction of the President, the U.S. Trade Representative determined to increase the rate of the additional duty applicable to the products covered by the action announced in the August 20 notice from 10 percent to 15 percent. On January 22, 2020, the U.S. Trade Representative determined to reduce the rate from 15 percent to 7.5 percent. The U.S. Trade Representative initiated a product exclusion process in October 2019, and interested persons have submitted requests for the exclusion of specific products. This notice announces the U.S. Trade Representative's determination to grant certain exclusion requests, as specified in the Annex to this notice. The U.S. Trade Representative will continue to issue decisions on pending requests on a periodic basis.

**DATES:** The product exclusions announced in this notice apply as of September 1, 2019, the effective date of List 1 of the $300 billion action, and extend to September 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** For general questions about this notice, contact Associate General Counsel Philip Butler, Assistant General Counsel Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## A. Background

For background on the proceedings in this investigation, please see prior notices including: 82 FR 40213 (August 24, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 40823 (August 16, 2018), 83 FR 47974 (September 21, 2018), 83 FR 49153 (September 28, 2018), 84 FR 20459 (May 9, 2019), 84 FR 43304 (August 20, 2019), 84 FR 45821 (August 30, 2019), 84 FR 57144 (October 24, 2019), 84 FR 69447 (December 18, 2019), 85 FR 3741 (January 22, 2020), 85 FR 13970 (March 10, 2020), 85 FR 15244 (March 17, 2020), 85 FR 17936 (March 31, 2020), 85 FR 28693 (May 13, 2020), and 85 FR 32098 (May 28, 2020).

In a notice published on August 20, 2019, the U.S. Trade Representative, at the direction of the President, announced a determination to modify the action being taken in the Section 301 investigation by imposing an additional 10 percent *ad valorem* duty on products of China with an annual aggregate trade value of approximately $300 billion. 84 FR 43304 (August 20, 2019) (the August 20 notice). The August 20 notice contains two separate lists of tariff subheadings, with two different effective dates. List 1, which is set out in Annex A of the August 20 notice, was effective September 1, 2019. List 2, which is set out in Annex C of the August 20 notice, was scheduled to take effect on December 15, 2019.

On August 30, 2019, the U.S. Trade Representative, at the direction of the President, determined to modify the action being taken in the investigation by increasing the rate of additional duty from 10 to 15 percent *ad valorem* on the goods of China specified in Annex A (List 1) and Annex C (List 2) of the August 20 notice. *See* 84 FR 45821. On October 24, 2019, the U.S. Trade Representative established a process by which U.S. stakeholders could request exclusion of particular products classified within an eight-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading covered by List 1 of the $300 billion action from the additional duties. *See* 84 FR 57144 (the October 24 notice). Subsequently, the U.S. Trade Representative announced a determination to suspend until further notice the additional duties on products set out in Annex C (List 2) of the August 20 notice. *See* 84 FR 69447 (December 18, 2019). The U.S. Trade Representative later determined to further modify the action being taken by reducing the additional duties for the products covered in Annex A of the August 20 notice (List 1) from 15 percent to 7.5 percent. *See* 85 FR 3741 (January 22, 2020).

Under the October 24 notice, requests for exclusion had to identify the product subject to the request in terms of the physical characteristics that distinguish the product from other products within the relevant eight-digit subheading covered by the $300 billion action. Requestors also had to provide the ten-digit subheading of the HTSUS most applicable to the particular product requested for exclusion, and could submit information on the ability of U.S. Customs and Border Protection to administer the requested exclusion. Requestors were asked to provide the quantity and value of the Chinese-origin product that the requestor purchased in the last three years, among other information. With regard to the rationale for the requested exclusion, requests had to address the following factors:

- Whether the particular product is available only from China and specifically whether the particular product and/or a comparable product is available from sources in the United States and/or third countries.
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requestor or other U.S. interests.
- Whether the particular product is strategically important or related to ''Made in China 2025'' or other Chinese industrial programs.

The October 24 notice stated that the U.S. Trade Representative would take into account whether an exclusion would undermine the objectives of the Section 301 investigation.

The October 24 notice required submission of requests for exclusion from List 1 of the $300 billion action no later than January 31, 2020, and noted that the U.S. Trade Representative periodically would announce decisions. In March 2020, the U.S. Trade Representative granted an initial set of exclusion requests. *See* 85 FR 13970. The U.S. Trade Representative granted additional exclusions in March and May 2020. *See* 85 FR 15244, 85 FR 17936, 85 FR 28693, as modified by 85 FR 32098. The Office of the United States Trade Representative regularly updates the status of each pending request on the Exclusions Portal at *https://exclusions.ustr.gov/s/docket?docketNumber=USTR-2019-0017.*

## B. Determination To Grant Certain Exclusions

Based on evaluation of the factors set out in the October 24 notice, which are summarized above, pursuant to sections 301(b), 301(c), and 307(a) of the Trade Act of 1974, as amended, and in accordance with the advice of the interagency Section 301 Committee, the U.S. Trade Representative has determined to grant the product exclusions set out in the Annex to this notice. The determination also takes into account advice from advisory committees and any public comments on the pertinent exclusion requests.

As set out in the Annex, the exclusions are reflected in two ten-digit HTSUS subheadings and 32 specially prepared product descriptions, which together respond to 55 separate exclusion requests.

In accordance with the October 24 notice, the exclusions are available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request. Further, the scope of each exclusion is governed by the scope of the ten-digit HTSUS subheading as described in the Annex, and not by the product descriptions set out in any particular request for exclusion.

Paragraph A, subparagraphs (3)–(4) of the Annex contain conforming amendments to the HTSUS reflecting the modifications made by the Annex.

The U.S. Trade Representative will continue to issue determinations on pending requests on a periodic basis.

**Joseph Barloon,**

*General Counsel, Office of the United States Trade Representative.*

**BILLING CODE 3290–F0–P**

## ANNEX

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 1, 2019, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified:

1. by inserting the following new heading 9903.88.49 in numerical sequence, with the material in the new heading inserted in the columns of the HTSUS labeled "Heading/Subheading", "Article Description", and "Rates of Duty 1-General", respectively:

| Heading/ Subheading | Article Description | Rates of Duty | | |
|---|---|---|---|---|
| | | 1 | | 2 |
| | | General | Special | |
| "9903.88.49 | Articles the product of China, as provided for in U.S. note 20(bbb) to this subchapter, each covered by an exclusion granted by the U.S. Trade Representative . . . . . | The duty provided in the applicable subheading" | | |

2. by inserting the following new U.S. note 20(bbb) to subchapter III of chapter 99 in numerical sequence:

"(bbb) The U.S. Trade Representative determined to establish a process by which particular products classified in heading 9903.88.15 and provided for in U.S. notes 20(r) and (s) to this subchapter could be excluded from the additional duties imposed by heading 9903.88.15. See 84 Fed. Reg. 43304 (August 20, 2019), 84 Fed. Reg. 45821 (August 30, 2019), 84 Fed. Reg. 57144 (October 24, 2019) and 85 Fed. Reg. 3741 (January 22, 2020). Pursuant to the product exclusion process, the U.S. Trade Representative has determined that, as provided in heading 9903.88.49, the additional duties provided for in heading 9903.88.15 shall not apply to the following particular products, which are provided for in the following enumerated statistical reporting numbers:

1) 5210.11.4040
2) 5210.11.6020
3) Down of ducks or geese, not further worked than cleaned, disinfected or treated for preservation, meeting both test standards 4 and 10.1 of Federal Standard 148a promulgated by the General Services Administration, with a fill power of at least 315 $cm^3/g$ but not more than 580 $cm^3/g$ (described in statistical reporting number 0505.10.0055)

4) Cyanuric chloride (IUPAC name: 2,4,6-trichloro-1,3,5-triazine) (CAS No. 108-77-0), 99.5 percent or higher in purity (described in statistical reporting number 2933.69.6010)
5) Kneeling pads of plastics (described in statistical reporting number 3924.90.5650)
6) Fittings of plastics, of a kind used to connect mop heads with mop handles (described in statistical reporting number 3926.90.9990)
7) Printed books, in the Chinese language (other than dictionaries and encyclopedias, textbooks, directories, bibles, testaments, prayer books and other religious books, technical, scientific and professional books, art and pictorial books, hardbound books, and rack size paperbound books), containing 49 or more pages each (excluding covers) (described in statistical reporting number 4901.99.0093)
8) Women's cut and sewn garden gloves, without fourchettes, cut and sewn from preexisting machine knitted fabric of polyester and cotton jersey, containing 50 percent or more by weight of rubber or plastics, clute cut (described in statistical reporting number 6116.10.4400)
9) Gloves cut and sewn of machine knitted fabric, without fourchettes, with applied polyvinyl chloride dots, such gloves containing 50 percent or more by weight of cotton, man-made fibers or wool, or any combination thereof and subject to man-made fiber restraints (described in statistical reporting number 6116.10.5520)
10) Gloves, containing less than 50 percent by weight of textile fibers, coated with rubber or plastics designed for enhanced grip (described in statistical reporting number 6116.10.6500)
11) Gloves, cut and sewn of knitted fabric in chief weight of polyester, not impregnated, coated or covered with plastics or rubber, without fourchettes (described in statistical reporting number 6116.93.8800)
12) Gloves of vegetable fibers, without fourchettes, with applied dots of polyvinyl chloride (described in statistical reporting number 6216.00.1720)
13) Shells for pillows and comforters made from microfiber fabric consisting of filament yarns not more than 1.22 decitex, such fabric with a weight of at least 55 $g/m^2$ but not more than 155 $g/m^2$ (described in statistical reporting number 6307.90.9889)
14) Round wire of nonalloy steel, hot-dipped galvanized with zinc, containing by weight less than 0.25 percent carbon, measuring at least 1.5 mm in diameter (described in statistical reporting number 7217.20.3000)
15) Ring binder mechanisms for loose leaf binders, each measuring at least 132 mm but not more than 134 mm in length and at least 16 mm but not more than 18 mm in width, with 2 prongs seated underneath housing (described in statistical reporting number 8305.10.0010)
16) Three-way hand-operated valve part of brass, suitable for use as an input part on irrigation-grade valves (described in statistical reporting number 8481.90.1000)

17) Lithium-ion batteries of a form other than size designations of the International Electrotechnical Commission ("IEC") or the American National Standards Institute ("ANSI"), each producing not more than 45 V, with a capacity of at least 6,000 milliamp hours (mAh) but not more than 10 A hours (described in statistical reporting number 8507.60.0020)

18) Optical channel splitters (capable of converting between electrical signals and multiplexed optical signals) (described in statistical reporting number 8517.62.0090)

19) Television liquid crystal display ("LCD") main board assemblies, each consisting of a printed circuit board containing a television tuner and audio and video components (described in statistical reporting number 8529.90.1300)

20) Safety spectacle frames of plastics conforming to U.S. Occupational Safety and Health Administration standards (described in statistical reporting number 9003.11.0000)

21) Spectacle frames of plastics conforming to U.S. Food and Drug Administration regulations as approved medical devices (described in statistical reporting number 9003.11.0000)

22) Spectacle frames, other than of plastics (described in statistical reporting number 9003.19.0000)

23) Liquid crystal display ("LCD") modules, not capable of receiving or processing a broadcast television signal, each with a video display diagonal measuring not more than 191 cm (described in statistical reporting number 9013.80.9000)

24) Watch cases of stainless steel and titanium, not gold- or silver-plated, unassembled, each measuring at least 20 mm but not more than 48 mm in diameter and weighing at least 50 g but not more than 250 g (described in statistical reporting number 9111.20.4000)

25) Wristwatch cases of stainless steel, not gold- or silver-plated, including the sapphire crystal, the crown and the case back, each measuring at least 39 mm but not more than 41 mm in diameter and at least 8 mm but not more than 10 mm in thickness, weighing not more than 40 g (described in statistical reporting number 9111.20.4000)

26) Watch dials of brass, each measuring at least 18 mm but not exceeding 50 mm in width and weighing at least 10 g but not more than 20 g (described in statistical reporting number 9114.30.4000)

27) Wristwatch dials of copper, each measuring at least 33 mm but not more than 35 mm in diameter (described in statistical reporting number 9114.30.4000)

28) Wristwatch hands, presented in sets each containing three hands (second, minute and hour) of copper, each hand measuring at least 10 mm but not more than 14 mm in length, faced with lume paint (described in statistical reporting number 9114.90.4000)

29) Parts of child safety seats (described in statistical reporting number 9401.90.1085)

30) Unfinished pads and seats for weight-training exercise machines (described in statistical reporting number 9506.91.0030)
31) Fish hooks, not snelled (described in statistical reporting number 9507.20.8000)
32) Mop heads of polyester and rayon, lint free, disposable (described in statistical reporting number 9603.90.8050)
33) Tufts of swine hair bristles, oriented with the soft feather tipped ends of the hairs facing up and the hard, root ends of the hairs facing down, with the root ends of the hairs glued together to form a round bottom not more than 7 mm in diameter, for incorporation into brushes (described in statistical reporting number 9603.90.8050)
34) Electrical spark lighters (described in statistical reporting number 9613.80.2090)"

3. by amending the last sentence of the first paragraph of U.S. note 20(r):
   a. by deleting "or (4)" and by inserting "(4)" in lieu thereof; and
   b. by inserting "; or (5) heading 9903.88.49 and U.S. note 20(bbb) to subchapter III of chapter 99" after "U.S. note 20(zz) to subchapter III of chapter 99".

4. by amending the article description of heading 9903.88.15:
   a. by deleting "9903.88.44 or" and by inserting "9903.88.44," in lieu thereof; and
   b. by inserting "or 9903.88.49" after "9903.88.47".

[FR Doc. 2020–12672 Filed 6–11–20; 8:45 am]
BILLING CODE 3290–F0–C

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Drone Advisory Committee (DAC); Renewal

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of renewal.

**SUMMARY:** The FAA announces the charter renewal of the Drone Advisory Committee (DAC), a Federal Advisory Committee that works with industry, community stakeholders, and the public to improve the development of the FAA's regulations. This charter renewal will take effect on June 12, 2020, and will expire after 2 years if not renewed.

**FOR FURTHER INFORMATION CONTACT:** Gary Kolb, UAS Integration Office, Federal Aviation Administration, 490 L'Enfant Plaza SW, Suite 7225, Washington, DC, telephone (202) 267–4441; email *Gary.Kolb@faa.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act (Pub. L. 92–463), the FAA is giving notice of the charter renewal for the DAC. The DAC is a broad-based, long-term Federal advisory committee that provides the FAA with advice on key UAS integration issues by helping to identify challenges and prioritize improvements. The committee helps to create broad support for an overall integration strategy and vision. Membership is comprised of chief executive officer/chief operating officer-level executives from a cross-section of stakeholders representing the wide variety of UAS interests, including industry, research and academia, retail, and technology. See the DAC website for more information details on pending tasks at *https://www.faa.gov/uas/programs_partnerships/drone_advisory_committee/.*

Issued in Washington, DC.

**Erik W. Amend,**

*Manager, Executive Office, AUS–10, UAS Integration Office, Federal Aviation Administration.*

[FR Doc. 2020–12709 Filed 6–11–20; 8:45 am]
BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. –2020–47]**

### Petition for Exemption; Summary of Petition Received; The Air Medical Operators Association

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

**ACTION:** Notice.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number and must be received on or before June 17, 2020.

**ADDRESSES:** Send comments identified by docket number FAA–2020–0412 using any of the following methods:

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

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

*Docket:* Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Alphonso Pendergrass, (202) 267–4713 or *alphonso.pendergrass@faa.gov,* Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on June 8, 2020.

**Brandon Roberts,**

*Deputy Executive Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2020–0412.

*Petitioner:* The Air Medical Operators Association.

*Section(s) of 14 CFR Affected:* § 135.

*Description of Relief Sought:* Petitioner requests an extension to Exemption No. 18537 which expires on August 31, 2020 to allow the Air Medical Operators Association (AMOA) members and other part 135 air ambulance operators that submit a Letter of Intent to complete recurrent training and testing activities up to three calendar months after the month in which the activity was due to have been completed.

[FR Doc. 2020–12713 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on Proposed Transportation Project in Florida

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by Florida Department of Transportation (FDOT), pursuant to 23 U.S.C. 327, and other Federal Agencies.

**SUMMARY:** The FHWA, on behalf of the FDOT, is issuing this notice to announce actions taken by FDOT and other Federal Agencies that are final agency actions. These actions relate to the proposed regional transportation improvement creating a new alignment from State Road 30 (U.S. 98) in Gulf County to State Road 30 (U.S. 98) and State Road 75 (U.S. 231) in Bay County, State of Florida. These actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA, on behalf of FDOT, 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 listed highway project will be barred unless the claim is filed on or before November 9, 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:** For FDOT: Jason Watts, Director, Office of Environmental Management, FDOT, 605 Suwannee Street, MS 37, Tallahassee, Florida 32399; telephone (850) 414–4316; email: *Jason.Watts@dot.state.fl.us.* The FDOT Office of Environmental Management's normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern Standard Time), Monday through Friday, except State holidays.

**SUPPLEMENTARY INFORMATION:** Effective December 14, 2016, the FHWA assigned, and the FDOT assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that FHWA and other Federal Agencies have taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the proposed improvement highway project. The actions by FDOT and other Federal Agencies on the project, and the laws under which such actions were taken are described in the Final Environmental Impact Statement (FEIS) issued on 12/10/2019, the Record of Decision (ROD) issued on 5/4/2020, and in other project records for the listed project. The FEIS, ROD, and other documents for the listed project are available by contacting FDOT at the address provided above. The FEIS, ROD, and additional project documents can be viewed and downloaded from the project website at: *https://nwflroads.com/projects/410981–2.*

The project subject to this notice is:

*Project Location:* Gulf and Bay County, Florida—Gulf Cost Parkway near Panama City. The highway project consists of a new roadway alignment from State Road 30 (U.S. 98) in Gulf County, Florida to State Road 30 (U.S. 98) and State Road 75 (U.S. 231) in Bay County, Florida. Federal Aid Project Number: (To Be Determined); FDOT Project Identification (FPID) Number: 410981–2. FDOT proposes a new four-lane divided, controlled-access, arterial highway, approximately 30 miles in length. The proposed facility would provide an urban typical section with bicycle lane and sidewalks in urban areas and a rural typical section with a multi-use trail on one side of the highway in rural areas. The proposed roadway would also include a new high-level bridge across the Gulf Intracoastal Waterway (ICWW) to connect US 98 in Gulf County, Florida with US 231 and US 98 (Tyndall Parkway) in Bay County, Florida.

This notice applies to the Record of Decision (ROD), and all other Federal Agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351; Federal—Aid Highway Act (FAHA) [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act (CAA), 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 (4f) [49 U.S.C. 303 and 23 U.S.C. 138].

4. *Wildlife:* Endangered Species Act (ESA) [16 U.S.C. 1531–1544 and 1536]; Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d);

Migratory Bird Treaty Act (MBTA) [16 U.S.C. 703–712]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended (106) [16 U.S.C. 470(f) *et seq.*]; Archaeological Resources Protection Act of 1977 (ARPA) [16 U.S.C. 470(aa)–470(II)]; Archaeological and Historic Preservation Act (AHPA) [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 (Civil Rights) [42 U.S.C. 20009(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 Barriers Resources Act (CBRA) [16 U.S.C. 3501 *et seq.*]; Coastal Zone Management Act (CZMA) [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]; Wetlands Mitigation, [23 U.S.C. 103(b)(6)(M) and 103(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *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).

Issued on: May 14, 2020.

**Karen M. Brunelle,**

*Director, Office of Project Development, Federal Highway Administration, Tallahassee, Florida.*

[FR Doc. 2020–12573 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–RY–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Notice of Meeting of the Transit Advisory Committee for Safety

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a meeting of the Transit Advisory Committee for Safety (TRACS).

**DATES:** The meeting will be held virtually on July 21–22, 2020. Requests to attend the meeting must be received no later than July 7, 2020. Requests for disability accommodations must be received no later than July 7, 2020. Requests to verbally address the committee during the meeting must be submitted with a written copy of the remarks to DOT no later than July 7, 2020. Requests to submit written materials to be reviewed during the meeting must be received no later than July 7, 2020.

**ADDRESSES:** The meeting will be held virtually via an online platform. Any committee related requests should be sent by email to *TRACS@dot.gov.* The virtual meeting's online access link and a detailed agenda will be provided upon registration They will also be posted on the TRACS web page at: *https://www.transit.dot.gov/regulations-and-guidance/safety/transit-advisory-committee-safety-tracs* one week in advance of the meeting along with meeting minutes and other TRACS related information.

**FOR FURTHER INFORMATION CONTACT:** Henrika Buchanan, TRACS Designated Federal Officer, Associate Administrator, FTA Office of Transit Safety and Oversight, (202) 366–1783, *Henrika.Buchanan@dot.gov;* or Paulina Orchard, Division Chief, FTA Office of Transit Safety and Oversight, (202) 366–6153, *paulina.orchard@dot.gov;* or *TRACS@dot.gov.*

**SUPPLEMENTARY INFORMATION:** TRACS meetings are normally held in-person. Due to the coronavirus disease 2019 (COVID–19) public health emergency and travel advisories, the meeting will be conducted virtually.

#### I. Background

The Secretary of Transportation created TRACS in accordance with the Federal Advisory Committee Act (FACA) (Pub. L. 92–463, 5 U.S.C. App. 2) to provide information, advice, and recommendations to the Secretary and FTA Administrator on matters relating to the safety of public transportation systems.

#### II. Agenda

- Welcome Remarks/Introductions
- Review of Recommendations: Roadway Worker Protections
- Review of Recommendations: Trespass and Suicide Prevention
- Review of Recommendations: Employee Safety Reporting
- Summary of Deliverables and Public Comments

#### III. Public Participation

The meeting will be open to the public. Members of the public who wish to participate are asked to register via email by submitting their name and affiliation to the email address listed in the **ADDRESSES** section.

The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the email listed in the **ADDRESSES** section.

There will be a total of 60 minutes allotted for oral comments from members of the public at the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, to include the individual's name, address, and organizational affiliation to the email address listed in the **ADDRESSES** section.

Written comments for consideration by TRACS during the meeting must be submitted no later than the deadline listed in the **DATES** section, to ensure transmission to TRACS members prior to the meeting. Comments received after that date will be distributed to the members but may not be reviewed prior to the meeting.

Issued in Washington, DC.

**K. Jane Williams,**

*Acting Administrator.*

[FR Doc. 2020–12699 Filed 6–11–20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Limitation on Claims Against Proposed Public Transportation Projects

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice.

**SUMMARY:** This notice announces final environmental actions taken by the Federal Transit Administration (FTA). The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject project and to activate the limitation on any claims that may challenge these final environmental actions.

**DATES:** By this notice, FTA is advising the public of final agency actions subject to 23 U.S.C. 139(l). A claim seeking judicial review of FTA actions announced herein for the listed public transportation project will be barred unless the claim is filed on or before November 9, 2020.

**FOR FURTHER INFORMATION CONTACT:** Nancy-Ellen Zusman, Assistant Chief Counsel, Office of Chief Counsel, (312) 353–2577 or Saadat Khan, Environmental Protection Specialist, Office of Environmental Programs, (202) 366–9647. FTA is located at 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation project listed below. The actions on the project, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA) and in other documents in the FTA environmental project file for the project. Interested parties may contact either the project sponsor or the relevant FTA Regional Office for more information. Contact information for FTA's Regional Offices may be found at *https://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed project as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, NEPA [42 U.S.C. 4321–4375], Section 4(f) requirements [23 U.S.C. 138, 49 U.S.C. 303], Section 106 of the National Historic Preservation Act [54 U.S.C. 306108] and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period for challenges of project decisions subject to previous notices published in the **Federal Register**.

The project and actions that are the subject of this notice follow: *Project name and location:* West Valley Corridor Connector (WVCC) Project, City of Pomona (Los Angeles County) and Cities of Montclair, Ontario, Rancho Cucamonga, and Fontana (San Bernardino County), California. *Project Sponsor:* San Bernardino County Transportation Authority (SBCTA). *Project description:* The WVCC project involves construction of a 35-mile-long bus rapid transit (BRT) that would decrease travel times and improve the existing public transit system within the corridor. The project includes up to 60 station platforms at 33 locations/major intersections and associated improvements. A new operation and maintenance facility for light maintenance activities will be constructed. The project will be constructed in two phases: WVCC—Phase I will include the 19-mile-long Milliken Alignment, from the eastern boundary limit in Pomona to Victoria Gardens in Rancho Cucamonga; WVCC—Phase II will include the 16-mile-long Haven Alignment, from Ontario International Airport to Kaiser Permanente Medical Center in Fontana. *Final agency action:* Section 4(f) *de minimis* impact determination; Section 106 No Adverse Effect Determination dated March 19, 2020; The WVCC Finding of No Significant Impact (FONSI) dated May 12, 2020. *Supporting Documentation:* The WVCC Environmental Assessment (EA) dated June 14, 2019. The WVCC FONSI, EA and associated documents can be viewed and downloaded from: *https://www.gosbcta.com/project/west-valley-connector-brt/.*

**Authority:** 23 U.S.C. 139(l)(1).

**Mark A. Ferroni,**

*Deputy Associate Administrator for Planning and Environment.*

[FR Doc. 2020–12747 Filed 6–11–20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0080]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel WINDWARD (Motor Vessel); Invitation for Public Comments

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before July 13, 2020.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD–2020–0080 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0080 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0080, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

**Note:** If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

**FOR FURTHER INFORMATION CONTACT:** Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel WINDWARD is:

—*Intended Commercial Use of Vessel:* To be a non-inspected yacht charter vessel on the east coast of U.S. carrying no more than 12 passengers for the day and 6 over night

—*Geographic Region Including Base Of Operations:* ''Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware, New Jersey, Connecticut, New York (New York Harbor), Rhode Island, Maine'' (Base of Operations: Palm Beach Gardens, FL)
—*Vessel Length and Type:* 90′ motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0080 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

**Public Participation**

*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

*Where do I go to read public comments, and find supporting information?*

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2020–0080 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

*Will my comments be made available to the public?*

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

*May I submit comments confidentially?*

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

**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, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy*. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

**Authority:** 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121 * * *

Dated: June 9, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020–12742 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0082]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel HALCYON SEAS (Motor Vessel); Invitation for Public Comments

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before July 13, 2020.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD–2020–0082 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0082 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0082, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

**Note:** If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

**FOR FURTHER INFORMATION CONTACT:** Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel HALCYON SEAS is:

—*Intended Commercial Use of Vessel:* ''Charters Yacht''
—*Geographic Region Including Base of Operations:* ''California, Oregon, Washington'' (Base of Operations: San Diego, CA)
—*Vessel Length and Type:* 72′ motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0082 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in

accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

**Public Participation**

*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

*Where do I go to read public comments, and find supporting information?*

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0082 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

*Will my comments be made available to the public?*

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

*May I submit comments confidentially?*

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

**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, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

**Authority:** 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121 * * *.

Dated: June 9, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020–12740 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0083]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel VENTURE (Catamaran); Invitation for Public Comments

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before July 13, 2020.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD–2020–0083 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0083 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0083, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

**Note:** If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

**FOR FURTHER INFORMATION CONTACT:** Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel VENTURE is:

—*Intended Commercial Use of Vessel:* ''Boat tours of Santa Monica Bay''
—*Geographic Region Including Base of Operations:* ''California'' (Base of Operations: Marina Del Ray, CA)
—*Vessel Length and Type:* 37′ catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0083 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

**Public Participation**

*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised

that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

*Where do I go to read public comments, and find supporting information?*

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2020–0083 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

*Will my comments be made available to the public?*

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

*May I submit comments confidentially?*

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

**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, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

**Authority:** 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121 * * *.

Dated: June 9, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020–12741 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2019–0077; Notice 1]**

### Harley-Davidson Motor Company, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Harley-Davidson Motor Company, (Harley-Davidson), has determined that certain model year (MY) 2018–2019 Harley-Davidson Softail motorcycles do not fully comply with Federal motor vehicle safety standard (FMVSS) No. 120, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of more than 4,536 kilograms (10,000 Pounds).* Harley-Davidson filed a noncompliance report dated June 20, 2019. Harley-Davidson subsequently petitioned NHTSA on July 17, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Harley-Davidson's petition.

**DATES:** The closing date for comments on the petition is July 13, 2020.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**SUPPLEMENTARY INFORMATION:**

*I. Overview:* Harley-Davidson has determined that certain MY 2018–2019 Harley-Davidson Softail motorcycles, do not fully comply with paragraph S5.3.1 of FMVSS No. 120, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of More Than 4,536 Kilograms (10,000 Pounds)* (49 CFR 571.120). Harley-Davidson filed a noncompliance report for the motorcycles dated June 20, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Harley-Davidson petitioned NHTSA on July 17,

2019, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt, of Harley-Davidson's petition, is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercises of judgment concerning the merits of the petition.

*II. Motorcycles Involved:* Approximately 12,931 MY 2018–2019 Harley-Davidson Softail FXBB Street Bob and FXLR Low Rider motorcycles, manufactured between June 22, 2017, and June 11, 2019, are potentially involved.

*III. Noncompliance:* Harley-Davidson explains that the noncompliance is that the subject motorcycles are equipped with a certification label which incorrectly states the recommended cold inflation pressure for the front tires and therefore, does not fully comply with paragraph S5.3.1 of FMVSS No. 120. Specifically, at the inflation pressure stated on the certification label, the load ratings of the front tires per the Tire and Rim Association Year Book (TRA Year Book) are less than the stated front gross axle weight ratings (GAWR) of the motorcycles.

*IV. Rule Requirements:* Paragraphs S5.1.2 and S5.3.1 of FMVSS No. 120 provide the relevant requirements to this petition. Under FMVSS 120 S5.1.2, the sum of the maximum load ratings of the tires fitted to an axle shall be not less than the GAWR of the axle system as specified on the vehicle's certification label required by 49 CFR part 567. FMVSS 120 S5.3.1 requires the tire size designation (not necessarily for the tires on the vehicle) and the recommended cold inflation pressure for those tires such that the sum of the load ratings of the tires on each axle (when the tires' load carrying capacity at the specified pressure is reduced by dividing by 1.10, in the case of a tire subject to FMVSS No. 109) is appropriate for the GAWR as calculated in accordance with S5.1.2.

*V. Summary of Harley-Davidson's Petition:* The following views and arguments presented in this section, V. Summary of Harley-Davidson's petition, are the views and arguments provided by Harley-Davidson. They have not been evaluated by the Agency and do not reflect the views of the Agency.

Harley-Davidson described the subject noncompliance and stated that the noncompliance is inconsequential as it relates to motor vehicle safety. Harley-Davidson submitted the following views and arguments in support of the petition:

The front wheel of the FXBB motorcycle is fitted with a Dunlop D401F 100/90–19 57H BW tire as original equipment. The model has a GAWR of 450 lbs., but at the recommended inflation level shown on the certification label (*i.e.,* 30 psi), the calculated load rating of the front tire according to the TRA Year Book is 386 lbs. Because the FXBB's GAWR is 450 lbs., the tire's load rating at its recommended inflation pressure is 64 lbs. below the specified front GAWR.

The front wheel of the FXLR motorcycle is fitted with a Michelin Scorcher ''31'' 100/90B19 62H BW tire as original equipment. The front axle has a GAWR of 450 lbs., but at the recommended inflation level shown on the certification label (*i.e.,* 30 psi), the calculated load rating of the front tire according to the TRA Year Book is 443 lbs. Because the FXLR's GAWR is 450 lbs., the tire's load rating at its recommended inflation pressure is 7 lbs. below the specified front GAWR.

Harley-Davidson cited NHTSA as explaining that the GAWR ''formalizes the decision each manufacturer makes about the load-bearing ability of the tires, rims, axle, brakes, and suspension components (at a minimum) chosen to support and control the loaded vehicle.'' *See* 42 FR 7140 (February 7, 1977). FMVSS No. 120 S5.3.1 seeks to ensure that the combination of the tire size designation and the recommended cold inflation pressure can support and control the loaded vehicle.

In its views, despite the load rating of the tires at the recommended inflation pressure as stated in the TRA Year Book falling below the GAWR, Harley-Davidson contends that the noncompliant tires were designed to carry a greater load than specified. Harley-Davidson supported its position by submitting test results conducted by their respective tire manufacturers (Michelin and Dunlop) to confirm that the subject tires could be safely operated on the motorcycles at 30 psi to support the GAWRs of 450 lbs. Accordingly, Harley-Davidson believes the noncompliance is inconsequential to motor vehicle safety.

For the Dunlop tire, Harley-Davidson commissioned an endurance test that tracks the testing conditions in FMVSS 119 S7.2 and Table III. The test simulated the three phases of the endurance test detailed in Table III of FMVSS 119 at the recommended tire pressure of 41 psi beginning with maximum sidewall load and increasing the load at each phase. The test also added a fourth, extended phase that tested the tire at the recommended tire pressure (30 psi). The phases break down as follows:

- Phase 1: 100% maximum sidewall load (507 lbs.) for 4 hours totaling 200 miles;
- Phase 2: 108% maximum sidewall load (549 lbs.) for 6 hours totaling 300 miles;
- Phase 3: 117% maximum sidewall load (594 lbs.) for 24 hours totaling 1,200 miles; and
- Phase 4: 125% of the gross axle load (495 lbs., derived by applying the 0.88 correction factor under the FMVSS 119 test procedure) for 8,300 miles at 30 psi.

In total, the four-phase endurance test ran the tire for 10,000 total miles at loads above the stated GAWR of the motorcycles. The tire passed all four phases of the endurance test. Based on the endurance test results—including the worst-case scenario of Phase 4—the load carrying capacity of the Dunlop tire at 30 psi would adequately support a GAWR of 450 lbs.

For the Michelin Scorcher tire, which is the original fitment for the FXLR model and optional/replacement fitment for the FXBB model, Harley-Davidson worked with Michelin to confirm that the Scorcher ''31'' could be operated safely at a recommended tire pressure of 30 psi on both of these models when loaded to the full GAWR of 450 lbs. Michelin confirmed the performance of the tires through a high-speed test on a smooth drum by inflating the tire to 30 psi, applying a load of 450 lbs., and running the tire at a maximum speed of 210 kph (130 mph). Based on its testing, Michelin provided Harley-Davidson with letters certifying that the tire would adequately support a GAWR of 450 lbs.

Harley-Davidson added that the above-referenced Dunlop and Michelin tires are the only fitments specified as original or replacement equipment for the two model types of motorcycles. Based upon this factor and the test results from its tire manufacturers, Harley-Davidson concluded that the noncompliance does not expose the rider of the noncompliant motorcycles to a significantly greater risk than a rider on a compliant motorcycle. 69 FR at 19900. While the recommended inflation pressure of 30 psi would reduce the tire's load rating as stated in the TRA Year Book, the tire's actual load carrying capacity is sufficient to allow the motorcycles to be safely operated at the full GAWR of 450 lbs. Accordingly, Harley-Davidson believes that the difference is inconsequential to motor vehicle safety. Harley-Davidson

also noted that NHTSA has previously granted a petition for inconsequential noncompliance where the recommended cold inflation pressure on the certification label was below the appropriate ''GAWR as calculated in accordance with S5.1.2''. *See* 55 FR 49365 (November 27, 1990).

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject motorcycles that Harley-Davidson no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant motorcycles under their control after Harley-Davidson notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8.

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2020–12714 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2019–0070; Notice 1]**

### FCA US, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** FCA US LLC (f/k/a Chrysler Group LLC) ''FCA US'' has determined that certain model year (MY) 2017–2018 Alfa Romeo Giulia motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less.* FCA US filed a noncompliance report dated June 6, 2019. FCA US subsequently petitioned NHTSA on June 28, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of FCA US's petition.

**DATES:** The closing date for comments on the petition is July 13, 2020.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**SUPPLEMENTARY INFORMATION:**

*I. Overview:* FCA US has determined that certain MY 2017–2018 Alfa Romeo Giulia motor vehicles do not fully comply with paragraph S4.3(c) of FMVSS No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less* (49 CFR 571.110). FCA US filed a noncompliance report dated June 6, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* FCA US subsequently petitioned NHTSA on June 28, 2019, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of FCA US's petition, is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercises of judgment concerning the merits of the petition.

*II. Equipment and Vehicles Involved:* Approximately 16,332 MY 2017–2018 Alfa Romeo Giulia motor vehicles, manufactured between September 7, 2016, and August 2, 2018, are potentially involved.

*III. Noncompliance:* FCA US explains that the noncompliance is that the subject vehicles are equipped with vehicle placards that display the incorrect manufacturer's recommended cold tire inflation pressures as required by paragraph S4.3(c) of FMVSS No. 110 for the three available tires sizes that can be installed on the vehicles. Specifically, the vehicle placards show for: (1) Rear tires sized at 225/45R18 and a 91V rating labeled with an incorrect inflation pressure of 35 pounds per square inch (PSI) instead of the correct

inflation pressure of 36 PSI; (2) rear tires sized at 225/40R19 and a 93V rating labeled with an incorrect inflation pressure of 37 PSI instead of the correct inflation pressure of 39 PSI; and (3) rear tires sized at 225/35R19 92W and 92Y tires labeled with an incorrect inflation pressure of 33 PSI instead of the correct inflation pressure of 35 PSI.

*IV. Rule Requirements:* Paragraph S4.3(c) of FMVSS No. 110 includes the requirements relevant to this petition. Each vehicle, except for a trailer or incomplete vehicle, shall show the information specified in paragraph S4.3(a) through (g). A vehicle manufacturer's recommended cold tire inflation pressure for the front, rear, and spare tires, are subject to the limitations of paragraph S4.3.4. For full-size spare tires, the statement ''see above'' may, at the manufacturer's option, replace manufacturer's recommended cold tire inflation pressure.

*V. Summary of FCA US's Petition:* The following views and arguments presented in this section, V. Summary of FCA US's petition, are the views and arguments provided by FCA US. They have not been evaluated by the Agency and do not reflect the views of the Agency.

FCA US described the subject noncompliance and stated that the noncompliance is inconsequential as it relates to motor vehicle safety. FCA US submitted the following views and arguments in support of the petition:

1. The incorrect pressure values are all within the range of acceptable tire inflation and would not cause a Tire Pressure Monitoring System (TPMS) alert.

• The affected Alfa Romeo Giulia vehicles are FMVSS No. 138 compliant.

• Consistent with FMVSS No. 138, the TPMS illuminates at equal to or less than the pressure 25 percent below the correct vehicle manufacturer's recommended cold inflation pressure. The TPMS warning telltale will illuminate prior to the tire pressure dropping to the range of 26–29 PSI on the affected Alfa Romeo Giulia vehicles, which is significantly above the 20 PSI requirement called out and tested to in FMVSS No. 139. FCA US believes the warning provided by the TPMS will give drivers ample time to check and inflate tires well before low tire inflation becomes a safety concern.

2. The subject tires passed a low inflation pressure performance test.

• The affected Alfa Romeo Giulia vehicles are equipped with tires that are FMVSS No. 139 compliant.

• Tire manufacturers are required to certify the tires meet all applicable requirements of FMVSS No. 139.

• FMVSS No. 139 specifies a low inflation pressure performance test in which the tire is loaded to its maximum tire load capacity and inflated to only 140 kPa (20 PSI), significantly less than the TPMS telltale activation pressure for the subject Alfa Romeo Giulia vehicles. In order to pass this test, the tires are loaded to 100 percent of the tire's maximum load-carrying capacity and then run on a test axle for 1.5 hours at 20 PSI.

3. FCA US is not aware of any crashes, injuries, or customer complaints associated with the condition.

4. NHTSA has previously granted inconsequential treatment for FMVSS No. 110 noncompliance for incorrect vehicle placard values; see examples below.

• MY 2018 Buick Regal, *See* 84 FR 25117;

• MY 2016 Volkswagen Beetle Convertible, *See* 81 FR 88728; and

• MY 2016–2017 Mercedes Benz GLE and GLS, *See* 84 FR 25118.

FCA US concluded that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that FCA US no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after FCA US notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2020–12715 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2020–0021; Notice 1]**

### Mercedes-Benz USA, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Mercedes-Benz AG (''MBAG'') and Mercedes-Benz USA, LLC (''MBUSA'') (collectively, ''Mercedes-Benz'') have determined that certain model year (MY) 2019 Mercedes-Benz A-Class motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 104, *Windshield Wiping and Washing Systems.* Mercedes-Benz filed a noncompliance report dated February 24, 2020, and subsequently petitioned NHTSA on March 12, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of Mercedes-Benz's petition.

**DATES:** Send comments on or before July 13, 2020.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

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

• *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.

• *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.

• Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary

attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**SUPPLEMENTARY INFORMATION:**

*I. Overview:* Mercedes-Benz has determined that certain MY 2019 Mercedes-Benz A-Class motor vehicles do not fully comply with the requirements of paragraph S4.1.2 of FMVSS No. 104, *Windshield Wiping and Washing Systems* (49 CFR 571.104). Mercedes-Benz filed a noncompliance report dated February 24, 2020, pursuant to 49 CFR part 573, *Defect and noncompliance responsibility and reports,* and subsequently petitioned NHTSA on March 12, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for inconsequential defect or noncompliance.*

This notice of receipt of Mercedes-Benz's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

*II. Vehicles Involved:* Approximately 4,145 MY 2019 Mercedes-Benz A220 and A220 4MATIC motor vehicles manufactured between August 3, 2018, and November 26, 2019, are potentially involved.

*III. Noncompliance:* Mercedes-Benz explains that the noncompliance is that the windshield wiping systems in the subject vehicles do not wipe the percentage of the windshield as required by paragraph S4.1.2 of FMVSS No. 104. Specifically, the windshield wiping system may only wipe 93.8% of the windshield instead of the 94% required.

*IV. Rule Requirements:* Paragraph S4.1.2 of FMVSS No. 104 includes the requirements relevant to this petition. When tested wet in accordance with SAE Recommended Practice J903a (1966), each passenger car windshield wiping system shall wipe the percentage of Areas A, B, and C of the windshield (established in accordance with S4.1.2.1) that (1) is specified in column 2 of the applicable table following subparagraph S4.1.2.1 and (2) is within the area bounded by a perimeter line on the glazing surface 25 millimeters from the edge of the daylight opening.

*V. Summary of Mercedes-Benz's Petition:* The following views and arguments presented in this section, V. Summary of Mercedes-Benz's Petition, are the views and arguments provided by Mercedes-Benz. They have not been evaluated by the Agency and do not reflect the views of the Agency. Mercedes-Benz described the subject noncompliance and stated their belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Mercedes-Benz submitted the following reasoning:

1. Mercedes-Benz cited the definition of motor vehicle safety as cited in the National Traffic and Motor Vehicle Safety Act of 1966 and their belief that this matter is appropriate for a decision that the noncompliance is inconsequential to motor vehicle safety as it does not present any increased risk to vehicle occupants.

2. They state that, in the subject vehicles, the portion of the windshield that just falls below the minimum wiped area is located at the outer edge of the windshield. In the worst-case scenario, only 93.8%, instead of the minimum 94%, of the Area B portion of the windshield remains unwiped. The affected portion of Area B is located at the outer edge of the passenger's side of the windshield and not in the area located directly in front of the driver's field of view.

3. Mercedes-Benz asserts that NHTSA has previously considered the performance of windshield wiper systems in the context of interpreting the meaning of the term ''daylight opening'' in FMVSS No. 104. Mercedes-Benz says that in 2003, in response to a request from a manufacturer, NHTSA interpreted that opaque coatings located around the edge of the windshield would not be considered part of the daylight opening for purposes of calculating the starting point of the wiped area. *See* Letter to Reed, May 6, 2003. This interpretation was an apparent change in approach for several manufacturers. In a request for reconsideration, the industry reported that many vehicles would not meet the minimum wiped portion of Area B based on the Agency's new interpretation. In supporting comments, two manufacturers reported that there were multiple vehicle models that would not meet the 94% minimum requirement for Area B. For one of the manufacturers, all of its vehicles were no more than 93.2% of the Area B minimum, while the other manufacturer did not provide specific information on how far its system deviated from the Area B minimum. After considering the substantial resources necessary to redesign the wiper systems outside of the normal vehicle refresh schedule, the Agency delayed the date on which it would begin enforcement of FMVSS No. 104 based on its updated interpretation. *See* Letter to Strassburger, January 7, 2005.

4. Thus, while the Agency was alerted to the fact that certain vehicles would not be able to comply with the minimum wiped area requirements of FMVSS No. 104, the Agency delayed implementing enforcement of the new interpretation for several years. While the delay was based, in part on the additional complexities needed to update the vehicle, fundamentally, the small deviation in the minimum wiped area requirement appears to not have been considered one that adversely impacted driver visibility or increased the safety risk to vehicle occupants. In that case, the deviation from the minimum wiped portion of Area B was more than what exists in the subject vehicles. While it is unclear from the interpretation letters what portion of Area B did not meet the minimum wiped requirements, in the subject vehicles, only a narrow strip of a portion of the outer edge of the passenger side of the windshield is affected by the deviation. Due to the location and small size of the unwiped

area, the deviation would not affect the visibility of the driver or their ability to safely operate the vehicle and would not lead to an overall increased safety risk to the vehicle occupants.

5. Mercedes-Benz stated that the windshield wiper systems installed in the subject vehicles otherwise meet or exceed the remaining requirements in FMVSS No. 104 for the wiped portion of Areas A and C, for wiper frequency, and the windshield washing system. Mercedes-Benz has not received any reports related to a lack of visibility due to the performance of the windshield wiping system at issue here.

Mercedes-Benz concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Mercedes-Benz no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Mercedes-Benz notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2020–12718 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2020–0005; Notice 1]**

### Daimler Trucks North America, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Daimler Trucks North America, LLC (DTNA) has determined that certain model year (MY) 2011–2021 Thomas Built Buses Saf-T-Liner HDX school buses do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 222, *School Bus Passenger Seating and Crash Protection*. DTNA filed a noncompliance report dated December 17, 2019, and later amended the report on January 16, 2020. DTNA subsequently petitioned NHTSA on January 16, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of DTNA's petition.

**DATES:** Send comments on or before July 13, 2020.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/*. Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**SUPPLEMENTARY INFORMATION:**

I. *Overview:* DTNA has determined that certain MY 2011–2021 Thomas Built Saf-T-Liner HDX school buses do not fully comply with the requirements of paragraph S5.2.3 of FMVSS No. 222, *School Bus Passenger Seating and Crash Protection* (49 CFR 571.222). DTNA filed a noncompliance report dated December 17, 2019, and later amended their report on January 16, 2020, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. DTNA subsequently petitioned NHTSA on January 16, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of DTNA's petition is published under 49 U.S.C. 30118 and 30120 and does not represent

any agency decision or other exercise of judgment concerning the merits of the petition.

II. *Buses Involved:* Approximately 7,601 MY 2011–2021 Thomas Built Saf-T-Liner HDX school buses manufactured between October 21, 2009, and December 16, 2019, are potentially involved.

III. *Noncompliance:* DTNA explains that the noncompliance is that the subject school buses are equipped with a wall-mounted restraining barrier that does not meet the requirements specified in paragraph S5.2.3 of FMVSS No. 222. Specifically, when tested according to the test procedure, the restraining barrier did not meet the force/deflection curve or deflection requirements because the upper loading bar contacted the trim panel on the front entry door of the bus causing the upper loading bar force to exceed the allowable limit.

IV. *Rule Requirements:* Paragraph S5.2.3 of FMVSS No. 222 includes the requirements relevant to this petition. When force is applied to the restraining barrier in the same manner as specified in paragraphs S5.1.3.1 through S5.1.3.4 for seating performance tests the restraining barrier:

(a) Force/deflection curve shall fall within the zone specified in Figure 1;

V. *Summary of DTNA's Petition*: The following views and arguments presented in this section, V. Summary of DTNA's Petition, are the views and arguments provided by DTNA. They have not been evaluated by the Agency and do not reflect the views of the Agency. DTNA described the subject noncompliance and stated their belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, DTNA submitted the following reasoning:

1. *Background and description of the noncompliance:* DTNA found that it had modified the restraining barrier design in October 2009 following an update to FMVSS No. 222 to increase the seat back height requirement to 24 inches. For aesthetic purposes and not for functional or compliance reasons, DTNA similarly adjusted the profiles (slope and angle) of the restraining barrier to match the new higher seatback height. To do so, DTNA added approximately 5⁄8 inch of foam padding to each side of the restraining barrier. Notably, the foam was added onto the outside of the frame of the barrier—doing so did not widen the frame structure itself. The additional padding is used for cosmetic purposes (to promote uniformity of design of the seat profiles at that time) and is not needed to provide protection beyond the construction of the restraining barrier itself.

2. *Analysis:* DTNA says that the purpose of the restraining barrier is to provide compartmentalization for occupants of the first row of school bus seats where there is not a seat back to offer protection. FMVSS No. 222 includes a series of performance requirements for school bus frontal barriers which includes distance between the barrier and the seat (S5.2.1), the barrier height and position (S5.2.2), and barrier forward performance (S5.2.3). The purpose of the barrier forward performance requirement at S5.2.3 is to ensure the front barrier can withstand the impact of certain set forces while at the same time maintaining component integrity.

3. *The forces measured in testing are a product of the test apparatus that would not occur in the real world.* DTNA says that the effect of the additional foam outside the restraining barrier frame was to slightly widen the restraining barrier. Now, with a wider restraining barrier, the placement of the upper restraining barrier is moved outwards so that it now encounters the door frame trim. With a wider restraining barrier, based on its calculated placement per the test procedure, the corresponding length of the upper loading bar becomes longer than that of the prior design. When the upper loading bar deployed, it contacted the front entrance door trim and caused the upper loading bar to exceed the force limits. The behavior of the upper loading bar is a product of the test procedure and does not represent the behavior of the barrier in actual use conditions. Prior to the 2009 design change; there was an approximately two-inch gap at the height where the upper loading arm was placed. This design well exceeded the minimum requirements as indicated above. With the design change in 2009, that space was filled in with soft foam, but the effect of doing so did not have any impact on the performance or integrity of the barrier itself.

DTNA has since conducted its own analysis of the restraining barrier performance in the design tested by the Agency as well as the prior design. The results of that testing demonstrate that the additional foam creates approximately 11 mm (.43 inches) of interference between the upper loading bar on the right side of the vehicle and the bus entrance door frame. The additional foam was not intended to and does not provide any safety or functional benefit. Even though the prior design of the restraining barrier left a small gap between the bus sidewall and the barrier itself, the barrier was more than sufficient to meet the performance forward requirements. The addition of foam for cosmetic purposes in 2009 does not deter from the safety of the barrier.

Removing the additional 5⁄8 inches of foam padding would eliminate the potential for any interference with the upper loading bar as it then cannot come into physical contact with the doorframe. The previous small gap in space did not expose occupants to an increased risk of harm (as demonstrated by the lack of any reports from the field potentially related to this issue), and the more recent addition of the foam also does not create any safety concerns beyond the operation of the test itself.

4. *The current restraining barrier addresses the unreasonable risk to safety identified by FMVSS No. 222.* DTNA says that the purpose of a restraining barrier is to compartmentalize and contain passengers located in the first row of seats in the event of a crash or sharp deceleration. The forward performance test evaluates the strength of the restraining barrier in a forward impact and to deflect in a controlled manner as it absorbs the energy of the occupant striking the barrier.

The restraining barrier is intended to provide an equivalent level of compartmentalization as does the seat back for the rearward seats. The safety benefit of compartmentalization is realized through the height of the restraining barrier (or seatback) as a restraining barrier that is too low could increase the likelihood that in a forward crash, an occupant could be thrown over the barrier. This view is consistent with the requirement that the height and position of the restraining barrier match or ''coincide'' with that of the seatback. Because FMVSS No. 222 defines the unreasonable risk to safety as the potential for being thrown over the barrier, it is the height and position of the barrier that mitigate against this risk.

Additionally, while the surface area of the barrier must at least coincide with the surface area of the seatback, any additional width of the barrier that extends beyond the frame of the barrier and thus is surplus material that does not address the unreasonable risk to safety identified by the standard. DTNA says that the Agency has previously recognized that a ''restraining barrier must therefore only coincide with or lie outside of the seatback surface required by S5.1.2. If a seat back surface exceeds the size required in Standard 222, the size of the restraining barrier need not coincide.'' *Letter to Wort,* August 11,

1987. The reverse also holds true. For the subject buses, the surface area of the barrier is larger than that of the seat back and exceeds the area required by S5.2.1. While the restraining barrier surface area can be larger than the seat back, the unreasonable risk to safety is addressed by maximizing the effects of compartmentalization by ensuring the perimeter of the restraining barrier coincides with the surface area of the seatback.

DTNA says that the test procedure considers the need to assess the portion of the barrier that is intended to bear the force of the loading. DTNA believes that when creating the test procedure, the Agency intentionally limited the length of the loading bar to be approximately 4 inches shorter than the width of the seat back or restraining barrier. DTNA says NHTSA declined to reduce the size of the range to two inches because it wanted ''to ensure loads would be transferred to the seat structure without collapse of the seat back'' and to discourage manufacturers from adding a narrow structural member to meet the requirements. *See* 39 FR 27585 (July 30, 1974). In other words, the objective of the forward performance test is to measure the operation and structural integrity of the restraining barrier by ensuring the loads are concentrated in the core of the structure itself and not the periphery of the structure which could cause it to unnecessarily collapse. Thus, the additional foam installed outwards of the retaining barrier frame has no bearing on the forward performance of the restraining barrier.

5. DTNA has corrected this issue in production by adjusting the location of the installation of the barrier by moving it away from the wall by ¾ inch. Doing so ensures that in any future testing, the loading bar will not encounter the door frame.

6. Finally, DTNA has used this seating design for over a decade. It is not aware of any consumer complaints or reports of accidents or injuries related to the forward displacement of the restraining barrier.

DTNA's complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov* and by following the online search instructions to locate the docket number as listed in the title of this notice.

DTNA concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject buses that DTNA no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant buses under their control after DTNA notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2020–12716 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2019–0130; Notice 1]**

### Goodyear Tire & Rubber Company, Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Goodyear Tire & Rubber Company (Goodyear), has determined that certain Kelly Armorsteel KDM 1 commercial truck tires do not comply with Federal motor vehicle safety standards (FMVSS) No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds) and Motorcycles.* Goodyear filed a noncompliance report dated November 26, 2019, and petitioned NHTSA on November 25, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Goodyear's petition.

**DATES:** The closing date for comments on the petition is July 13, 2020.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this

petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

**SUPPLEMENTARY INFORMATION:**

I. *Overview:* Goodyear has determined that certain Kelly Armorsteel KDM 1 commercial truck tires do not fully comply with paragraph S6.5 of FMVSS No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of More than 4,536 kilograms (10,000 pounds) and Motorcycles* (49 CFR 571.119). Goodyear filed a noncompliance report dated November 26, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports,* and petitioned NHTSA on November 25, 2019, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Goodyear's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

II. *Tires Involved:* Approximately 76 Kelly Armorsteel KDM 1 commercial truck tires, size 11/R22.5 LRH, manufactured between August 25, 2019, and August 31, 2019, are potentially involved.

III. *Noncompliance:* Goodyear explained that the noncompliance is that the Tire Identification Number (TIN) on the subject tires contains a date code that was engraved less than the required height of 0.51 mm (0.020 inches) and, therefore, do not meet the requirements of paragraph S6.5 of FMVSS No. 119.

IV. *Rule Requirements:* Paragraph S6.5. of FMVSS No. 119 includes the requirements relevant to this petition. Each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall be placed between the maximum section width (exclusive of sidewall decorations or curb ribs) and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area which is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, the markings shall appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings shall be in letters and numerals not less than 2 mm (0.078 inch) high and raised above or sunk below the tire surface not less than 0.4 mm (0.015 inch), except that the marking depth shall be not less than 0.25mm (0.010 inch) in the case of motorcycle tires.

V. *Summary of Goodyear's Petition:* The following views and arguments presented in this section are the views and arguments provided by Goodyear. They have not been evaluated by the Agency and do not reflect the views of the Agency.

Accordingly, Goodyear described the subject noncompliance and stated that the noncompliance is inconsequential as it relates to motor vehicle safety.

1. Goodyear believes this noncompliance is inconsequential to motor vehicle safety because these tires were manufactured as designed and meet or exceed all applicable FMVSS. All of the sidewall markings related to tire service (load capacity, corresponding inflation pressure, etc.) are correct. The mislabeling and irregular date code is not a safety concern and has no impact on the retreading, repairing, and recycling industries. The affected date code stencil has been corrected, and all future production will not contain the irregularity in the date code.

2. Goodyear states that the date code portion of the TIN becomes important in the event of a safety campaign, so that the consumer may properly identify the recalled tire(s). In the unlikely event that a safety campaign would ever become necessary for this Kelly Armorsteel KDM 1 11/R22.5 LRH commercial truck tire made in the 34th week of 2019, Goodyear would include in the listing of recalled TINs the TIN for these tires with the date code portion as shown, MJ3TK2BW3419, as well as the TIN for these tires with the date code portion shown with the date code portion of the TIN below the regulation specified height so that the consumer would know that tires with this TIN, MJ3TK2BW, are included in the recall even if they have difficulty reading the date code portion because it is not raised to the 0.51 mm level.

Goodyear concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject tires that Goodyear no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after Goodyear notified them that the subject noncompliance existed.

**Authority:** (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2020–12717 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2020–0055 (Notice No. 2020–04)]**

### Hazardous Materials: Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, PHMSA seeks comment on the development of a Generic Information Collection Request for the collection of qualitative feedback on agency service delivery for approval under the Paperwork Reduction Act. This notice announces PHMSA's intent to submit this collection to the Office of Management and Budget for approval and allows for an additional 30 days of public comment.

**DATES:** Interested persons are invited to submit comments on or before July 13, 2020.

**ADDRESSES:** You may submit comments on this notice to the Office of Management and Budget, Attn: Desk Officer for PHMSA, via fax at 202–395–6974 or email at *OIRA_Submission@omb.eop.gov.* (Include reference to ''PHMSA Fast Track Generic Clearance comment'' in the subject line of the message.)

**FOR FURTHER INFORMATION CONTACT:** Steven Andrews or Shelby Geller, Standards and Rulemaking Division, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

*Title:* Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*OMB Number:* To be determined.

*Needs and Uses:* The proposed information collection provides a means to garner qualitative customer and stakeholder feedback in an efficient and timely manner, in accordance with the agency's commitment to improving service delivery. Qualitative feedback means information that provides useful insights on perceptions and opinions, but is not a statistical survey that yields quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

PHMSA expects to use various methods (*e.g.,* customer satisfaction surveys, comment cards), to solicit feedback. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public and other agency stakeholders. If this information is not collected, vital feedback from customers and stakeholders on the agency's services will be unavailable.

The agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial;
- The collections are focused on the awareness, understanding, attitudes, preferences, or experiences of the public or other stakeholders in order to improve existing or future services, products, or communication materials;
- Personally identifiable information (PII) is collected only to the extent necessary;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release to the public;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections submitted under this generic clearance will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

A **Federal Register** Notice with a 60-day comment period soliciting comments on this information collection was published on December 10, 2010 [75 FR 80542].

*Current Action:* New information collection request (generic).

*Type of Review*: New.

*Affected Public:* Individuals; Business or Other For-Profit Institutions; Not-For-Profit Institutions; State or Local Government.

*Average Expected Annual Number of Activities:* 75.

*Average Number of Respondents per Activity:* 50.

*Estimated Annual Number of Respondents:* 3,750.

*Responses per Respondent:* 1.

*Annual Responses:* 3,750.

*Estimated Annual Burden Hours:* 312.5.

*Projected Average Burden Hour Estimates for the next three years:* 937.5.

Issued in Washington, DC, on June 9, 2020.

**William A. Quade,**

*Deputy Associate Administrator for Programs and Policy, Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2020–12770 Filed 6–11–20; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0002]**

## Agency Information Collection Activity: Income, Net Worth and Employment Statement (In Support of Claim for Total Disability Benefits) and Application for Veterans Pension

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veteran's Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before August 11, 2020.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System

(FDMS) at *www.Regulations.gov* or to Nancy Kessinger, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0002'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Danny Green, *danny.green2@va.gov* at (202) 421–1354.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Authority:* 38 U.S.C. 1502, 1503.

*Title:* Income, Net Worth and Employment Statement (In Support of Claim for Total Disability Benefits) (VA Form 21P–527) and Application for Veterans Pension (VA Form 21P–527EZ).

*OMB Control Number:* 2900–0002.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services, established by law, for veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the Secretary. VA Form 21P–527EZ is the prescribed form for Veterans Pension applications.

VA Form 21P–527 is used by Veterans to apply for pension benefits after they have previously applied for pension or for service-connected disability compensation using one of the prescribed forms under 38 U.S.C. 5101(a). A veteran might reapply for pension using this form if a previous compensation or pension claim was denied or discontinued, or if the veteran is receiving compensation and the veteran now believes that pension would be a greater benefit.

*Affected Public:* Individuals and households.

*Estimated Annual Burden:* 56,250 Hours.

*Estimated Average Burden per Respondent:* 33.75 min.

*Frequency of Response:* Once.

*Estimated Number of Respondents:* 100,000.

By direction of the Secretary:

**Danny S. Green,**

*VA Clearance Officer, Office of Quality, Performance, and Risk, Department of Veterans Affairs.*

[FR Doc. 2020–12726 Filed 6–11–20; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0004]**

## Agency Information Collection Activity: Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child; Application for Dependency and Indemnity Compensation by a Surviving Spouse or Child—In-Service Death; Application for DIC, Death Pension, and/or Accrued Benefits

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veteran's Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before August 11, 2020.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy Kessinger at the Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 2042 or email to *nancy.kessinger@va.gov* or call 202–632–8924. Please refer to ''OMB Control No. 2900–0004'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Danny S. Green at (202) 421–1354.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Authority:* 38 U.S.C. 1310 through 1314 and 1532 through 1543.

*Title:* Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (VA Form 21P–534); Application for Dependency and Indemnity Compensation by a Surviving Spouse or Child—In-Service Death (21P–534a); Application for DIC, Death Pension, and/or Accrued Benefits (VA Form 21P–534EZ).

*OMB Control Number:* 2900–0004.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* Information is requested by these forms under the authority of 38 U.S.C. 1310 through 1314 and 1532 through 1543. VA Form 21P–534 is used to gather the necessary information to determine the eligibility of surviving spouses and children for dependency and indemnity compensation (DIC), death pension, accrued benefits, and death compensation. VA Form 21P–534a is an abbreviated application for DIC that is used only by surviving spouses and children of veterans who died while on active duty service. The VA Form 21P–534EZ is used for the

Fully Developed Claims (FDC) program for pension claims.

*Affected Public:* Individuals and households.

*Estimated Annual Burden:* 62,857.

*Estimated Average Burden per Respondent:* 37.154 minutes.

*Frequency of Response:* Once.

*Estimated Number of Respondents:* 101,426.

By direction of the Secretary.

**Danny S. Green,**

*VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.*

[FR Doc. 2020–12669 Filed 6–11–20; 8:45 am]

**BILLING CODE 8320–01–P**


# FEDERAL REGISTER

Vol. 85 Friday,
No. 114 June 12, 2020

Part II

## Commodity Futures Trading Commission

17 CFR Parts 1, 4, 41, et al.
Bankruptcy Regulations; Proposed Rule

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 1, 4, 41, and 190

**RIN 3038–AE67**

### Bankruptcy Regulations

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (the ''Commission'') is proposing amendments to its regulations governing bankruptcy proceedings of commodity brokers. The proposed amendments are meant to comprehensively update those regulations to reflect current market practices and lessons learned from past commodity broker bankruptcies.

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

**ADDRESSES:** You may submit comments, identified by ''Part 190 Bankruptcy Regulations'' and RIN 3038–AE67, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

[1] 17 CFR 145.9. Commission regulations referred to in this release are found at 17 CFR chapter I (2019), and are accessible on the Commission's website at *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.*

**FOR FURTHER INFORMATION CONTACT:** Robert B. Wasserman, Chief Counsel and Senior Advisor, 202–418–5092, *rwasserman@cftc.gov* or Kirsten Robbins, Associate Director, 202–418–5313, *krobbins@cftc.gov*, Division of Clearing and Risk; Andree Goldsmith, Special Counsel, 202–418–6624, *agoldsmith@cftc.gov* or Carmen Moncada-Terry, Special Counsel, 202–418–5795, *cmoncadaterry@cftc.gov*, Division of Swap Dealer and Intermediary Oversight, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

## I. Background

### *A. Background of the NPRM*

The basic structure of the Commission's bankruptcy regulations, part 190 of title 17 of the Code of Federal Regulations, was proposed in 1981 and finalized in 1983. While there have been a number of rulemakings that have amended part 190 in light of specific issues or statutory changes, this is the first comprehensive revision of part 190. The Commission is proposing to revise part 190 comprehensively in light of several major changes to the industry over the past 37 years, including the exponential growth in the speed of transactions and trade processing. In addition, important lessons have been learned over prior bankruptcies, including the need for administrative arrangements that are specific to the circumstances of the individual bankruptcy and the success of an approach, consistent with applicable statutes, that prioritizes cost effectiveness and promptness over precision.[2] Finally, derivatives clearing organizations (''DCOs'') have become increasingly important to the financial system.

In proposing these rules, the Commission is exercising its broad power under the Commodity Exchange Act (''CEA'' or ''Act'') to make regulations with respect to commodity broker debtors. Specifically, section 20(a) states that notwithstanding title 11, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11, by rule or regulation (1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property; (2) that certain cash, securities, other property, or commodity contracts are to be specifically identifiable to a particular customer in a specific capacity; (3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation; (4) any persons to which customer property and commodity contracts may be transferred under section 766 of title 11; and (5) how the net equity of a customer is to be determined.[3]

In developing this rulemaking, the Commission benefited from outside contributions.

On September 29, 2017, the Part 190 Subcommittee of the Business Law Section of the American Bar Association (''ABA Committee'') submitted a model set of part 190 rules (the ''ABA Submission'') in response to the Commission's Project KISS (''Request for Information'').[4]

As the ABA Committee noted,

> The [part 190 regulations] have generally served the industry, bankruptcy professionals and customers well. That said, the [ABA] Committee believes there is a need to update [p]art 190 in a comprehensive manner, as the markets—and how they are regulated—have changed dramatically in the intervening decades. At the same time, it is important to stay true to the sound conceptual elements of the existing rules with respect to account class distinctions, porting of customer positions, and pro rata distribution of customer property by account class, with priority given to public customers. The Committee was also spurred to act by the MF Global and Peregrine Financial Group bankruptcies, and the lessons they revealed on the challenges of liquidating a large [futures commission merchant (''FCM'')] that is severely under-segregated.[5]

The ABA Committee started its work in 2015, conducting a review of the Commission's part 190 regulations to identify potential areas for improvement, with the plan to draft comprehensive revisions in the form of model rules that the Commission could consider for potential agency rulemaking. The ABA Committee included participants who represented a broad cross-section of interested parties, in particular attorneys who work extensively in the areas of derivatives law, bankruptcy law, or both, including at law firms, futures commission merchants, clearing houses and exchanges, government agencies,[6] and industry associations. The ABA Committee also included attorneys for the trustees in the commodity broker bankruptcy cases of MF Global and Peregrine Financial Group, as well as attorneys who were formerly staff at the Commission, including one of the drafters of the original rules.[7] Each of the members devoted significant amounts of time to this project.

The resulting ABA Submission represents a consensus across this broad range of interests, thoughtfully and comprehensively addressing the issues presented in part 190, and assisting the Commission in developing a deeper understanding of the practical issues involved in commodity broker bankruptcy proceedings. This notice of proposed rulemaking (''NPRM'') has benefited significantly from the ABA Submission, as well as conversations between Commission staff and members of the ABA Committee, both individually and collectively, to understand their thinking with respect to various aspects of the ABA Submission.

### *B. Major Themes in the Proposed Revisions to Part 190*

While the proposed revised part 190 carries forward significant portions of existing part 190, there are important changes that are proposed. The major

[2] The concept of prioritizing cost effectiveness and promptness over precision is discussed in detail in overarching concept three in the cost-benefit considerations, section IV.C.3 below.

[3] *See* CEA section 20(a), 7 U.S.C. 24(a).

[4] 82 FR 23765 (May 3, 2017). The ABA Submission can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61331&SearchText*; the accompanying cover note (''ABA Cover Note'') can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText*. The ABA Cover Note cautions that ''[t]he views expressed in this letter, and the proposed Model Part 190 Rules, are presented on behalf of the [ABA] Committee. They have not been approved by the House of Delegates or Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA. In addition, they do not represent the position of the ABA Business Law Section, nor do they necessarily reflect the views of all members of the Committee.''

[5] ABA Cover Note at 2.

[6] The Committee members included staff at government agencies other than the Commission. Current Commission staff participated in a few meetings of the Committee (in the form of ''brainstorming exercises'') to discuss their understanding of the current regulations. Commission staff ''expressly conveyed that they did not want to direct the Committee's deliberations, and they were careful not to offer comments that could be construed as trying to persuade the Committee to any particular viewpoint on any particular issue. They were also clear that their comments did not represent the views of the Commission, or of anyone other than the person expressing them.'' ABA Cover Note at 3 n. 5.

[7] *See* generally *id.* at 3.

themes in changes to part 190 include the following:

(1) The Commission is proposing to add § 190.00, which is designed to set out the statutory authority, organization, core concepts, scope, and rules of construction for part 190. This section is intended to set out, subject to notice and comment rulemaking, the Commission's thinking and intent regarding part 190 in order to benefit and to enhance the understanding of DCOs, FCMs, their customers, trustees,[8] and the public at large.

(2) Some of the changes would further support the implementation of the requirements, established consistent with section 4d of the CEA, that shortfalls in segregated property should be made up from the FCM's general assets, while others further the preferences, established in title 11 of the United States Code (*i.e.,* the ''Bankruptcy Code''), section 766(h), that with respect to customer property, public customers are favored over non-public customers, and that public customers are entitled *inter se* to a pro rata distribution based on their respective claims.

(3) Other changes would foster the longstanding and continuing policy preference for transferring (as opposed to liquidating) positions of public customers and those customers' proportionate share of associated collateral.[9] Some of the benefits, for both customers and the markets as a whole, arising from this policy are addressed in the discussion of proposed § 190.00(c)(4) in section II.A.1 below.

(4) The Commission is proposing a new subpart C to part 190, governing the bankruptcy of a clearing organization. As explained in further detail in connection with proposed § 190.11, the Commission is proposing to establish ex ante the approach to be taken in addressing such a bankruptcy, in order to foster prompt action in the event such a bankruptcy occurs, and in order to establish a clear counterfactual (*i.e.,* ''what would creditors receive in a liquidation in bankruptcy?'') in the event of a resolution of a clearing organization pursuant to Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act [10] (hereinafter, ''Title II'' and ''Dodd-Frank'').[11] The Commission's approach toward a DCO bankruptcy is characterized by three overarching concepts:

a. First, the trustee should follow, to the extent practicable and appropriate, the DCO's pre-existing default management rules and procedures and recovery and wind-down plans that have been submitted to the Commission.[12] These rules, procedures, and plans will, in most cases,[13] have been developed pursuant to the Commission's regulations in part 39, and subject to staff oversight. This approach relieves the trustee of the burden of developing, in the moment, models to address an extraordinarily complex situation. It would also enhance the clarity of the counterfactual for purposes of resolution under Title II.

b. Second, resources that are intended to flow through to members as part of daily settlement (including both daily variation payments and default resources) should be devoted to that purpose, rather than to the general estate.[14]

c. Third, other provisions would draw, with appropriate adaptations, from provisions applicable to FCMs.[15]

(5) The Commission is proposing to note the applicability of part 190 in the context of proceedings under the Securities Investors Protection Act (''SIPA'') in the case of FCMs subject to a SIPA proceeding,[16] and Title II of Dodd-Frank in the case of a commodity broker where the Federal Deposit Insurance Corporation (''FDIC'') is acting as a receiver.

(6) In light of lessons learned from the MF Global bankruptcy, the Commission is proposing changes to the treatment of letters of credit as collateral, both during business as usual and during bankruptcy, in order to ensure that, consistent with the pro rata distribution principle discussed in proposed § 190.00(c)(5) in section II.A.1 below, customers who post letters of credit as collateral suffer the same proportional loss as customers who post other types of collateral.

(7) The Commission is proposing in a number of areas to grant trustees enhanced discretion, based on both practical necessity and positive experience.

a. Recent commodity broker bankruptcies have involved many thousands of customers, with as many as hundreds of thousands of commodity contracts. Trustees must make decisions as to how to handle such customers and contracts in the days—in some cases, the hours—after being appointed. Moreover, each commodity broker bankruptcy has unique characteristics, and bankruptcy trustees need to adapt correspondingly quickly to those unique characteristics.

i. In order to foster the ability of the trustee to operate effectively, some of the changes would permit the trustee enhanced discretion generally.

ii. Others, recognizing the difficulty in treating large numbers of customers on a bespoke basis, would permit the trustee to treat them on an aggregate basis. These changes represent a move from a model where the trustee receives/complies with instructions from individual customers to a model—reflecting actual practice in commodity broker bankruptcies in recent decades—where the trustee transfers as many open commodity contracts as possible.

b. These grants of discretion are also supported by the Commission's positive experience working in cooperation and consultation with bankruptcy and SIPA trustees.

c. On a related note, and as discussed further as the third overarching concept in the section below on cost-benefit considerations,[17] both the current and proposed versions of part 190 favor cost effectiveness and promptness over precision in certain respects, particularly with respect to the concept of pro rata treatment. Following the policy choice made by Congress in section 766(h) of the Bankruptcy Code, the Commission is proposing that it is more important to be cost effective and prompt in the distribution of customer property (*i.e.,* in terms of being able to treat customers as part of a class) than it is to value each customer's entitlements on an individual basis. Doing so fosters transfer rather than liquidation of customer positions, and

[8] Including bankruptcy and SIPA trustees, as well as the FDIC in its role as a receiver.

[9] This policy preference is manifest in section 764(b) of the Bankruptcy Code, 11 U.S.C. 764(b) (protecting from avoidance transfers approved by the Commission up to seven days *after* the order for relief); *see also* current § 190.06(g) (approving a wide variety of pre-relief and post-relief transfers).

[10] Public Law 111–203 (July 21, 2010).

[11] Section 210(d)(2), 12 U.S.C. 5390(d)(2), provides that the maximum liability of the FDIC, acting as a receiver for a covered financial company in a resolution under Title II, is the amount the claimant would have received if the FDIC had not been appointed receiver and the covered financial company had instead been liquidated under chapter 7 of the Bankruptcy Code. Thus, in developing resolution strategies for a DCO while mitigating claims against the FDIC as receiver, it is important to understand what would happen if the DCO was instead liquidated pursuant to chapter 7 of the Bankruptcy Code (and this part 190), and such a liquidation is the counterfactual to resolution of that DCO under Title II.

[12] *See generally* proposed § 190.15.

[13] Only those DCOs that are subject to subpart C of part 39 (*i.e.,* those that have been designated as systemically important by the FSOC or that have elected to be subject to subpart C of part 39) are subject to § 39.35 (Default rules and procedures) and § 39.39 (Recovery and wind-down).

[14] *See generally* proposed § 190.19.

[15] *See, e.g.,* proposed §§ 190.16, 190.17(c).

[16] Those would be FCMs that are also registered as broker-dealers with the Securities and Exchange Commission. *See generally* SIPA, 15 U.S.C. 78aaa *et seq.*

[17] *See* the overarching concept discussed in section IV.C.3 below.

return of most funds to customers in time periods of days or weeks rather than months or years. Similarly, calculations of each customer's funded balance are directed in proposed § 190.05 to be ''as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' The quoted language would allow the trustee to avoid more precise calculations where such precision would not be cost effective or could not reasonably be accomplished on a prompt basis (for example, in a situation where price information for particular assets or contracts at particular times was not readily available). The Commission believes that this approach would lead to (1) in general, a faster administration of the proceeding, (2) customers receiving their share of the debtor's customer property more quickly, and (3) a decrease in administrative costs (and thus, in case of a shortfall in customer property, a greater return to customers).

(8) Many of the changes are intended to update part 190 in light of changes to the regulatory framework over the past three decades, including cross-references to other Commission regulations. Some of these codify actual practice in prior bankruptcies, such as a requirement that an FCM notify the Commission of its imminent intention to file for voluntary bankruptcy. In another case, the Commission is addressing for the first time the interaction between part 190 and recent revisions to the Commission's customer protection rules.[18]

(9) Other changes follow from changes to the technological ecosystem, in particular changes from paper-based to electronic-based means of communication, (for example, the use of communication to customers' electronic addresses rather than by paper mail, as well as the use of websites as a means for the trustee to communicate with customers on a regular basis). The proposal would also recognize the change from paper-based to electronic recording of ''documents of title.'' Many of these changes also recognize the actual practice in prior bankruptcies.

(10) As discussed further below, many of the changes are intended to clarify language in existing regulations, without any intent to change substantive results. While some of these changes will, as discussed below, address ambiguities that have complicated past bankruptcies, this comprehensive revision of part 190 has also provided opportunities to clarify language in order to avoid future ambiguities, and to add provisions to address circumstances that have not yet arisen, in order to accomplish better and more reliably the goals of promptly and cost-effectively resolving commodity broker bankruptcies while mitigating systemic risk and protecting the commodity broker's customers.

The Commission seeks comment on these major themes. Do commenters agree or disagree with these themes and the analysis presented? Do commenters view proposed revised part 190 as appropriately implementing these major themes, or are some of the proposed changes inconsistent with (or does the proposal in some areas insufficiently address) these themes? General comments concerning these major themes are welcome, however, adding more specific suggestions for changes to the proposed regulations would be most helpful.

## II. Proposed Regulations

### *A. Subpart A—General Provisions* [19]

#### 1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction

The Commission is proposing a new § 190.00, which would contain general provisions applicable to all of part 190. Proposed § 190.00 is intended to assist trustees, bankruptcy courts, customers, clearing members, clearing organizations, and other interested parties in understanding the Commission's rationale for, and intent in promulgating, the specific provisions of this proposed part. Moreover, this regulation may be particularly useful in a time of crisis for those individuals who may not have extensive experience with the CEA or Commission regulations. This provision generally would state facts and concepts that exist in the Commission's bankruptcy regulations.[20] To the extent there are changes reflected in this proposed § 190.00, these changes will be identified and the reasoning for these changes will be further detailed in the relevant section below.

Proposed § 190.00(a) would set forth the Commission's statutory authority to adopt the proposed part 190 regulations under section 8a(5) of the CEA, which empowers the Commission to ''make and promulgate such rules and regulations as are necessary to effectuate any of the provisions or to accomplish any of the purposes of'' the CEA, and section 20 of the CEA, which provides that the Commission may, notwithstanding the Bankruptcy Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code.

Proposed § 190.00(b) would explain that the proposed part 190 regulations are organized into three subparts. Subpart A would contain general provisions applicable in all cases. Subpart B would contain provisions that apply when the debtor is a FCM, the definition of which includes acting as a foreign FCM.[21] Subpart C would contain provisions that apply when the debtor is a DCO as defined by the CEA. Proposed § 190.00(c) would present the core concepts [22] of proposed part 190. These core concepts are central to understanding how a commodity broker bankruptcy works. These include those related to commodity brokers and commodity contracts; account classes; public customers and non-public customers, Commission segregation

[18] 78 FR 68506 (Nov. 14, 2013). This refers to proposed new § 190.05(f) in section II.B.3 below.

[19] The Commission is proposing technical corrections and updates to parts 1, 4 and 41, which are discussed in II.F. below.

[20] *See* ABA Cover Note at 6:

The Committee recommends adding a rule to Subpart A that provides context and sets forth the general framework for the Part 190 Rules to assist a trustee or bankruptcy court in understanding the reasons for the specific requirements set forth in the other rules. If the individual appointed as the trustee, or the bankruptcy court, does not have extensive experience with the CEA or CFTC rules, in particular with requirements relating to clearing and customer funds segregation, the Part 190 Rules may well prove difficult to comprehend, particularly in the critical early days when the trustee is expected to act in circumstances that are likely chaotic and stressful. This context and description of the general framework will also be important to customers and other stakeholders that may not have experience with a subchapter IV proceeding.

Thus, the Committee has proposed Rule 190.00, which explains:

- The Commission's statutory authority to adopt the Part 190 Rules.
- The organization of the rules into the three subparts described above.
- The core principles reflected in the rules.
- The scope of the rules in terms of proceedings, account classes, customer property and commodity contracts.

Although Rule 190.00 adds to the length of the rules, on balance, we believe it provides useful explanation that will benefit trustees, bankruptcy judges, customers and other stakeholders applying the rules in practice.

[21] *See* CEA section 1a(28), 7 U.S.C. 1a(28). The definition of foreign FCM involves soliciting or accepting orders for the purchase or sale of a commodity for future delivery executed on a foreign board of trade, or by accepting property or extending credit to margin, guarantee or secure any trade or contract that results from such a solicitation or acceptance. *See* section 761(12) of the Bankruptcy Code, 11 U.S.C. 761(12).

[22] The Commission is proposing to use the term ''core concepts'' to avoid confusion with the core principles applicable to registered entities. *Cf.* CEA section 5b(c)(2), 7 U.S.C. 7a–1(c)(2).

requirements, and member property [23]; porting of public customer commodity contract positions; pro rata distribution; and deliveries. More specifically, this paragraph would explain the following concepts:

• Proposed § 190.00(c)(1) would explain that subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a ''commodity broker,'' the definition of which requires a ''customer.'' [24] Proposed § 190.00(c)(1) would further state that the rules in proposed part 190 apply to commodity brokers that are FCMs as defined by the Act, or DCOs as defined by the Act.

• Proposed § 190.00(c)(2) would explain that the CEA and Commission regulations provide separate treatment and protections for different types of cleared commodity contracts or account classes. The four account classes would include the (domestic) futures account class (including options on futures),[25] the foreign futures account class (including options on foreign futures),[26] the cleared swaps account class for swaps cleared by a registered DCO (including cleared options other than options on futures or foreign futures),[27] and the delivery account class for property held in an account designated as a delivery account. Delivery accounts would be used for effecting delivery under commodity contracts that provide for settlement via delivery of the underlying when a commodity contract would be held to expiration or, in the case of an option on a commodity, would be exercised.[28]

• Proposed § 190.00(c)(3)(i) would explain that in a bankruptcy, public customers are generally entitled to a priority distribution of cash, securities, or other customer property over ''non-public customers,'' [29] and both are given a priority over all other claimants (except for claims relating to the administration of customer property) pursuant to section 766(h) of the Bankruptcy Code.[30] That provision of the Code states explicitly that the trustee shall distribute customer property ratably to customers in priority to all other claims, except claims that are attributable to the administration of customer property. Notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full.

As noted in proposed § 190.00(c)(3)(i)(A), the cash, securities, or other property of public customers are subject to special segregation requirements under the CEA [31] and Commission regulations [32] for each class of account except delivery accounts. Although the transactions and property of non-public customers are not subject to segregation requirements, such transactions and property are deemed part of customer property. In the distribution of customer property, customer net equity claims of public customers are prioritized over those of non-public customers.

As noted in proposed § 190.00(c)(3)(i)(B), the property in delivery accounts nonetheless constitutes ''customer property,'' and thus claims of public customers enjoy the same priority over claims of non-public customers in the distribution of delivery account property.

• Proposed § 190.00(c)(3)(ii) would address the division of customer property and member property in proceedings in which the debtor is a clearing organization. The classification of customers as non-public customers in contrast to public customers also would be relevant, in that each member of the clearing organization would have separate claims against the clearing organization with respect to (A) transactions cleared for its own account or for any of its non-public customers and (B) transactions cleared on behalf of the public customers of the member. In such a proceeding, customer property would consist of member property, which could be distributed to pay member claims based on members' house accounts, and customer property other than member property, which would be reserved for payment of claims for the benefit of members' public customers.

• Proposed § 190.00(c)(3)(iii) would address preferential assignment of property among customer classes and account classes in clearing organization bankruptcies: (1) Certain customer property, as specified in § 190.18(c), would be preferentially assigned to ''customer property other than member property'' instead of ''member property'' to the extent that there is a shortfall in funded balances for members' public customer claims. Moreover, to the extent that there are excess funded balances for members' claims in any customer class/account class combination, that excess also would be assigned preferentially to ''customer property other than member property'' for other account classes to the extent of any shortfall in funded balances for members' public customer claims in such account classes; (2) Where property would be assigned to a particular customer class with more than one account class, it would be assigned on a least funded to most funded basis among the account classes.

• Proposed § 190.00(c)(4) would explain that, in a proceeding in which the debtor is an FCM, part 190 details the policy preference for transferring to another FCM, (commonly known as ''porting'') open commodity contract positions of the debtor's customers along with all or a portion of such customers' account equity. Porting mitigates risks to both the customers of the debtor FCM and to the markets. Specifically, porting (rather than the alternative, liquidation) of customer positions protects customers' hedges from changes in value between the time they are liquidated and the time, if any, that the customer may be able to re-establish them (and thus mitigates the market risk that some customers use the futures markets to counteract), and similarly protects customers' directional positions . Moreover, not all customers may be able to re-establish positions with the same speed—in particular, smaller customers may be subject to longer delays in re-establishing their positions. In addition, liquidation of an FCM's book of positions can increase volatility in the markets, to the detriment of all market participants (and also contribute to making it more expensive for customers to re-establish their hedges and other positions).

• Proposed § 190.00(c)(5) would address pro rata distribution. It would explain that, if the aggregate value of

[23] ''Member property'' would be defined in proposed § 190.01 and would be used to identify cash, securities, or property available to pay the net equity claims of clearing members based on their house account at the clearing organization. *Cf.* 11 U.S.C. 761(16).

[24] *See* 11 U.S.C. 101(6) (definition of ''commodity broker''), 761(9) (definition of ''customer'' referred to in 101(6)).

[25] This corresponds to segregation pursuant to section 4d(a) of the CEA, 7 U.S.C. 6d(a).

[26] This corresponds to segregation pursuant to section 30.7 (enacted pursuant to section 4(b)(2)(A) of the CEA, 7 U.S.C. 6(b)(2)(A).

[27] This corresponds to segregation pursuant to section 4d(f) of the CEA, 7 U.S.C. 6d(f).

[28] Delivery accounts are discussed further below in, *e.g.,* §§ 190.00(c)(6), 190.01 (definition of delivery account, cash delivery property, physical delivery property) and 190.06.

[29] Non-public customers are customers who bear certain proprietary or other ''insider'' relationships to an FCM. This term would be more precisely defined in § 190.01.

[30] Thus, as discussed further below, all customer property will be allocated to public customers so long as the funded balance in any account class for public customers is less than one hundred percent of public customer net equity claims. Once all account classes for public customers are fully funded (*i.e.,* at one hundred percent of net equity claims), any excess would be allocated to non-public customers' net equity claims until all of those are fully funded.

[31] *See, e.g.,* section 4d of the CEA, 7 U.S.C. 6d.

[32] *See, e.g.,* §§ 1.20–1.29, part 22, § 30.7.

customer property in a particular account class is less than the amount needed to satisfy the net equity claims of public customers in that account class (*i.e.,* there is a ''shortfall''), customer property in that account class would be distributed pro rata to those public customers. The pro rata distribution principle carries forth the statutory direction in section 766(h) of the Bankruptcy Code. It would ensure that all public customers within an account class will suffer the same proportional loss, including those public customers that post as collateral letters of credit or specifically identifiable property.[33]

Moreover, any customer property that would not be attributable to any particular account class or which is in excess of public customer net equity claims for the account class to which it is attributed, would be distributed to public customers in respect of net equity claims in other account classes where there is a shortfall. Thus, as noted in § 190.00(c)(3), all public customer net equity claims would receive priority over non-public customer claims.

• Proposed § 190.00(c)(6) would address deliveries. It would explain that the delivery provisions of part 190 apply to any commodity that is subject to delivery under a commodity contract, including agricultural commodities, other non-financial commodities (such as metals or energy) and commodities that are financial in nature (including virtual currencies). In the ordinary course of business, commodity contracts with delivery obligations are offset before reaching the delivery stage (*i.e.,* prior to triggering bilateral delivery obligations). Nonetheless, when delivery obligations do arise, a delivery default could have a disruptive effect on the cash market for the commodity and could adversely impact the parties to the transaction.[34]

In a proceeding in which the debtor is an FCM, the delivery provisions in proposed part 190 would reflect the policy preferences (A) to liquidate commodity contracts that settle via delivery before they move into a delivery position and (B) when contracts do move into a delivery position, to allow the delivery to occur, where practicable, outside the administration of the debtor's estate (*i.e.,* directly between the debtor's customer and the delivery counterparty assigned by the clearing organization).

Proposed § 190.00(d)(1)(i) would acknowledge that section 101(6) of the Bankruptcy Code recognizes ''commodity options dealers'' and ''leverage transaction merchants'' as defined in sections 761(6) and (13) of the Bankruptcy Code, as separate categories of commodity brokers. However, since there are no commodity options dealers or leverage transaction merchants currently registered,[35] in proposed § 190.00(d)(1), the Commission would declare its intent to adopt regulations with respect to commodity options dealers and leverage transaction merchants, respectively, at such time as an entity registers as such.

Proposed § 190.00(d)(1)(ii) would provide that, pursuant to the Securities Investor Protection Act (''SIPA''),[36] the trustee in a SIPA proceeding where the debtor is also a commodity broker has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with SIPA or as ordered by the court.[37] This part would implement subchapter IV of chapter 7 by establishing the trustee's duties thereunder, consistent with the broad authority granted to the Commission pursuant to section 20 of the CEA. Therefore, this part also would apply to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under section 15 of the Securities Exchange Act of 1934 [38] when the debtor also is an FCM.

Moreover, in the context of a resolution proceeding under Title II of Dodd-Frank, section 210(m)(1)(B) [39] provides that the FDIC (in its role as resolution authority) must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property of a resolution entity [40] that is a commodity broker as if the resolution entity were a debtor for purposes of subchapter IV. Proposed § 190.00(d)(1)(iii) would explain that this part shall serve as guidance with respect to distribution of property in a proceeding in which the FDIC acts as a receiver for an FCM or DCO pursuant to Title II of Dodd-Frank.[41]

Proposed § 190.00(d)(2)(i) would clarify that a trustee may not recognize any account classes not explicitly provided for in proposed part 190.

Proposed § 190.00(d)(2)(ii) would provide that no property that would otherwise be included in customer property, as defined in proposed § 190.01 of this part, shall be excluded from customer property because it is considered to be held in a constructive trust, resulting trust, or other trust that is implied in equity.[42] Generally, in a commodity broker bankruptcy, the basis for distributing segregated customer property is pro rata treatment and transparency. To achieve this goal, the FCM's segregation records (including account statements) and reporting to the Commission and self-regulatory organizations (''SROs'') and DCOs must reflect what is actually available for customers. This allows FCMs, SROs, DCOs, and the Commission to ensure, during business as usual, that (a) customer property is being properly protected pursuant to the segregation requirements of section 4d of the CEA and the regulations thereunder, and (b) customer property is not subject to hidden arrangements that cannot be accounted for transparently and reliably. Through this regulation, the Commission is making clear that customer property cannot be burdened by equitable trusts. Attempting to

[33] In prior bankruptcies, some customers posting letters of credit or specifically identifiable property as collateral sought to escape pro rata treatment for these categories of collateral, contrary to the Commission's intent. *See* discussion of § 190.04(d)(3) in section II.B. below.

[34] *See* ABA Cover Note at 12 (''It is important to address deliveries to avoid disruption to the cash market for the commodity or adverse consequences to parties that may be relying on delivery taking place in connection with their business operations.'').

[35] *See* ABA Cover Note at 5 (''To our knowledge, no person is currently registered or operating as a commodity option dealer or leverage transaction merchant. . . . Thus, we recommend uncluttering the rules by limiting their scope to subchapter IV proceedings of commodity brokers that are FCMs or DCOs, with respect to commodity contracts that are cleared.'').

[36] 15 U.S.C. 78aaa, *et seq.*

[37] *See* SIPA section 7(b), 15 U.S.C. 78fff–1(b) (To the extent consistent with the provisions of SIPA or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7).

[38] 15 U.S.C. 78*o.*

[39] 12 U.S.C. 5390(m)(1)(B).

[40] That is, the entity being resolved under Title II. Section 210(m)(1)(b) refers to ''any covered financial company or bridge financial company.''

[41] 12 U.S.C. 5390(m)(1)(B) provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Code with respect to the distribution of customer property and member property in connection with the liquidation of a commodity broker that is a ''covered financial company'' or ''bridge financial company'' (terms defined in 12 U.S.C. 5381(a)).

[42] This is in contrast to the (ultimately unsuccessful) claims of certain retail customers in the Peregrine bankruptcy, who claimed that their off-exchange retail foreign currency transactions and associated margin collateral were held in a constructive or resulting trust by Peregrine. An off-exchange retail foreign currency transaction is not defined as ''commodity contract'' under section 761(4) of the Bankruptcy code. Accordingly, counterparties that engage in off-exchange retail transactions with an FCM are not subject to the protections provided by part 190 with respect to their accounts in the event of the FCM's bankruptcy. *See generally Secure Leverage Group, Inc.* v. *Bodenstein,* 558 B.R. 226 (N.D. Ill. 2016) *aff'd* 866 F.3d 775 (7th Cir. 2017).

account for such equitable trusts in a bankruptcy proceeding under part 190 would undermine the Commission's implementation and enforcement of the statutory scheme under the CEA.[43]

Proposed § 190.00(d)(3) would provide that certain transactions, contracts or agreements are excluded from the term ''commodity contract.'' The contracts that would be excluded include: Options on commodities unless cleared by a DCO (or, in the context of a foreign futures clearing member, a foreign clearing organization); forwards (defined as such pursuant to the exclusions in sections 1a(27) or 1a(47)(B)(ii) of the CEA), unless they are cleared by a DCO (or, in the context of a foreign futures clearing member, a foreign clearing organization); security futures products when they are carried in a securities account; retail foreign currency transactions described in sections 2(c)(2)(B) or (C) of the CEA; security-based swaps or other securities carried in a securities account[44] (other than security futures products carried in an enumerated account class); and retail commodity transactions described in section (2)(c)(2)(D) of the CEA (other than transactions executed on or subject to the rules of a designated contract market (''DCM'') or foreign board of trade (''FBOT'') as if they were futures). The agreements and transactions that would be so excluded have traditionally not been considered to be commodity contracts for purposes of segregation and customer protection, while those that are excepted from these exclusions are so considered, and thus are covered by part 190.[45]

Positions or transactions that would be covered by part 190 include:

- As part of the cleared swaps account class (discussed in further detail in the definitions section), ''swaps'' as defined in section 1a(47) of the CEA and § 1.3 that are cleared by a DCO, including options on commodities cleared by a DCO unless otherwise excluded, and non-swap/non-futures contracts that are traded over-the-counter on a swap execution facility and cleared by a DCO as if they were swaps (cleared swaps account class).[46]
- As part of the futures or foreign futures account class (discussed in further detail in the definitions section), futures or options on futures executed on or subject to the rules of a DCM or FBOT, including retail commodity contracts if they were traded on such market ''as if'' they are futures and forward contracts which are cleared by a DCO as if they were futures.[47]

Proposed § 190.00(e) would address the context in which proposed part 190 should be interpreted. It states that any references to other Federal rules and regulations refer to the most current versions of these rules and regulations (*i.e.,* ''as the same may be amended, superseded or renumbered''). Moreover, where they differ, the definitions set forth in proposed § 190.01 shall be used instead of the defined terms set forth in section 761 of the Bankruptcy Code. It should be noted that the other regulations in proposed part 190 are designed to be consistent with subchapter IV of chapter 7 of the Bankruptcy Code.

Proposed § 190.00(e) also addresses account classes in the context of portfolio margining and cross margining programs. Where commodity contracts (and associated collateral) that would be attributable to one account class are, instead, commingled with the commodity contracts (and associated collateral) in a second account class (the ''home field''), then the trustee must treat all such commodity contracts and associated collateral as being held in, and consistent with the regulations applicable to, an account of the second account class. The approach of following the rules of the ''home field'' also pertains to securities positions held in a commodity account class (and thus treated in accord with the relevant commodity account class) and commodity contract positions (and associated collateral) held in the securities account, in which case the rules applicable to the securities account will apply, consistent with section 16(2)(b)(ii) of SIPA, 15 U.S.C. 78lll(2)(b)(ii).

The Commission requests comment with respect to all aspects of proposed § 190.00. In particular, is a regulation setting forth core concepts useful? Are the core concepts that are addressed under or over inclusive? Are the definitions and discussions for each core concept helpful?

2. Regulation § 190.01: Definitions

The Commission would update the definitions for proposed revised part 190. The current and proposed definitions are in § 190.01. Most of the changes in proposed § 190.01 would be conforming changes, such as correcting cross-references and deleting definitions of certain terms that are not used in proposed part 190. Other changes would tie the definitions in § 190.01 more closely to the definitions in § 1.3 and other Commission regulations, to reflect changes in Commission regulations. In some cases, the Commission is proposing more substantive changes to the definitions, such as amending or adding definitions to further clarify and provide additional details where the current definitions are silent or unclear, or to reflect concepts that are new to proposed part 190. In particular, the Commission is proposing to separate the delivery account class into two sub-classes, a physical delivery account class and a cash delivery account class; the relevant terms are defined below. The proposed definitions of commodity contract and physical delivery property would codify positions that the Commission has taken in recent commodity broker bankruptcies.[48]

The Commission is also proposing to amend the current § 190.01 to replace the paragraphs currently identified with an alphabetic designation for each defined term (*e.g.,* ''§ 190.01(ll)'') with a simple alphabetized list, as is recommended by the Office of the Federal Register, and as recently

[43] The ABA Submission included a more complex approach to this subsection:

Absent extraordinary circumstances and upon application by the trustee (such as to address transfers of funds initiated prior to, but completed after, the entry of the order for relief), so long as there is any shortfall of customer property needed to satisfy customer net equity claims in the classes enumerated in § 190.01 of this part, no person is entitled to a distribution of any property in which the debtor holds any interest on the basis that the debtor holds such property in a 'constructive trust' for such person. The foregoing does not restrict any rights a person may have to distribution of property held by the debtor that is not covered by an account class on a 'custodial' or express trust basis pursuant to statute, governmental rule, regulation or order, or legally binding written agreement between the debtor and such person.

The Commission concludes that the ABA Submission's approach here is overly complicated (both in the level of detail and, in particular, with relation to evaluating what constitutes ''extraordinary circumstances''), and has instead determined to propose the more direct approach discussed above.

[44] Security-based swaps and securities that are carried in a securities account are part of this exclusion because they are protected under SIPA.

[45] As the ABA Cover Note explains:

The Committee believes it is important for the rules to cover cleared OTC transactions in contracts that may be outside the swap definition and futures contract classification, such as foreign exchange forwards or foreign exchange swaps excluded by the Treasury Department or spot forex transactions, because such transactions are already being cleared by DCOs as if they are swaps. It is the Committee's understanding that the DCOs are clearing such OTC transactions under the account structure, and subject to the customer funds segregation rules, for cleared swaps prescribed in the CFTC Part 22 Rules. Thus, we have included such commodity contracts in the cleared swaps account class.

ABA Cover Note at 8 (footnote omitted).

[46] *See* the definition of commodity contract in proposed § 190.01in conjunction with the definition of swap in proposed § 190.01.

[47] *See* the definition of commodity contract in proposed § 190.01 in conjunction with the definition of swap in proposed § 190.01.

[48] Respectively, *In Re Peregrine Financial Group* and *In Re MF Global, Inc.*

implemented by the Commission with respect to, *e.g.,* § 1.3.[49]

The Commission is proposing the following definitions in proposed § 190.01:

''Account Class'': The current definition of the term account class specifies that it includes certain types of customer accounts, each of which is to be recognized as a separate class of account. The types are ''futures account,'' ''foreign futures accounts,'' ''leverage accounts,'' ''delivery accounts,'' and ''cleared swaps accounts.'' The proposed definition of the term ''account class'' would be expanded to include definitions of each of these account classes. However, as discussed above with respect to proposed § 190.00(d)(1)(i), the ''commodity options'' and ''leverage account'' account classes are proposed to be removed, at least temporarily.

The definition of ''futures account'' would cross-reference the definition of the same term in § 1.3, while the definition of ''cleared swaps account'' cross-references the definition of ''cleared swaps customer account'' in § 22.1. Each of these definitions applies to both FCMs and DCOs. The definition of ''foreign futures account'' cross-references the definition of ''30.7 account'' in § 30.1(g). As that latter definition is limited to FCMs, a corresponding reference to such accounts at a clearing organization would be included, in the event that a clearing organization clears foreign futures transactions for members that are FCMs, where those accounts are maintained on behalf of those FCM members' 30.7 customers (as that latter term is defined in § 30.1(f)). This would not apply to the case where a foreign clearing organization is clearing foreign futures for clearing members that are not subject to the requirements of § 30.7.

Paragraph (1)(iv) of the definition of account class would address the delivery account class. The delivery account class is relevant when an FCM or DCO establishes delivery accounts through which it accounts for the making or taking of physical delivery under commodity contracts whose terms require settlement by delivery of a commodity, in either case in an account designated as a delivery account on the books and records of the entity.

Paragraph (1)(iv)(A)(*1*) would define delivery accounts for FCMs, and would be based on current § 190.05(a)(2). Paragraph (1)(iv)(A)(*2*) would incorporate the same concepts for clearing organizations, and also adds in additional concepts. Specifically, a clearing organization may act as a central depository for physical delivery property represented by electronic title documents, or otherwise in electronic (dematerialized) form.

As set forth in paragraph (1)(iv)(B), the delivery account class would be subdivided into separate physical and cash delivery account classes, as provided in proposed § 190.06(b).[50] Customer property held in a delivery account is not subject to Commission segregation requirements. Thus, it may be more challenging and time-consuming to identify customer property for the delivery account class.

As the ABA Committee noted:

> Based on lessons learned from the MF Global bankruptcy, those challenges are likely greater for tracing cash. Physical delivery property, in particular when held in the form of electronic documents of title as is prevalent today, is more readily identifiable and less vulnerable to loss, compared to cash delivery property that an FCM may hold in an operating bank account.[51]

(and such cash would thus be commingled with the FCM's own cash intended for operations). Thus, separating (1) cash delivery property and customer claims therefor from (2) physical delivery property and customer claims therefor, would promote the more efficient and prompt distribution of the latter to customers.

For these reasons, the Commission is proposing that the delivery account class be further divided into physical delivery and cash delivery account classes, for purposes of pro rata distributions to customers for their delivery claims.

The claims with respect to these subclasses are fixed on the filing date. Thus, the physical delivery account class includes, in addition to certain physical delivery property, cash delivery property received post-filing date in exchange for physical delivery property held on the filing date that has been delivered under a commodity contract. Conversely, the cash delivery account class includes, in addition to certain cash delivery property, physical delivery property that has been received post-filing date in exchange for cash delivery property held on the filing date.

Paragraph (2) of the definition of account class would address commingling orders and rules. Specifically, there are cases where commodity contracts (and associated collateral) that would be attributable to one account class are held separately from contracts and collateral associated with that first account class, and instead are allocated to a different account class and commingled with contracts and collateral in such account class. This would take place because the contracts in question are risk-offsetting to contracts in the latter account class.[52] This commingling may be authorized pursuant to a Commission regulation or order, or pursuant to a clearing organization rule that is approved in accordance with § 39.15(b)(2). Paragraph (2) would confirm that the trustee must treat the commodity contracts in question (and the associated collateral) as being held in an account of the latter account class.

Paragraph (3) of the definition of account class would address cases where the commodity broker establishes internal books and records in which it records a customer's commodity contracts and collateral, and related activity. It would confirm that the commodity broker is considered to maintain such an account for the customer regardless of whether it has kept such books and records current or accurate.

''Act'' is proposed to be added to the definitions in proposed § 190.01 to refer to the Commodity Exchange Act.

''Allowed net equity'' is proposed to be revised to update cross-references and to allow for two definitions of the term (as used in subparts B and C of part 190).

''Bankruptcy code'' is proposed to be revised to update cross-references.

''Business day'' is proposed to be described further by defining what constitutes a Federal holiday. The definition also would clarify that the end of a business day is one second before the beginning of the next business day.

''Calendar day'' is proposed to be amended to include a reference to Washington, DC as the location of the Calendar day.

''Cash delivery account class'' is proposed to be cross-referenced to the new definition in ''account class.''

''Cash delivery property'' and ''physical delivery property'' are proposed to be added.

[49] *See generally* 83 FR 7979, 7979 & n.6 (Feb. 23, 2018).

[50] It should be noted that under the proposed regulations, ''physical delivery property'' refers to a commodity that is held in a form that can be delivered, including, *e.g.,* virtual currencies, and (in contrast to current § 190.01(ll)(3)), is not limited to physical (*i.e.,* tangible) commodities.

[51] ABA Cover Note at 14. *See also In re MF Global Inc.,* 2012 WL 1424670 (noting how physical delivery property was traceable).

[52] This could involve portfolio margining within a DCO or cross-margining between a DCO and another central counterparty, which may or may not be a derivatives clearing organization.

The current definition of ''delivery account,'' § 190.05(a)(2), refers to an account that contains only property described in three of the nine categories of property in the definition of ''specifically identifiable property.'' Following the suggestion of the ABA Committee,[53] the Commission is proposing to define directly a delivery account class, taking elements of the definition from the current definition of ''specifically identifiable property,'' as discussed below with reference to the proposed changes to that definition. The proposed regulation will separate delivery property into subcategories, with separate definitions of ''cash delivery property'' and ''physical delivery property.''

Defining these terms would also be relevant for proposed § 190.06, which would address the process for making or taking physical delivery under commodity contracts, including deliveries that may occur outside a delivery account.

The proposed definition of cash delivery property would carry through the concepts from current § 190.01(ll)(4) and (5) that the cash or cash equivalents, or the commodity, must be identified on the books and the records of the debtor as having been received, from or for the account of a particular customer, on or after three calendar days before the relevant (i) first delivery notice date in the case of a futures contract or (ii) exercise date in the case of an option.

The proposed definition of physical delivery property includes, under the four specified sets of circumstances discussed below, a commodity, whether tangible or intangible, held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract that settles via delivery if held to a delivery position.[54] The definition would note that this includes warehouse receipts, shipping certificates or other documents of title (including electronic title documents) for the commodity, or the commodity itself.

Some of the changes in the definition address changes in delivery practices since the 1980s. The reference to electronic title documents explicitly would recognize that ''title documents for commodities are now commonly held in dematerialized, electronic form, in lieu of paper.'' Moreover, the types of commodities that might be physically delivered would extend beyond tangible commodities to those that are intangible, including Treasury securities, foreign currencies, or virtual currencies.[55]

For purposes of analytical clarity, the definition of physical delivery property would be separated into four categories:

First, commodities or documents of title for commodities that the debtor holds for the account of a customer for purposes of making delivery of such property and which, as of the filing date or thereafter, can be identified as held in a delivery account for the benefit of such customer on the books and records of the debtor.[56]

Second, commodities or documents of title for commodities that the debtor holds for the account of the customer, where the customer received or acquired such property by taking delivery under an expired or exercised commodity contract, and which, as of the filing date or thereafter, can be identified as held in a delivery account for the benefit of such customer on the books and records of the debtor.[57]

The third category addresses property that (a) is in fact being used, or has in fact been used, for the purpose of making or taking delivery, but (b) is held in a futures, foreign futures, cleared swaps, or (if the commodity is a security) securities account.[58] This property would be considered physical delivery property *solely* for the purpose of the obligations, pursuant to proposed § 190.06, to make or take delivery of physical delivery property. Property in this category would be *distributed* as part of the account class in which it is held (futures, foreign futures, or cleared swaps, or, in the case of a securities account, as part of a SIPA proceeding).

Fourth, where such commodities or documents of title are not held by the debtor, but are delivered or received by a customer in accordance with proposed § 190.06(a)(2) (either by itself in the case of an FCM bankruptcy or in conjunction with proposed § 190.16(a) in the case of a clearing organization bankruptcy), they will be considered physical delivery property, but, again, *solely* for purposes of obligations to make or take delivery of physical delivery property pursuant to proposed § 190.06.[59] As this property is held outside of the debtor's estate (and there was no obligation to transmit it to the debtor's customer accounts), it is not subject to pro rata distribution.

''Cash equivalents'' is proposed to be added to define assets that might be accepted as a substitute for United States dollar cash.

''Cleared swaps account'' is proposed to be cross-referenced to the new definition in ''account class.''

''Clearing organization'' is proposed to be revised to update cross-references.

''Commodity broker'' is proposed to be updated to reflect the current definition of commodity broker in the Bankruptcy Code and the relevant cross-references.

''Commodity contract'' is proposed to be amended to incorporate and extend in context (through references to current Commission regulations) the definition in section 761(4) of the Bankruptcy Code.[60]

''Commodity contract account'' is proposed to be added to refer to accounts of a customer based on commodity contracts in one of the account classes, as well as, for purposes of identifying customer property for the foreign futures account class, accounts maintained by foreign futures intermediaries or foreign clearing organizations reflecting foreign futures.

''Court'' is proposed to be clarified to refer to the court having jurisdiction over the debtor's estate, reflecting that such court may not be a bankruptcy court (*e.g.,* in the event of a withdrawal of the reference.)[61]

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[53] *See* ABA Cover Note at 10.

[54] The current definition is found in § 190.01(ll)(3), and focuses on documents of title and physical commodities.

[55] *See* ABA Cover Note at 10, 12–13.

[56] These first two categories together correspond to current § 190.01(ll)(3), with the first category corresponding to physical delivery property held for the purpose of *making* delivery and the second category corresponding to physical delivery property held as a result of *taking* delivery. The property that is (or should be) within these two categories, as of the filing date, comprises the property that will be distributed as part of the physical delivery account class.

[57] The current definition does not prescribe or imply a limit to how long such received property can be held in a delivery account, because there is no principled basis to draw a bright line delineating how long is too long. The proposed definition explicitly would codify that position.

[58] *See* ABA Cover Note at 13 (''When the FCM has a role in facilitating delivery, deliveries may occur via title transfer in a futures account, foreign futures account, cleared swaps account, delivery account, or, if the commodity is a security . . . in a securities account.'').

[59] As noted immediately above, the third and fourth categories of physical delivery property are not part of the physical delivery account class. They are included because the Commission is proposing, consistent with the suggestion in the ABA Submission for § 190.06 and the ABA Cover Note ''to provide more specificity than is found in current [§ ] 190.05 on how to accomplish delivery'' where ''[o]pen positions . . . get caught in delivery position where parties incur bilateral contractual obligations.'' *Id.* at 13. This more ramified approach to setting out obligations in connection with delivery requires a correspondingly broader definition of physical delivery property.

[60] It should be noted that, consistent with proposed § 190.00(d)(3)(iv) and the decision *In re Peregrine Financial Group, Inc.,* 866 F.3d 775, 776 (7th Cir. 2017), *adopting by reference Secure Leverage Group, Inc.* v. *Bodenstein,* 558 B.R. 226 (N.D. Ill. 2016), retail foreign exchange contracts do not fit within the definition of commodity contracts.

[61] *Cf.* 28 U.S.C. 157(d).

''Cover'' is proposed to be reworded to improve clarity; no substantive change is intended.

''Customer'' is proposed to be revised to reflect the revisions to part 190 through this rulemaking, specifically, noting the different meanings of ''customer'' with respect to an FCM in contrast to with respect to a DCO.

''Customer claim of record'' is proposed to be reworded to improve clarity; no substantive change is intended.

''Customer class'' is proposed to be revised to reflect the revisions to part 190 through this rulemaking, specifically emphasizing the difference between public customers and non-public customers.

''Customer property, customer estate'' is proposed to be updated to clarify cross-references and to note that customer property distribution is also addressed in section 766(i) of the Bankruptcy Code.

''Dealer option'' is proposed to be eliminated as this term is no longer used.

''Debtor'' is proposed to be revised to explicitly refer to commodity brokers involved in a bankruptcy proceeding, a proceeding under SIPA, or a proceeding under which the FDIC is appointed as a receiver.

''Delivery account'' is proposed to be cross-referenced to the new definition in ''account class.''

''Distribution'' is proposed to be defined to include transfer of property on a customer's behalf, return of property to a customer, as well as distributions to a customer of valuable property that is different than the property posted by that customer.

''Equity'' is proposed to be amended to update a cross-reference.

''Exchange Act'' and ''FDIC'' definitions are proposed to be added as the Commission is taking into account both in these proposed rules.

''Filing Date'' is proposed to be revised to include the commencement date for proceedings under SIPA or Title II of the Dodd-Frank Act.[62]

''Final net equity determination date'' is proposed to be revised stylistically, to provide updated cross-references, and to further clarify who the parties involved are intended to be.

''Foreign board of trade'' is proposed to be added, and adopts by reference the definition in § 1.3 (which is consistent with § 48.2(a)).

''Foreign clearing organization'' is proposed to be added to refer to a clearing house, clearing association, clearing corporation or similar entity, facility or organization that clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade.

''Foreign future'' and ''Foreign futures commission merchant'' are unchanged.

''Foreign futures account'' is proposed to be cross-referenced to the new definition in ''account class.''

''Foreign futures intermediary'' is proposed to refer to a foreign futures or options broker, as defined in § 30.1, acting as an intermediary for foreign futures contracts between a foreign futures commission merchant and a foreign clearing organization.

''Funded balance'' is proposed to be revised to refer to the definition in proposed § 190.08(c). That definition is discussed further below.

''Futures, futures contract'' is proposed to be added to clarify what these terms mean for purposes of part 190.

''Futures account'' is proposed to be cross-referenced to the new definition in ''account class.''

''House account'' is proposed to be modified to replace the current definition with one that (a) clarifies the connection between the concept of a ''house account'' in part 190 and the concept of a proprietary account in § 1.3, and (b) separately defines the term in relation to an FCM, in relation to a foreign futures commission merchant, and in relation to a DCO.

''In-the-money amount'' is proposed to be deleted as the term will no longer be used. It is proposed to be replaced by ''in-the-money,'' a term that is Boolean, and is used in proposed § 190.04(c).

''Joint account'' is proposed to be edited to reflect the fact that a commodity pool must be a legal entity.[63] Thus, the reference to a commodity pool that is not a legal entity is removed.

''Leverage contract'' and ''Leverage transaction merchant'' are proposed to be deleted, consistent with the discussion above with respect to proposed § 190.00(d)(1)(i)(B).

''Member property'' is proposed to be moved from current § 190.09(a), and clarified to note that member property may be used to pay net equity claims based on claims on behalf of non-public customers of the member.

''Net equity'' is proposed to be revised to update cross-references, including the difference between bankruptcy of an FCM and of a clearing organization.

''Non-public customer'' and ''public customer'': These definitions are complements (*i.e.,* every customer is either a public customer or a non-public customer, but not both). The Commission is proposing to define who is considered a public versus a non-public customer separately for FCMs and for clearing organizations.

In the case of a customer of an FCM, the proposed regulation would explicitly define ''public customer.'' [64] The definition of public customer would be analyzed separately for each of the relevant account classes (futures, foreign futures, cleared swaps, and delivery) with the relevant cross-references to other Commission regulations. For the futures account class, this would be a futures customer as defined in § 1.3 whose futures account is subject to the segregation requirements of section 4d(a) of the Act and the Commission regulations thereunder; for the foreign futures account class, a § 30.7 customer as defined in § 30.1 whose foreign futures account is subject to the segregation requirements of § 30.7; for the cleared swaps account class, a cleared swaps customer as defined in § 22.1 whose cleared swaps account is subject to the segregation requirements of part 22; and for the delivery account class, a customer that would be classified as a public customer if the property held in the customer's delivery account had been held in an account described in one of the prior three categories. This would tie the definition of public customer for bankruptcy purposes to the definitions of ''customer'' (and segregation requirements) that apply during business as usual. An FCM's

[62] In SIPA, the term ''filing date'' is defined to occur earlier than the filing of an application for a protective decree if the debtor is the subject of a proceeding in which a receiver, trustee, or liquidator for the debtor has been appointed and such proceeding is commenced before the date on which the application for a protective decree under SIPA is filed. In such case, the term ''filing date'' is defined to mean the date on which such proceeding is commenced. By contrast, this proposal does not define the term ''filing date'' to occur earlier in such a case, although it would (in proposed § 190.02(f), discussed below) authorize such a receiver to themselves file a voluntary petition for bankruptcy of the FCM.

This difference is due to the different uses of the ''filing date'' in these rules and in SIPA. For purposes of part 190, ''filing date'' refers to the date on and after which a commodity broker is treated as a debtor in bankruptcy. *See, e.g.,* proposed §§ 190.00(c)(4), 190.06(a)(1) and (b)(1), 190.08(b)(4), 190.09(a)(1)(ii)(A). For purposes of SIPA, by contrast, the ''filing date'' is the date on which securities are valued. *See, e.g.,* SIPA sections 8(b), 8(c)(1), 8(d), 9(a)(3), 15 U.S.C. 78fff–2(b), (c)(1), (d), 78fff–3(a)(3).

[63] *See* § 4.20(a)(1).

[64] This is in contrast to the current definitions in § 190.01(cc) and (ii), which explicitly define non-public customer, and define public customer as a customer that is not a non-public customer. This proposed change would not be intended to be substantive, but rather would be intended to foster closely tying the account classes to business-as-usual segregation requirements.

non-public customers would be defined as customers that are not public customers.

As part of the process for introducing a bespoke regime for the bankruptcy of a clearing organization, the proposed definitions also would differentiate between public and non-public customers for those purposes. Specifically, customers of clearing members (whether such clearing members are FCMs or foreign brokers) acting on behalf of their proprietary (*i.e.,* house) accounts, would be non-public customers, while all other customers of clearing members would be public customers.

In the case of members of a DCO that are foreign brokers, the determination as to whether a customer of such a member is a proprietary member would be based on either the rules of the clearing organization or the jurisdiction of incorporation of such member: If either designates the customer as proprietary member, then the customer would be treated as a proprietary member.

''Open commodity contract'' is proposed to be reworded to improve clarity; no substantive change is intended.

''Order for relief'' is proposed to be revised to update cross-references and to be reworded for stylistic purposes.

''Person'' is proposed to be added as a definition to clarify what this term means.

''Physical delivery account class'' is proposed to be cross-referenced to the new definition in ''account class.''

''Physical delivery property'' See discussion above under ''cash delivery property.''

''Premium'' is proposed to be deleted as that term is no longer used.

''Primary liquidation date'' is proposed to be revised to reflect the removal of the concept of accounts being held open for later transfer. As a result of such removal, the Commission would also delete current § 190.03(a), which sets forth provisions regarding the operation of accounts held open for later transfer, since there will no longer be any such accounts.

''Principal contract'' is proposed to be deleted as that term is no longer used. This term was previously used to refer to contracts that are not traded on designated contract markets, but the definition excluded cleared swaps.

''Public customer'' is discussed under non-public customer.

''Securities Account'' and ''SIPA'' are proposed to be added to address the bankruptcy of an FCM that is also subject to the Securities Investor Protection Act. These are based on appropriate cross-references to the Exchange Act and SIPA.

''Security'' is proposed to be changed to update the cross-reference to the Bankruptcy Code.

''Short term obligation'' is proposed to be removed as the term is no longer used. It would be removed from the definition of specifically identifiable property, and the concept of a duration or maturity date of 180 days or less would be stated explicitly in the text of that latter definition.

''Specifically identifiable property'': The Commission is proposing a new definition that updates and streamlines the definition in current § 190.01(ll).

The proposal in paragraph (1)(i) would focus on ''futures accounts,'' ''foreign futures accounts,'' and ''cleared swaps accounts.'' Paragraph (1)(i)(A) of the proposed definition corresponds in major part to paragraphs (ll)(1) and (6) of the current definition. For securities, paragraph (1)(i)(A)(*1*) of the proposal substantially copies current paragraph (ll)(1)(i), but would clarify that a security is not a short term obligation when it has ''a duration or maturity date of more than 180 days.'' Paragraph (1)(i)(A)(*2*) of the proposal simply would reformat current paragraph (ll)(6). For warehouse receipts, bills of lading, or other documents of title (paragraph (i)(B), corresponding to current paragraph (ll)(1)(ii)), the proposal would restate the corresponding portion of the current definition.

Paragraph (1)(ii) of the definition in the proposal would further the approach of providing discretion to the trustee. It would include as specifically identifiable property commodity contracts that are treated as such in accordance with proposed § 190.03(c)(2). As discussed further below,[65] the latter provision would permit (but does not require) the trustee, following consultation with the Commission, to treat open commodity contracts of public customers as specifically identifiable property if they are held in a futures account, foreign futures account, or cleared swaps account that is designated as a hedging account in the debtor's books and records, and if the trustee determines that treating the commodity contracts as specifically identifiable property is reasonably practicable under the circumstances of the case. In contrast, paragraph (ll)(2) of the current definition is more prescriptive. It refers to open commodity contracts that meet the following criteria: They (A) have not been transferred, (B) are identified on the books and records of the debtor FCM as held for the account of a particular customer, and (C) are either bona fide hedging positions or transactions as defined in § 1.3 or are commodity option transactions that have been determined by the registered entity to be appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules that have been approved by the Commission pursuant to section 5c(c) of the CEA.

Paragraph (ll)(3) of the current definition refers to documents of title, including warehouse receipts or bills of lading, or physical commodities that, as of the filing date, can be identified on the books and records of the debtor as received from or for the account of a particular customer as held specifically for the purpose of delivery or exercise. These types of property, to the extent included in the debtors estate, would be transposed in the proposed regulations to paragraphs (1) through (3) of the definition of physical delivery property, in this proposed § 190.01, above, and discussed in that context.

Paragraph (ll)(4) of the current definition refers to cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract, or the payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity. Correspondingly, paragraph (ll)(5) of the current definition refers to the cash price tendered, for property deposited prior to the entry of the order for relief, where such property (i) has been deposited to make physical delivery on a short commodity contract, or for exercise of a long put or a short call option contract on a physical commodity, and (ii) is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date (for delivery) or exercise date (for exercise). In either case, current paragraph (ll)(5) requires the customer to make delivery or exercise the option in accordance with the applicable contract market rules. These items both refer to cash, which is fungible, and thus are excluded from the definition of specifically identifiable property, but are instead proposed to be addressed in the definition of cash delivery property, the proper treatment of which is addressed in proposed § 190.06(a)(3)(i)(B), discussed below.

Current paragraph (ll)(7), which refers to open commodity contracts that have been transferred, would be deleted, in that open commodity contracts that

[65] *See* section II.B.1.

have been transferred are no longer part of the debtor's estate, and thus no longer subject to liquidation as part of a bankruptcy. While the customer may well have to provide margin to the transferee in order to collateralize the contract, that requirement does not deny the customer the protection applicable to specifically identifiable property.

Current paragraph (ll)(8), limiting treatment as specifically identifiable property to the items specified in the definition thereof would be transposed to proposed paragraph (3), while current paragraph (ll)(9), which excludes security futures products and related collateral from specifically identifiable property, if they are held in a securities account, would be transposed to proposed paragraph (2).

''Strike price'' is proposed to be reworded for brevity. No substantive change is intended.

''Substitute customer property'': The Commission is proposing to add this definition to refer to the property (in the form of cash or cash equivalents) delivered to the trustee by or on behalf of a customer in order to redeem either specifically identifiable property or a letter of credit.

''Swap'' is proposed as the term used to refer to what is in the current regulation referred to as a ''Cleared swap.'' [66] The definition is proposed to be updated to reflect the current definition and meaning of the term ''swap'' under the Commission's rules and regulations outside of part 190. The definition also would add as a swap, for purposes of this part, ''any other contract, agreement or transaction that is carried in a cleared swaps account pursuant to a rule, regulation or order of the Commission, provided, in each case, that it is cleared by a clearing organization [*i.e.,* a DCO] as, or the same as if it were, a swap.'' [67]

''Trustee'' is proposed to be amended to include the trustee in a SIPA proceeding.

''Undermargined'': The Commission proposes to define ''undermargined'' for purposes of part 190 as a futures account, foreign futures account, or cleared swaps account carried by the debtor is considered undermargined if the funded balance for such account is below the minimum amount that the debtor is required to collect and maintain for the open commodity contracts in such account under the rules of the relevant clearing organization, foreign clearing organization, DCM, Swap Execution Facility (''SEF''), or FBOT. If any such rules establish both an initial margin requirement and a lower maintenance margin [68] requirement applicable to any commodity contracts (or to the entire portfolio of commodity contracts or any subset thereof) in a particular commodity contract account of the customer, the trustee will use the lower maintenance margin level to determine the customer's minimum margin requirement for such account. An undermargined account may or may not be in deficit.[69]

''Variation Settlement'' is proposed to be added to define the payments a trustee may make with respect to open commodity contracts. It would include ''variation margin'' as defined in § 1.3, and, in order to cover all of the potential obligations associated with an open commodity contract, also includes all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.

The Commission requests comment with respect to all aspects of proposed § 190.01. In particular, are the revised definitions useful? Do any appear likely to lead to unintended consequences, and, if so, how may these best be mitigated?

3. Regulation 190.02: General

Proposed § 190.02(a)(1) is derived from current § 190.10(b)(1). There is one substantive change: the proposed section would permit a request to the Commission for exemption from any procedural provision (rather than limiting such requests to exemptions from, or extension of, a time limit). Such an exemption may be subject to conditions, and must be consistent with the purposes of this part and of subchapter IV of the Bankruptcy Code. This change would further major theme 7, discussed in section I.B above, of enhancing trustee discretion. It would allow, *e.g.,* the trustee to request to be permitted to extend a deadline or to amend a form.

Proposed § 190.02(a)(2)(i) and (ii), (a)(3), and (b), are derived from current §§ 190.10(b)(2), (3), and (4) and 190.10(d), respectively, with minor editorial and conforming changes.

Proposed §§ 190.02(c) (forward contracts), (d) (other), and (e) (rule of construction) would be transposed from current § 190.10(e), (g), and (h), respectively.

Proposed § 190.02(f) would be added to enhance customer protection in cases where a receiver has been appointed (pursuant to *e.g.,* section 6c of the CEA) for an FCM due to a violation or imminent violation [70] of the customer property protection requirements of section 4d of the CEA or of the regulations thereunder, or of the Commission's capital rule (§ 1.17 of this chapter). It would explicitly permit such a receiver to file a voluntary petition for bankruptcy of such FCM in appropriate cases. For example, the receiver may determine that, due to a deficiency in property in segregation, bankruptcy is necessary in order to protect customers' interests in customer property.

The Commission requests comment with respect to all aspects of proposed § 190.02. In particular, is it appropriate to permit trustees to request relief from procedural provisions such as requirements as to forms, in addition to requesting relief from deadlines? Is it appropriate to permit receivers for FCMs to file voluntary petitions in bankruptcy? Does any portion of proposed § 190.02 appear likely to lead to unintended consequences, and, if so, how may these be mitigated?

*B. Subpart B—Futures Commission Merchant as Debtor*

The provisions of subpart B (proposed §§ 190.03–190.10) address debtors that are FCMs.

1. Regulation § 190.03: Notices and Proofs of Claims

In proposed § 190.03, the Commission is proposing to reorganize and revise much of current § 190.02. Moreover, some portions of current § 190.10 have been reorganized into proposed § 190.03, and have been revised.

[66] *See* Current § 190.01(pp).

[67] *Cf.* 11 U.S.C. 761(4)(F)(ii) (including as a commodity contract ''with respect to a futures commission merchant or clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization'').

[68] For further discussion of maintenance margin and its relationship to initial margin, *see, e.g., https://www.cmegroup.com/education/courses/introduction-to-futures/margin-know-what-is-needed.html.*

[69] An account is in deficit if the balance is negative (*i.e.,* the customer owes the debtor instead of the reverse). An account can be undermargined but not in deficit (if the balance is positive, but less than the required margin). *See* discussion of proposed § 190.04(b)(4). For example, if the margin requirement is $100 and the account balance is $20, the account is undermargined by 80, but is not in deficit. If the account loses a further $35, the balance would be ($15). The account would be in deficit by $15, and would be undermargined by $115.

[70] Section 6c of the CEA provides in relevant part that whenever it shall appear to the Commission that any person has engaged, is engaging, or *is about to engage* in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder the Commission may bring an action in the proper district court to enjoin such act or practice, or to enforce compliance with this Act. Section 6c also refers to an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate. 7 U.S.C. 13a–1.

a. Regulation § 190.03(a): Notices—Means of Providing

Proposed § 190.03(a)(1) is substantially similar to current § 190.10(a). In an effort to modernize part 190, the Commission proposes to delete the current requirement that all mandatory or discretionary notices to be given to the Commission under part 190 be sent to the Commission via overnight mail (*i.e.,* hard copy). Proposed § 190.03(a)(1) would retain the requirement that all such notices be sent to the Commission via electronic mail. Overnight hard copy delivery is unnecessary, and removing the requirement to send notices to the Commission via overnight mail will result in cost savings.

Proposed § 190.03(a)(2) is a new paragraph proposed by the Commission to provide a general means of providing notice to customers under part 190. Proposed § 190.03(a)(2) would replace the specific procedures for providing notice to customers that currently appear in § 190.02(b) and, in light of evolving technology since the original issuance of part 190, implement a more generalized approach for giving notice to customers, whereby the trustee must establish and follow procedures ''reasonably designed'' for giving notice to customers under part 190. In addition, in an effort to modernize part 190, the Commission proposes to state that such notice procedures should generally include the use of a website and customers' electronic addresses. In the Commission's view, this new approach provides trustees with the necessary flexibility to determine the best way to provide notice to customers under part 190 and is consistent with the manner in which bankruptcy trustees in recent FCM bankruptcy cases have provided notice to customers. The Commission anticipates that adopting the more generalized approach to notifying customers set forth in proposed § 190.03(a)(2), rather than retaining the specific notice requirements in the existing regulations, including newspaper publication, will result in both cost savings for the debtor's estate, and more efficient and effective notification of customers.

The Commission requests comment as to the proposed approach to notice requirements set forth in proposed § 190.03(a). Are the proposed changes helpful? Do the proposed revisions appear likely to lead to unintended consequences, and, if so, how may such consequences be mitigated?

b. Regulation § 190.03(b): Notices to the Commission and Designated Self-Regulatory Organizations

Proposed § 190.03(b)(1) is derived from current § 190.02(a)(1). The time requirements set forth in proposed § 190.03(b)(1) are meant to ensure that the Commission and the relevant designated SRO (''DSRO'') [71] will be aware of a bankruptcy filing or SIPA application as soon as is practicable. These changes to the regulation are designed to codify the practices observed in recent bankruptcy and SIPA cases.

The Commission proposes to revise the time within which a commodity broker must notify the Commission in the event of a voluntary or involuntary bankruptcy filing.[72] First, proposed § 190.03(b)(1) would provide that, in the event of a voluntary bankruptcy filing, the commodity broker must notify the Commission and the appropriate designated SRO (''DSRO'') as soon as practicable before, and in any event no later than, the time of filing.[73]

Second, proposed § 190.03(b)(1) would provide that, in the event of an involuntary bankruptcy filing or an application for a protective decree under SIPA,[74] the commodity broker must notify the Commission and the appropriate DSRO immediately upon the filing of such petition or application.

Moreover, as a practical matter, a decision to file for bankruptcy takes measurable time, as does the preparation of the necessary papers. The Commission notes that, in previous FCM voluntary bankruptcy filings, the commodity broker has provided the Commission and its DSRO with notice ahead of the bankruptcy filing. Proposed § 190.03(b)(1) merely would codify the expectation that such advance notice should, in fact, occur to the extent practicable.

Proposed § 190.03(b)(1) further would amend current § 190.02(a)(1) by allowing the commodity broker to provide the relevant docket number of the bankruptcy or SIPA proceeding to the Commission and the DSRO ''as soon as known,'' in order to account for the fact that there may be a time lag between the filing of a proceeding and the assignment of a docket number. It is better that the Commission promptly be notified of the filing, rather than waiting for assignment and communication of the docket number.

Proposed § 190.03(b)(2), concerning intent to transfer customer accounts, is derived from current § 190.02(a)(2). Current § 190.02(a)(2) provides that the trustee, the applicable DSRO, or the commodity broker must notify the Commission of an intent to transfer or to apply to transfer open commodity contracts in accordance with section 764(b) of the Bankruptcy Code and relevant provisions of current part 190 no later than three days after the order for relief. Proposed § 190.03(b)(2) would remove the deadline for such notification because three days is likely in many cases to be too long, but may in some cases be too short.

The Commission expects that the bankruptcy trustee would begin working on transferring any open commodity contracts as soon as the trustee is appointed and that, by the end of three days following entry of the order for relief, any such transfers likely will be either completed, actively in process or determined not to be possible. Indeed, the Commission expects that a DCO would, in most cases, be reluctant to hold a position open for more than three days following entry of the order for relief unless a transfer is actively in process and imminent. Thus, while the Commission recognizes that the ''[a]s soon as possible'' language is somewhat vague, given past experience, the Commission views the current timeframe of three days after entry of the order for relief as generally too long, and it is not clear what precise shorter period of time would be generally appropriate, given the uniqueness of each case. Under different circumstances, that is, where transfer arrangements cannot be made within three days after the order for relief, a specified deadline for notification may in fact be harmful, in that it could be interpreted to prohibit notification after the expiration of such deadline (and thus, impliedly prohibit the trustee from forming the intent to transfer after that time).

In the event of an FCM bankruptcy, the Commission anticipates that there will be frequent contact between the trustee, the relevant DSRO, any relevant clearing organization(s), and the

[71] For further detail regarding SROs and DSROs *see generally* § 1.52.

[72] A voluntary case under a chapter of the Bankruptcy Code is commenced by the debtor by filing a petition under that chapter. Section 301(a) of the Bankruptcy Code, 11 U.S.C. 301(a). (A commodity broker may only be a debtor under chapter 7. *See generally* section 109 of the Bankruptcy Code, 11 U.S.C. 109.) Under certain circumstances, creditors of a person may file an involuntary case against that person pursuant to section 303 of the Bankruptcy Code, 11 U.S.C. 303. In such cases, the order for relief will be granted only if the petition is not timely controverted or if the court makes specific findings. *Id.* There is no historical precedent for an involuntary petition in bankruptcy being filed against a commodity broker.

[73] The historical background of such notice is discussed below in section II.C.1.

[74] A SIPA proceeding is commenced when SIPC files a petition for a protective order. *See generally* SIPA section 5, 15 U.S.C. 78eee.

Commission; thus, a specified deadline for such notification to occur would not appear to be helpful under such circumstances. The proposal also clarifies that notification should be made with respect to a transfer of customer property.

The Commission requests comment on proposed § 190.03(b). As proposed, would § 190.03 meet the objective of ensuring that the Commission and the relevant DSRO will be aware of a bankruptcy filing or SIPA proceeding as soon as is practicable? Why or why not?

c. Regulation § 190.03(c): Notices to Customers; Treatment of Hedging Accounts and Specifically Identifiable Property

Proposed § 190.03(c) introductory text would address notices to customers and treatment of hedging accounts and specifically identifiable property.

Proposed § 190.03(c)(1) would deal with notices to customers concerning specifically identifiable property other than open commodity contracts, and is derived from current § 190.02(b)(1). Proposed § 190.03(c)(1) would require the trustee to use all reasonable efforts to notify promptly any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, that such specifically identifiable property may be liquidated on and after the seventh day after the order for relief if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of customer property contained in proposed part 190.

The Commission would remove the requirement that the trustee publish notice to customers regarding specifically identifiable property in a newspaper for two consecutive days prior to liquidating such property. Instead, the new notice requirement to customers under part 190 are contained in proposed § 190.03(a)(2), which would provide that a trustee must establish and follow procedures ''reasonably designed for giving adequate notice to customers.'' As noted above, this change is meant to provide the trustee with flexibility in notifying customers regarding specifically identifiable property, and to modernize part 190 to allow the trustee to provide notice to customers in a way that will maximize the number of customers reached.

Pursuant to current § 190.02(b)(1), the trustee may commence liquidation of specifically identifiable property on the sixth calendar day following the second publication date of the notice to customers. Because proposed § 190.03(c)(1) would not require newspaper publication of customer notice, the Commission would allow the trustee to commence liquidation of specifically identifiable property on the seventh day after the order for relief (or such other date as specified by the trustee with the approval of the Commission or the court), so long as the trustee has used all reasonable efforts promptly to notify the customer under § 190.03(a)(2) and the customer has not instructed the trustee in writing to return such specifically identifiable property.

With respect to the return of specifically identifiable property, proposed § 190.03(c)(1) would add that the trustee's notice to customers whose futures accounts, foreign futures accounts, or cleared swaps accounts include specifically identifiable property must specify the terms upon which such property may be returned, ''including, if applicable and to the extent practicable, any substitute customer property that must be provided by the customer.'' This addition is meant to make clear that the trustee's notice to customers with specifically identifiable property should include, where applicable, a reference to substitute customer property.[75]

Proposed § 190.03(c)(2) would change how a bankruptcy trustee may treat open commodity contracts carried in hedging accounts to a categorical approach; it would replace the bespoke approach of current § 190.02(b)(2). Part 190 currently treats hedging positions as a type of specifically identifiable property, where the customer is given special rights, namely, to have the trustee endeavor to avoid liquidating its hedging positions.[76] Under current § 190.02(b)(2), the trustee treats customers with specifically identifiable open commodity contracts on a bespoke basis; specifically, to the extent the trustee does not receive transfer instructions regarding a customer's specifically identifiable open commodity contracts, the trustee is required to liquidate such contracts within a certain time period.

Proposed § 190.03(c)(2) would take a more categorical approach with respect to open commodity contracts. As discussed in major theme 7 in section I.B above, recent commodity broker bankruptcies have involved many thousands of customers, with as many as hundreds of thousands of commodity contracts. Trustees must make decisions as to how to handle such customers and contracts within days—in some cases, hours—after being appointed.

In light of the practical difficulties of treating such large numbers of customers with similar open commodity contracts on a bespoke basis, under proposed § 190.03(c)(2), the Commission is proposing instead to give the trustee authority (*i.e.,* an option, but not an obligation), to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor's records as specifically identifiable property, after consulting with the Commission and when practical under the circumstances.[77] To the extent the trustee exercises such authority, proposed § 190.03(c)(2) would provide that the trustee must notify each relevant public customer in accordance with proposed § 190.03(a)(2) and request that the customer provide instructions whether to transfer or liquidate the relevant open commodity contracts.[78]

Proposed § 190.03(c)(2) would also require the notice to customers to inform the customer that (i) if the customer does not provide instructions in the prescribed manner and by the prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property; (ii) any transfer of the open commodity contracts is subject to the terms for distribution contained in

[75] For an explanation of why proposed § 190.03(c)(1) would refer to ''substitute customer property'' rather than ''cash,'' please see discussion below, section II.B.7, in connection with proposed § 190.09(d)(1).

[76] *See* current §§ 190.01(ll), 190.02(f)(1)(ii), and 190.04(e)(1).

[77] *See also* discussion of ''Changing the Special Treatment for Hedge Positions'' in the ABA Cover Note:

> Given the policy preference set out in the Model Part 190 Rules that the trustee should attempt to port positions of public customers, which in practice is what typically occurs in actual subpart IV proceedings, we question the need to provide special protection to assure that hedge positions are transferred. We are also concerned that if a trustee is required to identify hedge accounts and provide the hedge account holders the opportunity to keep their positions open, that could interfere with the trustee's ability to take prudent and timely action to manage the debtor FCM's estate to protect all customers. We have attempted to strike a balance by allowing the trustee to provide special hedge account treatment when it is practical to do so.

ABA Cover Note at 11–12.

[78] The Commission also would make other changes that are intended to make it simpler for the trustee to identify hedging positions and allow an FCM to designate an account as a hedging account by relying on explicit customer representations that the account contains a hedging position. *See* proposed § 190.10(b). This would simplify the existing requirement that FCMs provide a hedging instructions form when a customer first opens up a hedging account. For commodity contract accounts opened prior to the effective date of the part 190 revisions, the Commission is proposing that FCMs may rely on written hedging instructions received from the customer in accordance with current § 190.06(d). *See* proposed § 190.10(b)(3).

proposed § 190.09(d)(2); (iii) absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts; and (iv) providing instructions may not prevent the open commodity contracts from being liquidated.

To the extent the trustee does not exercise its authority to treat public customer positions carried in a hedging account as specifically identifiable property, the trustee would endeavor to, as the baseline expectation, treat open commodity contracts of public customers carried in hedging accounts the same as other customer property and effect a transfer of such contracts to the extent possible. The Commission is proposing to make these changes to reflect the policy preference to port *all* positions of public customers. Requiring a trustee to identify hedging accounts and provide the hedging account holders the opportunity to keep their positions open may be a resource and time intensive process, which could interfere with the trustee's ability to take prudent and timely action to manage the debtor FCM's estate to protect all of the FCM's customers. By allowing the FCM to rely on representations made by customers during business-as-usual, the trustee will be able to take timely and prudent action to manage the debtor FCM's estate and protect all customers. In cases where it may be practical, the trustee may elect to provide special hedging account treatment.

Proposed § 190.03(c)(3) would address notice of an involuntary bankruptcy proceeding, and is derived from current § 190.02(b)(3). Both sections provide that a trustee appointed in an involuntary proceeding may notify customers of the commencement of such a proceeding prior to entry of an order for relief, and upon leave of the court, and that a trustee in an involuntary proceeding may request customer instructions with respect to the return, liquidation or transfer of specifically identifiable property. Proposed § 190.03(c)(3) would add a specific reference to proposed § 190.03(a)(2), which would set forth the procedure the trustee must follow in providing notice to customers. This change is intended to make clear that the notice described in proposed § 190.03(c)(3) must be in accordance with the notice provisions set forth in proposed § 190.03(a)(2). In addition, the Commission proposes to change the reference to ''the trustee'' in current § 190.02(b)(3) to ''a trustee'' in proposed § 190.03(c)(3) since appointment of a trustee in an involuntary bankruptcy proceeding is not automatic.[79] Lastly, the Commission would delete the specific reference to ''open commodity contracts at the end of current § 190.02(b)(3); given that the treatment of open commodity contracts as specifically identifiable property is likely to be less relevant under the proposed regulations, the Commission is proposing that such specific reference is unnecessary.

Proposed § 190.03(c)(4) would require the bankruptcy trustee to notify customers that an order for relief has been entered and instruct customers to file a proof of customer claim and is derived from current § 190.02(b)(4). Proposed § 190.03(c)(4) would add a specific reference to proposed § 190.03(a)(2), which would set forth the procedure the trustee must follow in providing notice to customers. This change would make clear that the notice described in proposed § 190.03(c)(4) must be in accordance with the notice provisions set forth in proposed § 190.03(a)(2).

In addition, the Commission would replace the term ''customer of record'' in current § 190.02(b)(4) with ''customer'' in proposed § 190.03(c)(4). The term ''customer of record'' is not a defined term in part 190, and the Commission notes that whether or not a customer qualifies as a ''customer of record,'' all customers should receive notice that an order for relief has been entered. Specifically, those customers for whom the debtor has contact information in its records should be notified using such contact information. For those customers whose contact information is not available in the debtor's records, notice is effectively given via the use of a website pursuant to proposed § 190.03(a)(2).

Proposed § 190.03(c)(4) also would provide that the trustee shall cause the proof of customer claim form to set forth the bar date for its filing, a requirement that exists in current § 190.02(d).

The Commission requests comment on proposed § 190.03(c). Are the proposed changes to the notice requirements helpful? Is the grant of discretion to the trustee concerning whether hedging accounts should be treated as specifically identifiable property (based on a policy of facilitating cost effective and prompt administration of the debtor's estate) appropriately tailored? Do the proposed revisions appear likely to lead to unintended consequences, and, if so, how may such consequences be mitigated?

[79] *See* 11 U.S.C. 303(g).

d. Regulation § 190.03(d): Notice of Court Filings

Proposed § 190.03(d) addresses notice of court filings and is derived from current § 190.10(f). The Commission would replace the term ''court papers'' in current § 190.10(f) to ''court filings'' in proposed § 190.03(d), as, in the Commission's view, the term ''court filings'' is a more accurate description, given that the modernization of court filings means that many are filed electronically rather than in paper form. In addition, whereas current § 190.10(f) provides that all court papers must be directed to the Washington, DC headquarters of the Commission, in an effort to modernize this paragraph, proposed § 190.03(d) would refer back to proposed § 190.03(a)(1), which requires notices to the Commission to be sent by electronic mail.

The Commission requests comment on proposed § 190.03(d). Do the proposed revisions appear likely to lead to unintended consequences, and, if so, how may such consequences be mitigated?

e. Section 190.03(e): Proof of Customer Claim

Proposed § 190.03(e) would set forth the requirement for a trustee to request that customers provide information sufficient to determine a customer's claim in accordance with the regulations contained in part 190, and is derived from current § 190.02(d). The proposed regulation would list certain information that customers shall be requested to provide, to the extent reasonably practicable, but would grant the trustee discretion to adapt the request to the facts of the particular case. This discretion would be granted to the trustee in order to enable them to tailor the proof of claim form to the information that, in the considered view of the trustee, is most appropriate in light of the specifics of the types of business that the debtor did (and did not do), the way in which such types of business were organized, and the available records of the debtor (as well as the reliability of those records).

Proposed § 190.03(e) would reorganize and revise certain information items that are listed in current § 190.02(d), though most of the information items listed in proposed § 190.03(e) correspond to those listed in current § 190.02(d). The changes to the listed information items are as follows:

- Proposed § 190.03(e)(1) corresponds to current § 190.02(d)(1). Proposed § 190.03(e)(1) would add, for clarity, the four types of commodity contract

accounts as defined in proposed § 190.01.

• Proposed § 190.03(e)(2) corresponds to current § 190.02(d)(4). Proposed § 190.03(e)(2) would ask whether the claimant itself is a public or non-public customer, rather than asking whether the account is a public or non-public customer account, as current § 190.02(d)(4) does. In the Commission's view, such a revision corresponds to the fact that ''public customer'' and ''non-public customer'' are the terms that would be defined in proposed part 190, and the information provided by customers should correspond to those defined terms.

• Proposed § 190.03(e)(3) would gather certain information that should be collected with respect to commodity contract accounts held by each claimant with the debtor. Much of the information that would be requested in proposed § 190.03(e)(3) is included in current § 190.02(d), though it would be reorganized and several information items would be revised. Proposed § 190.03(e)(3) would ask for (i) the account number; (ii) the name in which the account is held; (iii) the balance as of the last account statement and any subsequent activity that would affect the balance of the account as stated on the last account statement; (iv) the capacity in which the account is held; (v) whether the account is a joint account and, if so, the claimant's percentage interest in the account; (vi) whether the account is discretionary; (vii) whether the account is an individual retirement account for which there is a custodian; and (viii) whether the account is a cross-margining account for futures and securities.

• Proposed § 190.03(e)(4) would seek information regarding any accounts held by the claimant with the debtor that are not commodity contract accounts. Proposed § 190.03(e)(4) would be added in order for a claimant to provide a full picture of all accounts it holds with the debtor beyond those classified as commodity contract accounts that are listed in response to paragraph (e)(3) of this section.

• Proposed § 190.03(e)(5) is derived from current § 190.02(d)(6). Proposed § 190.03(e)(5) would seek information regarding all claims against the debtor not based upon a commodity contract account or an account listed in response to paragraph (e)(4) of this section. This provision is meant for a claimant to provide a full picture of all claims it has against the debtor beyond those arising from its commodity accounts with the debtor.

• Proposed § 190.03(e)(6) is the same as current § 190.02(d)(7). Proposed § 190.03(e)(6) would seek information regarding any claims of the debtor against the claimant. Proposed § 190.03(e)(6) would be included in order for a claimant to provide any information about amounts it might owe to the debtor.

• Proposed § 190.03(e)(7) is derived from current § 190.02(d)(8), though the wording would be revised from that in current part 190. While current § 190.02(d)(8) asks about any ''deposits of money, securities or property'' that the claimant holds with the debtor, proposed § 190.03(e)(7) would seek information regarding ''any open positions, unliquidated securities or other unliquidated property'' that the claimant may hold with the debtor. This change is meant to correspond to the various forms that specifically identifiable property may take. In addition, proposed § 190.03(e)(7) explicitly would ask for the value of any open positions, unliquidated securities or other unliquidated property. A claimant in an FCM bankruptcy should provide its own view as to the value of such open positions, unliquidated securities or other unliquidated property in order to support its claim against the debtor.

• Proposed § 190.03(e)(8) corresponds to current § 190.02(d)(11). The Commission is proposing slight revisions to the text in the proposed regulation and would ask the claimant to first identify whether it holds positions in security futures products and, only if so, to specify the type of account(s) in which such positions are held.

• Proposed § 190.03(e)(9) corresponds to current § 190.02(d)(12). The Commission would change the word ''possible'' to ''practicable'' to clarify that there may be situations where payment in kind is indeed possible but not practicable, and thus to manage expectations.

• Proposed § 190.03(e)(10) is the same as current § 190.02(d)(13). The Commission continues to believe that a claimant in an FCM bankruptcy proceeding should provide copies of any documents that support the information contained in the proof of customer claim.

There is one information item listed in current § 190.02(d) that would not appear in proposed § 190.03(e). Proposed § 190.03(e) would not include current § 190.02(d)(9), which asks whether the claimant is or was an ''affiliate,'' ''insider,'' or ''relative'' of the debtor as those terms are defined by sections 101(2), (25), and (34) of the Bankruptcy Code. This deletion is proposed due to the fact that proposed § 190.03(d)(4) now asks whether the claimant is a public or non-public customer, terms that are defined within proposed part 190. Therefore, a reference to terms as defined in the Bankruptcy Code is no longer necessary.

Finally, the header language to proposed § 190.03(e), unlike that to current § 190.02(d), would not contain a requirement that the proof of customer claim form set forth the bar date for its filing because such requirement would be moved to proposed § 190.03(c)(4), as discussed above.

The Commission requests comment on proposed § 190.03(e). Are the proposed changes helpful? Is the grant of discretion to the trustee concerning the data to be requested appropriately tailored? Do the proposed revisions appear likely to lead to unintended consequences, and, if so, how may such consequences be mitigated?

f. Regulation § 190.03(f): Proof of Claim Form

Proposed § 190.03(f) is a new paragraph which would provide that a template proof of claim form is included as appendix A to part 190.[80] The Commission would substantially revise the customer proof of claim form referred to in proposed § 190.03(f), and that is described above in the discussion of proposed § 190.03(e). In revising the customer proof of claim form, the Commission has endeavored to streamline the form, and to better map it to the information listed in proposed § 190.03(e). In that respect, the revised customer proof of claim form now would include, in each section, citations to the location in the text of proposed § 190.03(e) where such information is listed.

Proposed § 190.03(f)(1) would provide that, to the extent there are no open commodity contracts that are being treated as specifically identifiable property, the bankruptcy trustee should modify the proof of claim form to delete any references to open commodity contracts as specifically identifiable property. This would be the case, if, *e.g.,* all open commodity contracts had been transferred or liquidated before the proof of claim form is sent. Proposed § 190.03(f)(2) would make clear that the trustee has discretion whether to use the template proof of claim form, and that the proof of claim form should be modified to reflect the specific facts and circumstances of the case. The provisions of proposed § 190.03(f), taken together, are meant to provide bankruptcy trustees with the appropriate flexibility to determine the

[80] Appendix A is discussed in section II.D below.

best and most efficient way to compose the customer proof of claim form.

The Commission requests comment on proposed § 190.03(f). Are the proposed changes to the treatment of the proof of customer claim form helpful? Do the revisions appear likely to lead to unintended consequences, and, if so, how may such consequences be mitigated? Is the discretion granted to the trustee appropriately tailored? If not, what changes should be made?

2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property

Proposed § 190.04 would address the collection of margin and variation settlement, as well as the liquidation and valuation of positions. The Commission is proposing to clarify and update portions of current §§ 190.02, 190.03, and 190.04 in its proposed § 190.04. Changes from the current to the proposed regulation text are discussed below.

The Commission is proposing to revise current § 190.02(e) regarding transfers for customers in a bankruptcy proceeding in proposed § 190.04(a). It would largely retain the current provisions, including the identification of a clear policy preference [81] that the trustee should use its best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers to one or more solvent FCMs.[82] Proposed § 190.04(a)(1) would provide that the trustee ''shall promptly'' use its best efforts to effect such transfers, while current § 190.02(e)(1) states that the trustee ''must immediately'' do so. This revision would be a minor change, designed to signal to the trustee to take action to transfer open commodity contracts as soon as practicable, while avoiding the potential pressure of the term ''immediately'' in light of the challenges presented in an FCM bankruptcy. In addition, in proposed § 190.04(a)(2), the Commission is proposing a clarifying change to replace the term ''equity'' with ''property.'' In doing so, the Commission would clarify that the trustee should endeavor to transfer all types of property that the commodity broker is holding on behalf of customers; the transfer is not limited to equity. The Commission also would add the word ''public'' before ''customers'' to clarify that the transfers discussed in proposed § 190.04(a)(1) relate to the open commodity contracts and property of the debtor's public customers.[83]

Proposed § 190.04(a)(2) is derived from current § 190.02(e)(2), and would address transfers in the case of involuntary proceedings. In proposed § 190.04(a)(2), the Commission would strike language from current § 190.02(e)(2), addressing involuntary cases, that would limit a commodity broker against which an involuntary petition in bankruptcy is filed to trading for liquidation only unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court. Limitations on the business of an FCM in bankruptcy would be dealt with more generally in proposed § 190.04(e)(4); there is no need to separately address involuntary cases.[84] Proposed § 190.04(a)(2), like current § 190.02(e)(2), also would provide that if such a commodity broker demonstrates to the Commission within a specified period of time that it is in compliance with the Commission's segregation and financial requirements on the filing date, the Commission may determine to allow the commodity broker to continue in business. The Commission would retain this provision because, in the Commission's view, any requirement to transfer customers is properly addressed pursuant to § 1.17(a)(4), which deals with FCMs that do not meet minimum financial requirements. The Commission preliminarily is of the view that an FCM that does meet such requirements should not be compelled to cease business and transfer its customers absent an appropriate finding by a court or the Commission. In addition, similarly to proposed § 190.04(a)(1), discussed above, the Commission would replace the term ''equity'' with ''property'' to clarify that the transfers discussed in proposed § 190.04(a)(2) are for all types of property that the commodity broker is holding on behalf of customers, rather than limited to only equity. Also, as in proposed § 190.04(a)(1), discussed above, the Commission would add the word ''public'' before ''customers'' to clarify that the transfers discussed in proposed § 190.04(a)(1) relate to the open commodity contracts and property of the debtor's public customers.

In proposed § 190.04(b)(1), the Commission would clarify and update the provisions in current § 190.02(g)(1) allowing a trustee to make ''variation and maintenance margin payments'' on behalf of the debtor FCM's customers. While the proposed regulation is intended to be consistent with the current regulation, there are a number of substantive changes to the proposed regulation from the current regulation text.

First, the current regulation limits margin payments to ''pending liquidation.'' In fact, the approach consistent with the Commission's longstanding policy is for the trustee to endeavor to *transfer* open commodity contracts. The trustee has *two* paths for the treatment of such contracts: Transfer and, if transfer is not possible, liquidation. The regulation would accordingly be revised to permit the trustee to make margin payments pending *transfer or* liquidation, not just pending liquidation.

Second, the current provision could be read to prohibit margin payments for contracts that are being held open. While holding contracts open may or may not be practicable given the particular circumstances of the bankruptcy, a complete prohibition against paying margin on such open contracts would undermine the point of having the possibility to hold those contracts open. Accordingly, the proposed regulation would delete the phrase ''required to be liquidated under paragraph (f)(1) of this section'' and thus would instead apply more broadly to any open commodity contracts.

The following changes are more technical in nature.

Third, the proposed regulation would replace the phrase ''variation and maintenance margin payments'' with ''payments of initial margin and variation settlement'' which, in the Commission's view, more accurately describes the types of payments being reflected in this provision. Fourth, the proposed regulation would replace the phrase ''to a commodity broker'' with ''to a clearing organization, commodity broker, foreign clearing organization or foreign futures intermediary'' to account for the various types of entities to which a margin payment described in this provision may be made. Lastly, the proposed regulation would replace the phrase ''specifically identifiable to a particular customer'' with ''specifically identifiable property of a particular customer'' in order to be consistent with

[81] The rationale for this policy preference is addressed in the discussion of proposed § 190.00(c)(4) in section II.A.1 above. *See also* ABA Cover Note at 14 (''We recommend explicitly identifying in proposed Rule 190.04(a) a clear policy that the trustee should use best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers to one or more solvent FCMs.''

[82] Proposed § 190.04(a) also would contain updated cross-references to other provisions within proposed part 190 that discuss transfers of customer property.

[83] The Commission is proposing the same change—addition of the word ''public'' before ''customers''—to proposed § 190.04(a)(2), discussed below.

[84] The reference to ''liquidation'' further down in current § 190.02(e)(4) accordingly would be deleted, since the limitation to trading for liquidation only would be deleted from the proposed provision.

the definitions in proposed part 190, which includes as a defined term ''specifically identifiable property.''

Proposed § 190.04(b)(1)(i), which is derived from current § 190.02(g)(1)(i), would prevent the trustee from making any payments on behalf of any commodity contract account that is in deficit, to the extent within the trustee's control. The Commission also would add the phrase ''to the extent within the trustee's control'' as recognition of the fact that certain commodity contract accounts may be held on an omnibus basis (*i.e.,* on behalf of several customers), so to the extent the trustee is making a margin payment on behalf of the omnibus account, it may be out of the trustee's control to identify and only pay on behalf of those underlying customer accounts (within the omnibus account) that are not in deficit. The Commission, lastly, would add a proviso noting that proposed § 190.04(b)(1)(i) shall not be construed to prevent a clearing organization, foreign clearing organization, FCM or foreign futures intermediary from exercising its rights to the extent permitted under applicable law. The Commission is proposing this addition to remove any doubt that the right of these ''upstream'' entities to use collateral posted by the FCM on an omnibus basis is not affected by the prohibition on making margin payments on behalf of accounts that are in deficit.

Proposed § 190.04(b)(1)(ii) is new and would add a restriction that the trustee cannot make an upstream margin payment with respect to a specific customer account that would exceed the funded balance of that account. This revision would be consistent with the pro rata distribution principle discussed in proposed § 190.00(c)(5), in that any payment in excess of a customer's funded balance would be to the detriment of other customers.

Proposed § 190.04(b)(1)(iii) would make some minor non-substantive clarifications of the language in current § 190.02(g)(1)(ii), but retains the limitation that the trustee may not make payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers.

Proposed § 190.04(b)(1)(iv)–(v) would expand and clarify current § 190.02(g)(1)(iii) [85] to provide that margin must be used consistent with the requirements of section 4d of the CEA.[86] First, proposed § 190.04(b)(1)(iv) would provide that, if the trustee receives payments from a customer in response to a margin call, then to the extent within the trustee's control,[87] the trustee must use such payments to make margin payments for the open commodity contract positions of such customer. Second, proposed § 190.04(b)(1)(v) would provide that the trustee may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer. Given the restriction in paragraph (b)(1)(v), it may be impracticable for a trustee to follow paragraph (b)(1)(iv); in such a situation, the trustee would hold onto the funds received in response to a margin payment and such funds would be credited to the account of the customer that made the payment.[88]

Proposed § 190.04(b)(1)(vi) has its analog in current § 190.02(g)(1)(iv), but would build upon the concept in the current regulation. Current § 190.02(g)(1)(iv) provides that no payments need be made to restore initial margin, thus noting that such payments are not required but implicitly allowing such payments to be made. Proposed § 190.04(b)(1)(vi) would explicate this in more detail and provides more comprehensive guidance to the trustee about when such payments may be made. Specifically, proposed § 190.04(b)(1)(vi) would provide that, in the event that the funds segregated for the benefit of public customers in a particular account class exceed the aggregate net equity claims for all customers in that account class, the trustee is permitted to use such funds to meet the margin obligations for any public customer in such account class whose account is under-margined, but not in deficit, and sets conditions around such use.

In proposed § 190.04(b)(2), the Commission would update existing § 190.02(g)(2), which concerns margin calls made by a trustee with respect to under-margined accounts of public customers. The Commission would remove the current *requirement* that the trustee issue such margin calls, by replacing the term ''must issue margin calls'' with ''may issue a margin call,'' in light of the possibility that the trustee will determine it impracticable or inefficient to do so. Current § 190.02(g)(2), which sets up a retail-level analysis on issuing mandatory margin calls based on the funded balance of the account, is based on a model of the FCM continuing in business. The proposed changes, as reflected in proposed § 190.04(b)(2), would recognize that an FCM in bankruptcy will be operated in crisis mode, and may be pending wholesale transfer or liquidation of open positions.[89] Therefore, the Commission would allow for the *possibility* that the trustee may issue margin calls. The specification of highly prescriptive conditions for issuing such calls is no longer appropriate, given the Commission's proposal that whether or not to make such a call is now based on the trustee's discretion.

Proposed § 190.04(b)(3) is largely similar to current § 190.02(g)(3), with updated cross-references. The Commission would retain in proposed § 190.04(b)(3) the important concept that margin payments made by a customer in response to a trustee's margin call are fully credited to the customer's funded balance. Since these post-petition margin payments by the customer are fully counted toward the customer's net allowed equity claims, under proposed § 190.04(b)(3), they would not be subject to pro rata distribution (in contrast to the treatment of the debtor commodity broker's pre-petition obligations to customers).

Proposed § 190.04(b)(4) addresses the trustee's obligation to liquidate certain open commodity contracts, in particular, those in deficit and those where the customer has failed promptly to meet a margin call. It would be a combination of current §§ 190.03(b)(1) and (2) and 190.04(e)(4).

During business as usual, an FCM is required to cover, at all times, any customer accounts in deficit (*i.e.,* those with debit balances) with its own capital.[90] The FCM is also required to cover with its own capital any undermargined amounts in customer accounts each day by no later than the Residual Interest Deadline.[91] These ongoing requirements are intended to protect other customers with positive account balances.

An FCM in bankruptcy will generally not have capital available to protect other customers by covering these obligations; rather, any loss suffered by customers whose accounts are in deficit will be at the risk of those other customers.[92] Proposed § 190.04(b)(4) is

[85] Current § 190.02(g)(1)(iii) provides that ''The trustee must make margin payments if payments of margin are received from customers after bankruptcy in response to margin calls . . . .''

[86] *See* 7 U.S.C. 6d.

[87] The Commission's proposal to use the phrase ''to the extent within the trustee's control'' would recognize the reality that certain accounts are held on an omnibus basis. *See* discussion of proposed § 190.04(b)(1)(i) above.

[88] *See* proposed § 190.08(c)(1)(ii).

[89] *See generally* major theme 7 discussed in section I.B above.

[90] *See, e.g.,* §§ 1.22(i)(4), 1.23(a)(2).

[91] *See, e.g.,* § 1.22(c)(3).

[92] While the trustee may seek to recover any debit balance from a customer, *see* proposed § 190.09(a)(1)(ii)(E), proposed § 190.04(b)(4)

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intended to mitigate the risk to those other customers by directing the trustee to liquidate such accounts.

In light of the importance of mitigating this fellow-customer risk, proposed § 190.04(b)(4) would, in contrast to many of the other proposed changes to part 190, act to cabin the trustee's discretion. Specifically, it would first provide that the trustee shall, as soon as practicable, liquidate all open commodity contract accounts in any commodity contract account (i) that is in deficit; (ii) for which any mark-to-market calculation would result in a deficit; or (iii) for which the customer fails to meet a margin call made by the trustee within a reasonable time. This requirement, in part, would reflect current § 190.03(b)(1) and (2). Pursuant to current § 190.03(b)(1), a trustee must liquidate open commodity contracts if ''any payment of margin would result in a deficit in the account in which they are held.'' [93] In proposed § 190.04(b)(4), the Commission would add a requirement to liquidate ''all open commodity contracts in any commodity contract account that is in deficit.'' The existing language applies to an account that is on the threshold of deficit; the proposed revised language would clarify that the provision also applies to an account that is already in deficit. Moreover, the change from ''payment of margin'' to ''mark-to-market'' calculation addresses the case where the trustee is aware, based on mark-to-market calculations, that the account is in deficit. In order to protect other customers more effectively, the proposed regulation would direct the trustee to begin the liquidation process immediately upon gaining that awareness, rather than delaying until the time when a margin payment is due.

Proposed § 190.04(b)(4) further would provide that, absent exigent circumstances or unless otherwise provided, a reasonable time for meeting margin calls made by a trustee shall be one hour or such greater period not to exceed one business day, as determined by the trustee.[94] This proposed language is largely reflective of current § 190.04(e)(4), though it would add the concept of ''exigent circumstances'' as a new exception to the general and long-established rule that a minimum of one hour is sufficient notice for a trustee to liquidate an undermargined account. This revision would provide the trustee with the discretion to deem a period of less than one hour as sufficient notice to liquidate an undermargined account if the ''exigent circumstances'' so require.

The Commission would delete current § 190.03(b)(3), which would permit the trustee to liquidate open commodity contracts where the trustee has received no customer instructions with respect to such contracts by the sixth calendar day following the entry of the order for relief. This change is being proposed as part of a move from a model where the trustee receives and complies with instructions from individual customers to a model—that reflects actual practice in commodity broker bankruptcies in recent decades—where the trustee transfers as many open commodity contracts as possible.[95]

Proposed § 190.04(b)(5) is new, and would provide guidance to the trustee in assigning liquidating positions [96] to the debtor FCM's customers when only a portion of the open commodity contracts in an omnibus account are liquidated. It is intended to protect the customer account as a whole, in light of the fact that any losses which cause a customer account to go into deficit are, as discussed in connection with proposed § 190.04(b)(4) above, at the risk of other customers. To mitigate the risk of such losses, the provision would establish a preference, subject to the trustee's exercise of reasonable business judgment, for assigning liquidating transactions to individual customer accounts in a risk-reducing manner. Specifically, the trustee should endeavor to assign such liquidating transactions first, in a risk-reducing manner, to commodity contract accounts that *are* in deficit; second, in a risk-reducing manner, to commodity contract accounts that are under-margined; [97] and finally to liquidate any remaining open commodity contracts. Where there are multiple accounts in any of these groups, the trustee would be instructed to, to the extent practicable, allocate such liquidating transactions pro rata. The proposed section would explain that the term ''risk-reducing manner'' is measured by the margin methodology and parameters followed by the DCO at which such contracts are cleared. Specifically, where allocating a transaction to a particular customer account reduces the margin requirement for that account, such an allocation is ''risk-reducing.''

Proposed § 190.04(c) directs the trustee to use its best efforts to avoid delivery obligations concerning contracts held through the debtor FCM by transferring or liquidating such contracts before they move into delivery position. It has its analog in current § 190.03(b)(5) and would incorporate a portion of current § 190.02(f)(1)(ii). Current § 190.03(b)(5) instructs the trustee to liquidate promptly and in an orderly manner commodity contracts that are not settled in cash (implicitly, those that settle via physical delivery of a commodity) where the contract would remain open beyond the earlier of (i) the last day of trading or (ii) the first day on which notice of delivery may be tendered—that is, where the contract would move into delivery position. Proposed § 190.04(c) would have the same purpose, but would use more explicit language regarding physical delivery, referring to ''any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity,'' and moving into the delivery position. In addition, proposed § 190.04(c) would expand on current § 190.03(b)(5) to include explicit reference to how options on commodities move into delivery position, some of which is taken from current § 190.02(f)(1)(ii).

Proposed § 190.04(d) is derived from current §§ 190.02(f) and 190.04(d). Specifically, proposed § 190.04(d) would set forth the categories of commodity contracts and other property held by or for the account of a debtor that must be liquidated by the trustee in

proceeds from the conservative assumption that such efforts will be unsuccessful.

[93] An account is in deficit if the balance is negative (*i.e.,* the customer owes the debtor instead of the reverse). An account can be undermargined but not in deficit (if the balance is positive, but less than the amount of required margin). For example, a customer may have a margin requirement of 100 and an equity balance of 80. Such customer is undermargined by 20, but is not in deficit, because the liquidation value of the commodity contracts is positive.

[94] *See Morgan Stanley & Co. Inc.* v. *Peak Ridge Master SPC Ltd.,* 930 F.Supp.2d 532, 539–540 (S.D.N.Y. 2013) (Morgan Stanley, in its business discretion, determined Peak Ridge's account had assumed overly risky positions, necessitating an increase in the margin requirement and giving Peak Ridge a limited amount of time to bring the account into compliance. ''Courts have held that as little as one hour is sufficient notice under similar circumstances.''). *See also Capital Options Invs., Inc.* v. *Goldberg Bros. Commodities, Inc.,* 958 F.2d 186, 190 (7th Cir. 1992) (''One-hour notice to post additional margin . . . is reasonable where a contract specifically provides for margin calls on options at any time and without notice.''); *Prudential-Bache Sec., Inc.* v. *Stricklin,* 890 F.2d 704, 706–07 (4th Cir. 1989) (rejecting a claim that 24-hour notice, which the broker normally gave to customers, was necessary before broker could liquidate an undermargined account and upholding notice of one hour as in accordance with the customer agreement); *Modern Settings, Inc.* v. *Prudential-Bache Sec. Inc.,* 936 F.2d 640, 645 (2d Cir. 1991) (upholding a provision of a customer agreement allowing Defendant-broker to liquidate an undermargined account without notice).

[95] *Cf.* major theme 7 in section I.B above.

[96] A liquidating position or transaction is one that offsets a position held by the debtor, in whole or in part. Thus, if the debtor has three long March '21 corn contracts, then three (or two, or one) short March '21 corn contracts would be a liquidating transaction.

[97] And thus are next at risk of going into deficit.

the market or by book entry offset, promptly and in an orderly manner.[98]

Importantly, the Commission would retain the requirement, present in the header language to current § 190.02(f), that the trustee effect such liquidation ''in an orderly manner.'' This is to recognize that any factor which, in the trustee's discretion, makes it imprudent to liquidate a position at a particular point in time would contribute to the trustee's judgment as to what constitutes liquidation ''in an orderly manner.''

Proposed § 190.04(d)(1) derives from current § 190.02(f)(1), and would provide that all open commodity contracts must be liquidated, subject to two exceptions: (1) Commodity contracts that are specifically identifiable property and are subject to customer instructions to transfer as provided in proposed § 190.03(c)(2); and (2) open commodity contract positions that are in a delivery position.[99] In the former case (specifically identifiable property), proposed § 190.04(d)(1) would revise the language of current § 190.02(f)(1)(ii) to add references to the provisions of proposed § 190.03(c)(2) (concerning the trustee's option to treat hedging accounts as specifically identifiable property) and proposed § 190.09(d)(2) (concerning the payments that customers on whose behalf specifically identifiable commodity contracts will be transferred must make to ensure that they do not receive property in excess of their pro rata share).[100] The latter exception, for open commodity contract positions that are in a delivery position is new, and would provide that such positions should be treated in accordance with proposed § 190.06, which concerns delivery.[101]

Proposed § 190.04(d)(2) would describe when specifically identifiable property, other than open commodity contracts or physical delivery property must be liquidated. This provision derives from current § 190.02(f)(2), but would contain a number of revisions.

First, the proposed provision would apply to specifically identifiable property, other than open commodity contracts *or physical delivery property,* while the current regulation applies only to specifically identifiable property other than open commodity contracts. This change is intended to provide the trustee with discretion to avoid interfering with the physical delivery process.

Second, while the current regulation would require liquidation of such property if the fair market value of the property drops below 90% of its value on the date of the entry of the order for relief,[102] the proposed regulation (in paragraph (d)(2)(i)) changes that figure to 75% of the fair market value, in order to provide greater discretion to the trustee to forego or postpone liquidation in appropriate cases.

Third, the proposed regulation (in paragraph (d)(2)(ii)) would add an additional condition that would require liquidation where failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account, which corresponds to the general policy of liquidating any accounts that are in deficit.

Lastly, the proposed regulation (in paragraph (d)(2)(iii)), while similar to current § 190.02(f)(2)(ii), would include updated cross-references to the provisions in proposed part 190 that discuss the return of specifically identifiable property.

Proposed § 190.04(d)(3) is new, and is intended to codify the Commission's longstanding policies of pro rata distribution and equitable treatment of customers in bankruptcy, as described in § 190.00(c)(5) above, as applied to letters of credit posted as margin.[103] Accordingly, customers who post letters of credit as margin would be treated no differently than other customers and thus would suffer the same pro rata loss.

The implementation of this policy in current § 190.08(a)(1)(i)(E) was challenged in an adversary proceeding in the MF Global Bankruptcy;[104] the codifications of this policy in proposed §§ 190.00(c)(5) (clarifying policy), 190.04(d)(3) (treatment in bankruptcy), and 190.10(d) (treatment during business as usual) are intended to effectively implement the policy and to forestall any future challenge.

Proposed paragraph (d)(3) would provide that the trustee may request that such a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract. This would apply whether the letter of credit is held by the trustee on behalf of the debtor's estate or a DCO or a foreign broker or foreign clearing organization, and whether it is held on a pass-through or other basis. The amount of the substitute customer property to be posted may be less than the full face amount of the letter of credit, in the trustee's discretion, if such lesser amount is sufficient to ensure pro rata treatment consistent with proposed §§ 190.08 and 190.09. If required, the trustee may require the customer to post property equal to the full face amount of the letter of credit to ensure pro rata treatment. Proposed paragraph (d)(3)(i) would provide that, if such a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may draw upon the full amount of the letter of credit or any portion thereof.

Proposed paragraph (d)(3)(ii) would address cases where a letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract is not fully drawn upon. The trustee would be instructed to treat any portion of the letter of credit that is not fully drawn upon as having been distributed to the customer. However, the amount treated as having been distributed would be reduced by the value of any substitute customer property delivered by the customer to the trustee. For example, if the face amount of the letter of credit is $1,000,000, the customer delivers $250,000 in substitute customer property, and no portion of the letter of credit is drawn upon, then the trustee will treat the customer as having received a distribution of $750,000. In order to avoid an effective transfer of value, due to an expiration on or after the date of the order for relief, to the customer who posted the letter of credit, this calculation will not be changed due to such an expiration.

[98] The Commission is proposing three non-substantive changes in the header language to proposed § 190.04(d) from that in current § 190.02(f): (1) Addition of the phrase ''except as otherwise set forth in this paragraph (d)'' to account for any exceptions that are included in the subsections under the header language; (2) addition of cross-references to proposed § 190.04(e) when discussing liquidation, as that provision contains instructions on how to effect liquidation; and (3) deletion of the phrase ''subject to limit moves and to applicable procedures under the Bankruptcy Code.''

[99] Proposed § 190.04(d)(1) would also delete the reference in current § 190.02(f)(1)(i) to dealer option contracts since such term is no longer used.

[100] As noted above in the discussion of proposed § 190.04(c), part of current § 190.02(f)(1)(ii) would be incorporated into proposed § 190.04(c), and therefore would not appear in proposed § 190.04(d)(1).

[101] As noted in section II.A.1 above in the discussion of proposed § 190.00(c)(6), a delivery default could have a disruptive effect on the cash market for the commodity and could adversely impact the parties to the transaction.

[102] *See* current § 190.02(f)(2)(i).

[103] *See, e.g.,* 48 FR 8716, 8718–19 (March 1, 1983) (Commission intends ''to assure that customers using a letter of credit to meet original margin obligations would be treated no differently than customers depositing other forms of non-cash margin or customers with excess cash margin deposits. If letters of credit are treated differently than Treasury bills or other non-cash deposits, there would be a substantial incentive to use and accept such letters of credit as margin as they would be a means of avoiding the pro rata distribution of margin funds, contrary to the intent of the [Bankruptcy] Code [11 U.S.C. 766].'')

[104] *See ConocoPhillips* v. *Giddens,* No. 12 Civ. 6014, 2012 WL 4757866 (S.D.N.Y. 2012)

Paragraph (d)(3)(iii) would confirm that any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by a customer, shall be considered customer property in the account class applicable to the original letter of credit.

Proposed § 190.04(d)(4), which would provide for the liquidation of all other property not required to be transferred or returned pursuant to customer instructions and which has not been liquidated, is derived from current § 190.02(f)(3). Proposed § 190.04(d)(4) would except from the liquidation requirement any ''physical delivery property held for delivery in accordance with the provision of'' proposed § 190.06, in order to avoid interfering with the physical delivery process.

In proposed § 190.04(e), the Commission would provide details regarding the liquidation and valuation of open positions.[105] This paragraph is derived from current § 190.04(d), subject to a number of changes.

Proposed § 190.04(e)(1)(i), which would describe the process of liquidating open commodity contracts when the debtor is a member of a clearing organization, is derived from current § 190.04(d)(1)(ii). Both the current and the proposed regulations include an emphasis on achieving the goal of competitive pricing ''to the extent feasible under market conditions at the time of liquidation.'' Treatment under the CEA of clearing organization rules has evolved from a pre-approval regime to a primarily self-certification regime. The Commission is of the view that the various processes set forth in part 40 of the Commission's regulations (including self-certification under § 40.6, voluntary submission for rule approval under § 40.5, and Commission review of certain rules of systemically important DCOs under § 40.10) are sufficient, and that a separate rule approval process for rules regarding settlement price in the context of a bankruptcy is no longer necessary. The Commission is accordingly proposing in § 190.04(e)(1)(i) to delete the requirement, contained in current § 190.04(d)(1)(i), that a clearing organization obtain approval pursuant to section 5c(c) of the CEA for its rules regarding liquidation of open commodity contracts.

Proposed § 190.04(e)(1)(i) also would add a provision regarding open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, providing that such contracts shall by liquidated pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of such rules, in the manner the trustee deems appropriate. This new provision would be analogous to the current one, but would additionally extend to cases where the debtor FCM is a member of a foreign clearing organization.

Proposed § 190.04(e)(1)(ii) is new. It would provide instructions to the trustee regarding the liquidation of open commodity contracts where the debtor is not a member of a DCO or foreign clearing organization, but instead clears through one or more accounts established with an FCM or a foreign futures intermediary. In such a case, the proposed regulation would provide that the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation. The Commission would add this provision in order to account for those circumstances where the trustee must liquidate open commodity contracts for a debtor that is not a clearing member.

As with proposed § 190.04(e)(1)(i), the Commission would delete the rule approval requirement in proposed § 190.04(e)(2) for the same reasons stated above. Proposed § 190.04(e)(2) is derived from current § 190.04(d)(1)(ii). The proposed regulation would provide for a trustee or clearing organization to apply to the Commission for permission to liquidate open commodity contracts by book entry. In such a case, the settlement price for such commodity contracts shall be determined by the clearing organization in accordance with its rules, which shall be designed to establish, to the extent feasible under market conditions at the time of liquidation, such settlement prices in a competitive manner.

Proposed § 190.04(e)(3) is new. It would recognize that an FCM or foreign futures intermediary through which a debtor FCM carries open commodity contracts will generally have enforceable contractual rights to liquidate such commodity contracts. The proposed rule would confirm that the upstream intermediary may exercise such rights. However, there would be a proviso: The liquidating FCM or foreign futures intermediary shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade governing its liquidation of such open commodity contracts.

If the liquidating FCM or foreign futures intermediary fails to do so, the trustee may seek damages reflecting the difference in price(s) resulting from such failure. However, such damages are the trustee's sole available remedy; the proposed regulation makes clear that ''[i]n no event shall any such liquidation be voided.''

Proposed § 190.04(e)(4)(i) and (ii) derive from current § 190.04(d)(2) and (3), respectively, with some minor non-substantive language changes and updated cross-references.

Proposed § 190.04(f) derives from current § 190.04(e)(5). Proposed § 190.04(f) would contain only minor non-substantive changes from the current regulation text, including (1) a cross-reference to the liquidation provisions in proposed § 190.04(d) and (e), and (2) a clarification that the provision is referring to commodity contracts that are long option contracts, rather than to long option contracts more generally.

The Commission requests comment with respect to all aspects of proposed § 190.04. Specifically, do the revisions create any unintended conflicts with customer protection regulations set forth in parts 1, 22, and 30? If so, how may such conflicts be resolved? Are any of the proposed clarification changes (here or elsewhere) likely to create unintended consequences? If so, how might those be avoided or mitigated?

The Commission specifically seeks comment on whether the revised approach in proposed § 190.04(b)(4) regarding the required liquidation of certain open commodity contract accounts provides the trustee with an appropriate amount of discretion and is practicable. Given the level of discretion provided, are the trustee's choices likely to be challenged by customers who believe they did not benefit from those decisions? Could such challenges materially slow down the distribution of customer property relative to a context where the trustee was granted less discretion? Also, is the approach set forth in proposed § 190.04(b)(5), regarding the assignment of liquidating positions to debtor FCM customers in a ''risk-reducing manner'' when only a portion of the open commodity contracts in an omnibus account are liquidated, practicable? The

[105] In proposed § 190.08(d), the Commission would also clarify the process by which customer positions and other customer property are valued for purposes of determining the amount of a customer's claim.

Commission also seeks comment in particular on the treatment of letters of credit in bankruptcy, as set forth in proposed § 190.04(e).

3. Regulation § 190.05: Operation of the Debtor's Estate—General

The Commission would revise parts of current § 190.04 in proposed § 190.05, and would add two new provisions to (1) require a trustee to use all reasonable efforts to continue to issue account statements for customer accounts holding open commodity contracts or other property, and (2) clarify the trustee's obligations with respect to residual interest.

Proposed § 190.05(a) is derived from current § 190.04(a). Given that an FCM bankruptcy will likely be a fast-paced situation requiring the trustee to make decisions with little time for consideration, the Commission recognizes that there may be circumstances under which strict compliance with the CEA and the regulations thereunder may not be practicable. Accordingly, while current § 190.04(a) states that the trustee ''shall'' comply with all provisions of the CEA and of the regulations thereunder as if it were the debtor, the Commission would amend the language in proposed § 190.05(a) to state that the trustee ''shall use reasonable efforts to comply'' with all provisions of the CEA and of the regulations thereunder as if it were the debtor. This change is intended to provide the trustee some flexibility in making decisions in an emergency bankruptcy situation, subject, of course, to the requirements of the Bankruptcy Code.

Proposed § 190.05(b) is derived from current § 190.04(b). In revising this provision, the Commission's objective is to provide the bankruptcy trustee with the latitude to act reasonably given the circumstances they are confronted with, recognizing that information may be more reliable and/or accurate in some insolvency situations than in others and permitting an approach that, to an appropriate extent, favors cost effectiveness and promptness over precision.[106] Whereas current § 190.04(b) provides that a trustee ''must'' compute a funded balance for each customer account which contains open commodity contracts as of the close of each business day, proposed § 190.05(b) would require that trustee to use ''reasonable efforts'' to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day until such open commodity contracts and other property in such account has been transferred or liquidated. Proposed § 190.05(b) further would provide that such computations ''shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.''

In addition, proposed § 190.05(b) would increase the scope of customer accounts for which the bankruptcy trustee is obligated to compute a funded balance to accounts that contain open commodity contracts or other property, as opposed to just accounts that contain open commodity contracts. In the Commission's view, this broadened scope is appropriate; there is no reason to exclude customer accounts that contain only property (the value of which may change) from the scope of those for which bankruptcy trustees must compute a daily funded balance. Moreover, proposed § 190.05(b) would revise the length of time the trustee has the obligation to compute the funded balance of customer accounts. In current § 190.04(b), the trustee must compute a funded balance for certain customer accounts ''until the final liquidation date.'' In proposed § 190.05(b), however, the trustee must compute a funded balance only until the open commodity contracts and other property in the account have been transferred or liquidated. This change ties the computation requirement to each specific account, such that a bankruptcy trustee is not required to continue to compute the funded balance of customer accounts that do not contain any open commodity contracts or other property. Lastly, while current § 190.04(b) required the computation to be completed by noon on the next business day, the Commission does not believe that a noon deadline is crucial in a bankruptcy context (as it is with respect to an FCM conducting ongoing daily business [107]); proposed § 190.05(b) therefore would not contain a specific deadline. Of course, such computation would inherently need to be accomplished prior to performing any action where knowledge of funded balances is essential, such as transfer of accounts or property.

Proposed § 190.05(c) is derived from current § 190.04(c).

Proposed § 190.05(c)(1) concerns record retention, and is derived from current § 190.04(c)(1). It is intended to be more comprehensive than the current provision, and thus would expand the records referred to from ''computations required by this part'' to ''records required under this chapter to be maintained by the debtor, including records of the computations required by this part.'' It is also, on the other hand, intended to enable the trustee to mitigate the expenses of record retention by permitting them to end their record retention responsibilities effectively when they close the bankruptcy case. The proposed provision would thus reduce the time that records are required to be retained from ''the greater of the period required by § 1.31 of this chapter or for a period of one year after the close of the bankruptcy proceeding for which they were compiled'' to ''until such time as the debtor's case is closed.''

Proposed § 190.05(c)(2) would simplify the corresponding portion of current § 190.04(c)(2) by omitting the requirement that the records required in proposed § 190.05(c)(1) be available to the Court and parties in interest. It would retain the requirement that such records be available to the Commission and the United States Department of Justice. A court will generally not itself look at records, and any parties in interest should have access to records under the discovery provisions of the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure, as applicable.

Proposed § 190.05(d) is new. It is intended to facilitate the ability of customers of the bankrupt FCM with open commodity contracts or property to keep track of such open commodity contracts or property even during insolvency, and promptly to make them aware of the specifics of the liquidation or transfer of such contracts or property. It would require the trustee to use all reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred. The provision also would require the trustee to issue an account statement reflecting any liquidation or transfer that has taken place with respect to a customer account promptly after such liquidation or transfer has occurred.

Proposed § 190.05(e)(1) concerns disbursements to customers. It is derived from current § 190.04(e)(2). The Commission is proposing to change this provision to reflect the policy preference to transfer as many public customer positions as practicable in the event of an FCM insolvency.[108]

[106] *See* major theme 7.c discussed in section I.B above.

[107] *See, e.g.,* § 1.32(d).

[108] The Commission notes that current § 190.08(d) provides for the return of specifically identifiable property other than commodity contracts under

Continued

Proposed § 190.05(e)(1) would provide that a trustee needs court approval to make disbursements to customers, but (in contrast to the current regulation) would specifically carve out disbursements made in connection with a transfer of customer property made in accordance with proposed § 190.07. The Commission notes, however, that specifically carving out transfers made in accordance with proposed § 190.07 from requiring court approval does not detract from the trustee's ability to, in their discretion, nonetheless seek and obtain court approval for certain transfers of customer property. The Commission recognizes that there is an inherent tension between distributing to public customers as much customer property as possible from the debtor's estate, as quickly as possible, and ensuring accuracy in distribution, and believes that proposed § 190.05(e)(1) strikes the right balance between these competing objectives.[109]

Proposed § 190.05(e)(2) is derived from current § 190.04(e)(3). It concerns how a bankruptcy trustee may invest the proceeds [110] from the liquidation of open commodity contracts and specifically identifiable property, and other customer property. Proposed § 190.05(e)(2) would retain much of current § 190.04(e)(3), although the Commission would expand the provision in current § 190.04(e)(3) permitting the bankruptcy trustee to ''invest any customer equity in accounts which remain open in accordance with § 190.03'' to permit the investment of ''any other customer property,'' albeit continuing to strictly limit the permissible investments to obligations of, or fully guaranteed by, the United States, and limiting the location of permissible depositories to those located in the United States or its territories or possessions.

Proposed § 190.05(f) is new. It would require a bankruptcy trustee to apply the residual interest provisions contained in § 1.11 ''in a manner appropriate to the context of their responsibilities as a bankruptcy trustee'' and ''in light of the existence of a surplus or deficit in customer property available to pay customer claims.'' The purpose of the residual interest provisions is to have the FCM maintain a sufficient buffer in segregated funds ''to reasonably ensure that the [FCM] . . . remains in compliance with the segregated funds requirements at all times.'' [111]

In the Commission's view, the residual interest provisions contained in § 1.11 remain important, even in bankruptcy, in order to facilitate the goal of having each customer of the debtor receive in distributions from the debtor's estate all that the customer is entitled to, and therefore a trustee should be obligated to continue to apply such provisions, as appropriate, during the course of an FCM bankruptcy proceeding.

The context of the trustee's responsibilities—to wind down operations, and to transfer or liquidate positions and assets—will have a significant impact on how the trustee should apply the residual interest provisions. The references to a surplus or deficit in customer property in proposed § 190.05(f) are meant to apply the residual interest provisions to the bankruptcy context. Specifically, the Commission expects that, to the extent there is a surplus of segregated customer funds in a particular account class, a trustee would apply the residual interest provisions to minimize the risk that there could be a deficit and, to the extent there is a deficit of segregated customer funds in a particular account class, the trustee would apply the residual interest provisions to minimize such deficit and to promote the fair distribution of customer property consistent with the pro rata principle.

The Commission requests comment with respect to all aspects of proposed § 190.05. Specifically, the Commission seeks comment on the practicability of the proposed requirements in proposed § 190.05(d) regarding the issuance of account statements. The Commission also requests comment on the practicability and appropriateness of § 190.05(f), which proposes to require the application of the residual interest provisions set forth in § 1.11 in order to minimize risks of deficit of customer property during bankruptcy.

4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts

The issues concerning delivery in bankruptcy are discussed in some detail in proposed § 190.00(c)(6).

As discussed above,[112] proposed § 190.04(c) directs the trustee to use its best efforts to avoid delivery obligations concerning contracts held through the debtor FCM by transferring or liquidating such contracts before they move into delivery position. Where the trustee is unable to do so, proposed § 190.06(a)(2), discussed below, would direct the trustee to use reasonable efforts to permit the relevant customer to make or take delivery outside the administration of the debtor's estate. Where that is not practicable, proposed § 190.06(a)(3) would address delivery as part of the administration of the debtor's estate. Proposed § 190.06(a)(4) and (5) discuss, respectively, issues relating to deliveries in a securities account and in a house account, while proposed § 190.06(b) addresses the issues concerning special account class provisions for delivery accounts.[113]

In proposed § 190.06, the Commission is proposing to make significant changes to current § 190.05 regarding making and taking deliveries on commodity contracts to provide more specificity and to reflect current delivery practices. Generally, open positions may get caught in a delivery position where the parties incur bilateral contractual delivery obligations.[114] It is important to address deliveries to avoid disruption to the cash market for the commodity and to avoid adverse consequences to parties that may be relying on delivery taking

certain circumstances (namely, where the customer makes good any pro rata loss related to that property) without court approval; however, the Commission would delete this provision in favor of allowing transfers without court approval for the reasons stated above.

[109] The concept of prioritizing cost effectiveness and promptness over precision is discussed in detail in major theme 7.c in section I.B above and in overarching concept three in the cost-benefit considerations, section IV.C.3 below.

[110] Proposed § 190.05(e)(2) would use the term ''proceeds'' rather than the term ''equity,'' which is used in current § 190.04(e)(3). This would be simply a change in wording and would not be meant to be a substantive difference.

[111] Section 1.11(e)(3)(i)(D).

The ABA Submission would instead have provided:

*Residual interest.* The trustee is not required to transfer cash, securities, or other property of the debtor into a segregated account to maintain the debtor's ongoing compliance with its targeted residual amount obligations pursuant to § 1.11 of this chapter and the debtor's residual interest policies adopted thereunder or its related obligations to cover debit balances or under-margined amounts as provided in §§ 1.22, 22.2 or 30.7 of this chapter; provided, however, that any property not segregated under this exception shall nonetheless constitute customer property as provided in § 190.09(a)(1).

The ABA Cover Note explains that ''It seems impractical to require the trustee to continue to assure that funds of the debtor FCM are transferred into segregation to meet the FCM's top up obligations after the order for relief.'' *Id.* at 15.

For the reasons explained in the text, the Commission is instead proposing to require the trustee to apply the residual interest provisions, but on a modified basis.

[112] Section II.B.2.

[113] These issues are also addressed in the definitions of account class, delivery account class, cash delivery property and physical delivery property, discussed in section II.A.2 (§ 190.01 (definitions)).

[114] The timing of the entry of the order for relief in a subchapter IV proceeding relative to when physical delivery contracts move into a delivery positions will generally determine whether a delivery issue may arise. Additionally, during business as usual, market participants typically offset contracts before incurring delivery obligations.

place in connection with their business operations.

The current delivery provisions largely reflect the delivery practices at the time current part 190 was adopted in 1983. At that time, delivery was effected largely by tendering paper warehouse receipts or certificates. In contrast, most deliverable title documents today are held and transferred in electronic form, typically with the clearing organization serving as the central depository for such instruments. Under the terms of some contracts (such as energy futures) the party with the contractual obligation to make delivery will physically transfer a tangible commodity to meet its obligations.[115] In other cases, intangible commodities may be delivered, including virtual currencies.

As noted previously, in the definitions section (proposed § 190.01), the Commission is proposing to divide the delivery account class into physical delivery and cash delivery account classes to recognize the differing obligations for the different types of delivery.

The Commission is also proposing to recognize that, consistent with current practice, physical deliveries [116] may be effected in different types of accounts in proposed § 190.06.[117] For example, when an FCM has a role in facilitating delivery, deliveries may occur via title transfer in a futures account, foreign futures account, cleared swaps account, delivery account, or, if the commodity is a security, in a securities account.

Proposed § 190.06(a)(2), which would replace current § 190.05(b), addresses delivery made or taken on behalf of a customer outside of the administration of the debtor's estate, (*i.e.,* directly between the debtor's customer and the delivery counterparty assigned by the clearing organization). Current § 190.05(b) requires a DCO, DCM, or SEF to enact rules that permit parties to make or take delivery under a commodity contract outside the debtor's estate, through substitution of the customer for the commodity broker. The Commission believes that deliveries should occur in this manner only where feasible. Deliveries may not always happen in this manner, as customers largely rely on their FCMs to hold physical delivery property on their behalf in electronic form.[118]

Thus, proposed § 190.06(a)(2)(i) would direct the trustee to use ''reasonable efforts'' to allow a customer to deliver physical delivery property that is held directly by the customer in settlement of a commodity contract, and to allow payment in exchange for such delivery, to occur outside the debtor's estate, where the rules of the exchange or clearing organization prescribe a process for delivery that allows delivery to be fulfilled either (A) in the ordinary course by the customer, (B) by substitution of the customer for the commodity broker, or (C) through agreement of the buyer and seller to alternative delivery procedures. In requiring the trustee to use ''reasonable efforts,'' rather than (as in current § 190.06(a)(1)) ''best efforts,'' to allow a customer to deliver physical property that is held directly by the customer and not by the debtor to occur outside the administration of the debtor's estate, the Commission would recognize that in the event that the trustee is unable to transfer or earlier liquidate the positions, delivery involves a significant degree of bespoke administration. Moreover, requiring the trustee's best efforts for delivery might require the trustee to spend more time focusing on the needs of a few customers and detract from the trustee's ability to manage the short term challenges of the administration of the estate in the days immediately following the filing date.

Proposed § 190.06(a)(2)(ii) would address the circumstance where, while the customer makes physical delivery in satisfaction of a commodity contract using property that is outside the administration of the estate of the debtor, the customer nonetheless has property held in connection with that contract at the debtor (*i.e.,* collateral posted in connection with that contract pre-petition). Consistent with existing § 190.05(b)(2), the proposed paragraph provides that the property held at the debtor becomes part of the customer's claim, and can only be distributed pro rata, despite the customer fulfilling the delivery obligation outside the administration of the debtor's estate.

Proposed § 190.06(a)(3) would apply when it is not practicable to effect delivery outside the estate. The Commission would revise current § 190.05(c)(1)–(2) in proposed § 190.06(a)(3) by providing additional details for when delivery is made or taken within the debtor's estate. Proposed § 190.06(a)(3) would clarify that which was implied and was not addressed in current § 190.5(c)(1)–(2). It would contain provisions for the trustee to deliver physical or cash delivery property on a customer's behalf, or return such property to the customer so that the customer may fulfill its delivery obligation. This regulation would include restrictions designed to assure that a customer does not receive (or otherwise benefit from) a distribution of customer property (or other use of such property that benefits the customer) that exceeds the customer's pro rata share of the relevant customer property pool.

Proposed § 190.06(a)(4) is new and would recognize that delivery may need to be made in a securities account if an open commodity contract held in a futures account, foreign futures account, or cleared swaps account requires the delivery of securities, and property from any of these accounts is transferred to the securities account for the purpose of effecting delivery. Nonetheless, the value of the property transferred to the securities account must be limited to the customer's funded balance for a commodity contract account, and only to the extent that funded balance exceeds (*i.e.,* the surplus over) the customer's minimum margin requirements for that account. Moreover, such transfer may not be made if the customer is under-margined or has a deficit balance in any other commodity contract accounts.

Proposed § 190.06(a)(5) is derived from current § 190.05(c)(3), with some clarifying rewording. No substantive change is intended.

Proposed § 190.06(b) is new, and would create separate account subclasses for physical delivery property held in delivery accounts and the proceeds of such physical delivery property separate from cash delivery property.[119] As noted by the ABA Committee:

> Customer property held in a delivery account is not subject to Commission segregation requirements. Thus, it may be more difficult to identify customer property for the delivery account class. Based on lessons learned from the MF Global bankruptcy, it appears that those challenges are greater for tracing cash. Physical delivery property, in particular when held in the form

[115] *See* ABA Cover Note at 15.

[116] Current § 190.05 applies to delivery of a physical commodity. Proposed § 190.06 would apply to any type of commodity that is subject to physical delivery, whether tangible or intangible. This would be captured in the definition of physical property discussed earlier. Given the different ways in which delivery may take place, physical delivery property is not limited to property that an FCM holds for or on behalf of a customer in a delivery account. For a discussion of those different ways, *see* the third category under the definition of physical delivery property in § 190.01 in section II.A.2 above.

[117] *See also* proposed § 190.10(c).

[118] The proposed regulation again would delete the requirement for registered entity rules to be submitted for approval in accordance with section 5c(c) of the Act for reasons discussed in proposed § 190.04(e)(1) and (2).

[119] *See* reference to discussion of physical delivery property above in proposed § 190.00. In particular, recall that ''physical delivery property'' can include any deliverable commodity, and is not limited to commodities that are tangible.

of electronic title documents as is prevalent today, is more readily identifiable and less vulnerable to loss, compared to cash delivery property that an FCM may hold in an operating bank account.[120]

For these reasons, the Commission proposal would divide the delivery account class into separate physical delivery and cash delivery account subclasses, for purposes of pro rata distributions to customers in the delivery account class on their net equity claims. Proposed § 190.06(b)(1)(i) would provide that the physical delivery account class includes physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property received subsequently (*i.e.,* after the filing date), and § 190.06(b)(1)(ii) the cash delivery account class includes cash delivery property in delivery accounts as of the filing date, along with physical delivery property for which delivery is subsequently taken (*i.e.,* after the filing date) on behalf of a customer in accordance with proposed § 190.06(a)(3).

Proposed § 190.06(b)(2) would provide that customer property in the cash delivery account class includes cash or cash equivalents that are held in an account under a name, or in a manner, that clearly indicates that the account holds property for the purpose of making payment for taking delivery of a commodity under commodity contracts. Customer property in the cash delivery account class would also include any other property that is (x) not segregated for the benefit of customers in the futures, foreign futures, or cleared swaps account classes) and (y) traceable (through, *e.g.,* account statements) as having been received after the filing date as part of taking delivery.

Proposed § 190.06(b)(2) would also provide, conversely, that customer property in the physical delivery account class includes cash or cash equivalents that are held in an account under a name, or in a manner, that clearly indicates that the account holds property received in payment for making delivery of a commodity under a commodity contract. Customer property in the physical delivery account class would also include any other property that is (x) not segregated for the benefit of customers in the futures, foreign futures, or cleared swaps account classes) and (y) traceable (through, *e.g.,* account statements) as having been held for the purpose of making delivery of a commodity under a commodity contract, or held as of the filing date as a result of taking delivery.

The Commission requests comment with respect to all aspects of proposed § 190.06. In particular, the Commission seeks comment on the implications of the proposal in § 190.06(b) to subdivide the delivery account class into separate physical delivery and cash delivery account subclasses. Are there additional challenges or benefits that the Commission has not considered?

5. Regulation § 190.07: Transfers

The policy preference for transferring (or ''porting'') public customer commodity contract positions, as well as all or a portion of such customers' account equity, is discussed in proposed § 190.00(c)(4). In proposed § 190.07, the Commission is proposing to make changes to current § 190.06 governing transfers.

Proposed § 190.07(a) introductory text would revise current § 190.06(a) introductory text, which sets forth general provisions for transfers.

Proposed § 190.07(a)(1) derives from current § 190.06(a)(1), with a few technical changes.

In proposed § 190.07(a)(2), which derives from current § 190.06(a)(2), the Commission would make minor changes to improve readability, although no substantive changes are intended. In addition, in § 190.07(a)(2), the Commission would delete ''or persons which are required to be registered as futures commission merchants'' because such persons are included within the definition of futures commission merchants in § 1.3.

The changes in proposed § 190.07(a)(3) from current § 190.06(a)(3) focus on the goal of promoting transfers, but only to the extent consistent with good risk management. Specifically, the current regulation provides that no clearing organization or other self-regulatory organization may adopt, maintain in effect, or enforce rules that *prevent* the acceptance by its members of transfers of open commodity contracts and the equity margining or securing of such contracts from FCMs with respect to which a petition in bankruptcy has been filed, if the transfers have been approved by the Commission. It also states that this provision shall not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate open commodity contracts.

In proposed § 190.07(a)(3), the Commission would change the word ''prevent'' to ''[i]nterfere with'' to focus on the goal of promoting transfers consistent with good risk management. Further, the Commission would re-word the current regulation and specifically would clarify that the regulations do not limit a clearing organization or other registered entity's contractual right adequately to manage risk or to liquidate or transfer open commodity contracts.[121]

Proposed § 190.07(b) introductory text would revise current § 190.06(c), regarding requirements for transferees. In proposed § 190.07(b)(1), the Commission would clarify current § 190.06(c)(1) to establish that it is the duty of the transferee—not of anyone else—to assure that the transferee is not in violation of the minimum financial requirements upon accepting a transfer. The Commission would reframe current § 190.06(c)(2) in proposed § 190.07(b)(2)(i), but the changes would not be substantive. Similarly, proposed § 190.07(b)(2)(ii)(A) and (B) would transpose current § 190.06(c)(3) and (4), respectively, with conforming and non-substantive wording changes.

Proposed § 190.07(b)(3) and (4) are new common sense provisions to guide the transfer of open commodity contracts and property.

Proposed § 190.07(b)(3) recognizes that customer diligence processes would have already been required to have been completed by the debtor FCM with respect to each of its customers as part of opening their accounts. It thus would provide that a transferee may accept open commodity contracts and property, and may open accounts on its records prior to completing customer diligence, provided that account opening diligence as required is performed as soon as practicable but no later than six months after transfer, unless the time is extended, by the Commission, for a particular account, transfer, or debtor. The Commission believes that this proposal is entirely consistent with past practice in FCM bankruptcies, and provides the flexibility that is likely to be needed in a bankruptcy situation by allowing transfers to occur before customer due diligence is completed, while still

[120] ABA Cover Note at 14. *See generally* discussion of the *delivery account class* in the discussion of the definition of *account class* in § 190.01 in section II.A.2 (definitions) above.

[121] *See* ABA Cover Note at 14 (''recommend[ing] . . . [c]larification that the rule does not limit a DCO's (or other registered entity's) contractual right to liquidate *or transfer* open commodity contracts.'') Separately, the Commission would delete current § 190.06(b) regarding notice to the Commission regarding an intention to transfer commodity contracts held by or for a commodity broker from or for the account of a customer to another person registered as an FCM after a bankruptcy petition has been filed. In the Commission's view, this provision would be duplicative of the notice provision in proposed § 190.03(b)(2) and therefore would be unnecessary.

retaining the requirement that due diligence be performed as soon as practicable thereafter.

Proposed § 190.07(b)(4) is intended to further clarify what the governing agreement between the transferred customer and the transferee is at and after the time the transfer becomes effective. It is intended to make clear that any consequences for breaches pre-transfer would be borne by the transferor rather than the transferee. It would provide that any account agreements governing a transferred account shall be deemed assigned to the transferee and shall govern the customer's relationship unless and until a new agreement is reached, and would also provide that a breach of the agreement prior to a transfer does not constitute a breach on the part of the transferee.

Proposed § 190.07(b)(5) carries forward current § 190.02(c), and would provide that customer instructions received by the debtor with respect to open commodity contracts or specifically identifiable property that has been, or will be, transferred in accordance with section 764(b) of the Bankruptcy Code, should be transmitted to any transferee, who shall comply therewith to the extent practicable (if the transferee subsequently enters insolvency).

The Commission would revise current § 190.06(e), eligibility for transfer under section 764(b) of the Bankruptcy Code (accounts eligible for transfer), in proposed § 190.07(c). Sections and references pertaining to dealer option accounts and leverage accounts would be deleted because those account types are no longer being addressed in this regulation.[122] The proposed revision in § 190.07(c) would change the language ''all accounts are eligible for transfer'' in current § 190.06(e)(1) to ''[a]ll commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer . . . .'' The new language would focus on the commodities business and recognizes that accounts can be transferred even if the accounts are intended for trading commodities but do not include any open commodity contracts at the time of the order for relief.[123]

Proposed § 190.07(d), special rules for transfers under section 764(b) of the Bankruptcy Code, primarily would revise current § 190.06(f). Current § 190.06(f)(1) concerning dealer options would not be covered in this regulation.

Proposed § 190.07(d)(1) would be relocated from current § 190.02(e)(1).

Proposed § 190.07(d)(2) would be drawn from current § 190.06(f)(3), with revision intended to more generally promote transfers.

Currently § 190.06(f)(3)(i) provides that the Commission will not disapprove such a transfer for the sole reason that it was a partial transfer if it would prefer the transfer of accounts, the liquidation of which could adversely affect the market or the bankrupt estate. The Commission would revise the language in proposed § 190.07(d)(2)(i) to state that the Commission will not disapprove such a transfer for the sole reason that it was a partial transfer.'' The proposed revision would be consistent with the policy of promoting the transfer of customer commodity accounts.

In proposed § 190.07(d)(2)(ii), the Commission would clarify that the open commodity contracts and the associated property are to be transferred, thus the term ''property'' has been inserted throughout the section. The Commission would propose to add to current § 190.06(f)(2)(ii) a requirement that a partial transfer of contracts and property may be made *so long as such transfer would not result in an increase in the amount of any customer's net equity claim.* The added language would caution against partial transfers that would break netting sets and make the customer worse off. The Commission also would add language that clarifies that one way to accomplish a partial transfer is by liquidating a portion of the open commodity contracts held by a customer such that sufficient value is realized, or margin requirements are reduced to an extent sufficient, to permit the transfer of some or all of the remaining open commodity contracts and property. The revisions are intended to clarify that the liquidation may either crystalize gains or have the effect of reducing the required margin. Finally, with regards to the transfer of part of a spread or a straddle, the Commission would insert language in § 190.07(d)(2)(ii) that states ''to the extent practicable under the circumstances,'' each side of the spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred. This language would be added to clarify that the trustee is required to protect customers holding spread or straddle positions from the breaking of netting sets, but only to the extent practicable given the circumstances.

Proposed § 190.07(d)(3) is new. It would provide details regarding the treatment and transfer of letters of credit used as margin, consistent with other proposed provisions related to letters of credit. Generally, this provision states that a letter of credit associated with a commodity contract may be transferred with an eligible commodity contract account if it is held by a DCO on a pass-through basis or if it is transferable by its terms. This transfer cannot be made if it would result in a recovery that exceeds the amount to which the customer is entitled in proposed §§ 190.08 and 190.09 (note that, pursuant to proposed § 190.04(d)(3)(ii), any portion of such a letter of credit that is not drawn upon is treated as having been distributed to the customer, except to the extent that the customer delivers substitute customer property).

If the letter of credit cannot be transferred and the customer does not deliver substitute property, the trustee may draw upon a portion or upon all of the letter of credit, the proceeds of which will be treated as customer property in the applicable account class. The Commission believes a regulation detailing how letters of credit are to be treated in a transfer will provide more certainty, as there is currently no such regulation, and that the proposed treatment is both practical and consistent with the policy of pro rata distribution.[124]

Proposed § 190.07(d)(4) is new and would require a trustee to use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable. The Commission is proposing this regulation to clarify its expectations in such situations, specifically, to promote the delivery process.

Proposed § 190.07(d)(5) is intended to prevent prejudice to customers generally by prohibiting the trustee from making a transfer that would result in insufficient customer property being

[122] *This refers to the entirety of* current § 190.06(e)(1)(ii)–(iii) and (f)(1) and the reference to dealer option contracts in § 190.06(f)(3)(i). Accounts for trading commodities are used to purchase or sell a commodity.

[123] *Cf.* 11 U.S.C. 761(9)(A)(ii)(II) (customer means, with respect to an FCM, an entity that holds a claim against the FCM arising out of ''a deposit or payment of cash, security, or other property with such [FCM] *for the purpose of* making or margining [a] commodity contract'') (emphasis added).

Thus, where a person opens a customer account and deposits collateral on day 1, intending to trade on day 3 (or some subsequent day when the customer determines that it is propitious to trade) and the FCM becomes a debtor on day 2 (or some other day when the customer has no positions open) such person nonetheless qualifies as a customer, and their claim would be a customer claim.

[124] *See also* discussion of treatment of letters of credit in bankruptcy under proposed § 190.04(d)(3) in section II.B.2.

available to make equivalent percentage distributions to all equity claim holders in the applicable account class. It would revise current § 190.06(e)(2), changing the framing of the current regulation and focusing on transfers as a whole. The Commission further would clarify that the trustee should make determinations based on customer claims reflected in the FCM's records, and, for customer claims that are not consistent with those records, should make estimates using reasonable discretion based in each case on available information as of the calendar day immediately preceding transfer.

The Commission would revise current § 190.06(g) in proposed § 190.07(e), regarding the prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code. Throughout proposed § 190.07(e), the Commission would insert ''or customer property'' following ''the transfer of commodity contract accounts'' to clarify that transfers of commodity contract accounts include the associated customer property, and that customer property may be transferred even if the customer has no open commodity contracts (as was done in the MF Global bankruptcy).

In proposed § 190.07(e)(1), concerning transfers that were made pre-relief,[125] the Commission would add language that transfers ''are approved'' to clarify that the Commission is following the procedure set forth in the Bankruptcy Code and adding specific citations to the Bankruptcy Code. Proposed § 190.07(e)(1)(ii) also would apply to withdrawals or settlements at the request of public customers, in addition to transfers, in order to incorporate current § 190.06(g)(3). In this context, ''public customers'' would include a lower-level (*i.e.,* downstream) FCM acting on behalf of its own public customers (*e.g.,* cleared at the debtor on an omnibus basis).

Proposed § 190.07(e)(1)(iii) would add a provision to respect the actions of a receiver acting to protect the interests of customers in their property. Specifically, the provision would prohibit the avoidance of a transfer from ''a receiver that has been appointed for the FCM that is now a debtor.'' [126]

Proposed § 190.07(e)(2) would pertain to post-relief transfers. In proposed § 190.07(e)(2)(i), which is derived from current § 190.06(g)(2)(i), the Commission would modify the term ''SRO/commodity broker'' to ''clearing organization'' because the only entities who can perform the transfers that are subject to the provision are the trustee, and, in certain circumstances, clearing organizations. Proposed § 190.07(e)(2)(ii) is derived from current § 190.06(g)(2)(ii). Similarly, proposed § 190.07(e)(3) is derived from current § 190.06(g)(3), dealing with withdrawals (in contrast to the transfers dealt with previously).

Proposed § 190.07(f) is a revision to current § 190.06(h) regarding Commission action. The Commission would clarify that, notwithstanding the other provisions of this section (with exceptions discussed below), it may prohibit the transfer of a particular set or sets of the commodity contract accounts, or permit the transfer of a particular set or sets of commodity contract accounts that do not comply with the requirements of the section. In addition, the Commission would clarify that the transfers of the commodity contract accounts includes the associated customer property. The exceptions are the policy in favor of avoiding the breaking of netting sets in § 190.07(d)(2)(ii), and the avoidance of prejudice to other customers in § 190.07(d)(5).

The Commission requests comment with respect to all aspects of proposed § 190.07. Specifically, the Commission seeks comment on proposed § 190.07(b)(3), which permits transferees to accept open commodity contracts and property prior to completing customer diligence. Does the proposed provision with a maximum six-month period post-transfer (absent Commission action) for diligence requirements provide FCMs with sufficient flexibility to accept transfers following an FCM bankruptcy? Are there additional constraints on the requirements to perform diligence imposed by other regulators that the Commission should take into account? The Commission also seeks comment on proposed § 190.07(d)(2)(ii). Are there better ways to structure the provisions regarding partial transfers of a customer's commodity contract account? Is the discretion granted to the trustee concerning estimates of other customer claims appropriate?

### 6. Regulation § 190.08: Calculation of Allowed Net Equity

Proposed § 190.08 is derived from current § 190.07, with a significant number of technical changes.

Proposed § 190.08(a) is derived from current § 190.07(a), but changed to reflect the fact that, under the revised definition of the term ''primary liquidation date,'' all commodity contracts will be liquidated or transferred prior to the primary liquidation date.[127] Since no (relevant) operations will occur subsequent to the liquidation date, current § 190.07(d), a provision that sets forth instructions on how to adjust a customer's funded balance due to operations subsequent to the primary liquidation date, is rendered moot, and the reference to such section would be removed in proposed § 190.08(a).[128]

Proposed § 190.08(b), like current § 190.07(b), would set forth the steps for a trustee to follow when calculating each customer's net equity.[129] This proposed revision is meant to clarify that, when calculating the customer's claim against the debtor, the basis for calculating such claim should be what appears in the debtor's records. Once the customer's claim based on the debtor's records is calculated, the customer will have the opportunity to dispute such claim based on their own records, and the trustee may adjust the debtor's records if it is persuaded by the customer. However, for purposes of the calculations set forth in proposed § 190.08(b), the focus should be on the numbers that appear in the debtor's own records. In the header language to proposed § 190.08(b), the text would accordingly refer to ''a customer's total customer claim of record'' rather than ''the total claim of a customer'' against the estate of the debtor.''

In addition, the header language to proposed § 190.08(b) would clarify that the calculation of a customer's claim against the debtor is based on all types of customer property, including any commodity contracts, held by the debtor for or on behalf of the customer. While

[125] Proposed § 190.07(e) refers to transfers that were made ''pre-relief'' rather than ''pre-filing date'' because section 764(b) is based on the date of relief, not the filing date. The difference is attributable to the fact that, unlike voluntary bankruptcy cases, where the filing of the case constitutes an order for relief, *see* 11 U.S.C. 301(b), the order for relief in an involuntary bankruptcy will issue only if the petition is not timely controverted, or after trial. *See* 11 U.S.C. 303(h).

[126] A receiver might be appointed pursuant to, *e.g.,* section 6c(a) of the CEA, 7 U.S.C. 13a–1(a).

[127] *See* definition of ''primary liquidation date'' in proposed § 190.01.

[128] For the same reason, two other provisions in current § 190.07 also would be deleted. First, current § 190.07(b)(6), which instructs the trustee how to adjust the calculation of net equity of accounts remaining open subsequent to the primary liquidation date, would be deleted from proposed part 190. Second, current § 190.07(c)(2)(v), which provides that the calculation of funded balance must be adjusted by deficits generated by the continued operation of accounts after the primary liquidation date which cannot be fully adjusted under current § 190.07(d), has also would be deleted. Since, under the revised definition of the term ''primary liquidation date,'' no accounts will remain open subsequent to the primary liquidation date, these two provisions would no longer be necessary.

[129] Pursuant to section 20(a)(5) of the CEA, 7 U.S.C. 24(a)(5), the Commission has the power to provide how the net equity of a customer is to be determined.

this was always the Commission's intent, the language in current § 190.07(b) could be construed more narrowly to exclude any customer property other than commodity contracts.

Proposed § 190.08(b)(1), which would set forth the steps for a trustee to follow when calculating the equity balance of each commodity contract account of a customer, is derived from current § 190.07(b)(1), with the following changes (to the extent not addressed below, the provisions in proposed § 190.08(b)(1) are the same as those in current § 190.07(b)(1)).

First, in proposed § 190.08(b)(1)(i), which corresponds to current § 190.07(b)(1), the revised text would instruct the trustee to determine the equity balance of ''each commodity contract account,'' rather than ''each customer account.'' The term ''commodity contract account'' would be a defined term and, in the Commission's view, using such defined term in this context would be more precise because a customer may have other types of accounts (*e.g.,* securities accounts) with the debtor that are not relevant for the purposes of calculating net equity.

Second, in proposed § 190.08(b)(1)(i)(C), which corresponds with current § 190.07(b)(1)(iii), the Commission would replace the term ''current realizable market value'' with ''realizable market value'' in order to avoid confusion, since, according to the regulation text, the realizable market value is determined as of the close of the market on the last preceding market day.

Third, proposed § 190.08(b)(1)(ii)(A)(*2*), which corresponds with current § 190.07(b)(1)(iii)(A)(*2*), would be simplified to more clearly refer to the cash proceeds from the liquidation of the customer securities or other property referred to earlier in proposed § 190.08(b)(1)(i)(C).

Fourth, proposed § 190.08(b)(1)(ii)(A)(*4*) regarding letters of credit is new, and would be added to be consistent with other new provisions regarding how letters of credit are to be treated in the event of an FCM bankruptcy. This provision would treat the face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract as part of the posting customer's ledger balance.[130]

Lastly, in proposed § 190.08(b)(1)(ii)(B)(*2*), which corresponds with current § 190.07(b)(1)(iii)(B)(*2*), the Commission would add a reference to transfers made pursuant to proposed §§ 190.04(a) and 190.07, which the Commission would clarify should be categorized as disbursements for the purposes of this paragraph.

Proposed § 190.08(b)(2) is derived from current § 190.07(b)(2). Proposed § 190.08(b)(2) would provide instructions to the trustee regarding how to aggregate the credit and debit equity balances of all accounts of the same class held by a customer. Specifically, the proposed regulation would set forth how to determine whether accounts are held in the same capacity or in separate capacities. The Commission is proposing three changes in proposed § 190.08(b)(2) from current § 190.07(b)(2). First, in both proposed § 190.08(b)(2)(iii) and (iv), the Commission would add language to clarify that, in discussing accounts held in the name of an executor or administrator of an estate, the Commission is referring to accounts held in the name of an executor or administrator *in its capacity as such.* This clarification would reflect what was always intended in current § 190.07(b)(2)(iii) and (iv). Second, in proposed § 190.08(b)(2)(viii), the Commission would delete the terms ''leverage accounts'' and ''options accounts,'' as those types of accounts are no longer being addressed in proposed part 190.[131] Third, also in proposed § 190.08(b)(2)(viii), the Commission would add a referenced exception to the paragraph, which notes that futures accounts, delivery accounts, and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities, although such accounts may be aggregated in accordance with paragraph (b)(3) of the section. Current § 190.07(b)(2)(viii) is subject to one exception, paragraph (b)(2)(ix) of the section, which sets forth that an omnibus customer account of an FCM shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such person. Proposed § 190.08(b)(2)(viii) would also be subject to exception from paragraph (b)(2)(ix) and would add another exception, from paragraph (b)(2)(xiv), which would reflect that accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers. Fourth, in proposed § 190.08(b)(2)(xi), the Commission would expand the scope of retirement or pension plans that are discussed in that paragraph. As written, current § 190.07(b)(2)(xi) refers only to retirement or pension plans under the Employee Retirement Income Security Act of 1974 (''ERISA''); the Commission's proposal would expand the scope of plans dealt with in proposed § 190.08(b)(2)(xi) to those under ERISA or similar federal,[132] state or foreign laws or regulations applicable to pension and retirement plans since, in the Commission's view, any such retirement or pension plan is a separate entity from its administrators, employers, employees, participants, or beneficiaries.

Proposed § 190.08(b)(3), which sets forth instructions regarding how and when to set off positive and negative equity balances, is derived from current § 190.07(b)(3). The Commission would make several non-substantive edits to the current text for clarification purposes including, in proposed § 190.08(b)(3)(ii), adding letters to illustrate the equation that is described in the text. In addition, the Commission would edit § 190.08(b)(3)(ii) and (iii) to clarify that the provisions regarding the offset against a positive equity balance only apply in the event a customer has more than one class of account with a positive equity balance. Lastly, the Commission would make a slight change in proposed § 190.08(b)(3)(v) to clarify that, prior to the entry of an order for relief, the provisions of § 1.22 of the Commission's regulations and section 4d of the CEA govern what setoffs are permitted. As written, current § 190.07(b)(3)(v) refers to both the date of entry of an order for relief and the filing date, but the Commission notes that, in an involuntary bankruptcy, there may be a time gap between those dates. The Commission's proposed change to refer only to the date of entry of an order for relief would account for that inconsistency.

Proposed § 190.08(b)(4), which would provide that the value of property that has been transferred or distributed must be added to the net equity amount calculated for that customer, is substantially similar to current § 190.07(b)(4). In the proviso language, the Commission would replace the term ''customer claims'' with ''allowed customer claims.'' This change is intended to clarify that the calculation of net equity for any late-filed claims should be based on the amount that the customer is actually entitled to. The Commission also would correct a

[130] Separately, in proposed § 190.04(d)(3)(ii), any portion of the letter of credit that is not drawn upon is treated as having been distributed to the customer (with any substitute customer property posted serving as an offset).

[131] *See* proposed § 190.00(d)(1)(i).

[132] Including, *e.g.,* a church plan exempt from ERISA pursuant to section 403(b)(9) thereof.

typographical error in current § 190.07(b)(4) where the word ''data'' should be ''date.''

Proposed § 190.08(b)(5), which would provide that the calculation of net equity should be adjusted to correct for misestimates or errors, including corrections for the liquidation of claims or specifically identifiable property at a value different from the estimate value previously used in computing net equity, would be substantially similar to current § 190.07(b)(5), with two minor changes. First, the Commission is proposing to revise the term ''subsequent events'' to ''ongoing events'' in order to recognize that such events may be ''ongoing'' during the administration of the estate, accounting for the volatility that may arise with such events. The prior term of ''subsequent events'' refers to the primary liquidation date. Second, the Commission would add the phrase ''or specifically identifiable property'' to clarify that one of the ongoing events that should result in an adjustment to the calculation of net equity is the liquidation of unliquidated claims *or specifically identifiable property* at a value different from the estimated value previously used.

Proposed § 190.08(c), concerning the calculation of the funded balance, is derived from current § 190.07(c). In the header language to proposed § 190.08(c), the references to calculation as of the primary liquidation date would be deleted, because the funded balance (*i.e.,* each customer's pro rata share of the customer estate with respect to an account class) is relevant both (i) before the primary liquidation date (in support of determining how much value may be transferred, if a prompt transfer can be arranged) and (ii) after the primary liquidation date (as the value of property in the estate relative to claims may change as assets (including claims *by* the estate) are marshalled and liquidated, and claims against the estate are made and resolved).

Proposed § 190.08(c)(1), would set forth instructions for calculating the funded balance of any customer claim, and is derived from current § 190.07(c)(1). The Commission would make several non-substantive edits to the current text for clarification purposes, including (1) in proposed § 190.08(c)(1), clarifying that the funded balance of any customer claim shall be computed separately by account class and customer class; (2) in proposed § 190.08(c)(1)(i), adding letters to illustrate the equation that is described in the text; and (3) in proposed § 190.08(c)(1)(i)(B) and (C), referring to ''other property'' instead of simply ''property.'' In addition, the Commission would add § 190.08(c)(1)(i)(A), which would state that the ratio calculated in proposed § 190.08(c)(1)(i) should be multiplied by the sum of, among other items, the value of letters of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract relating to all customer accounts of the same class. This provision would be added to provide consistency with the other new provisions regarding the use of letters of credit.

Proposed § 190.08(c)(1)(i)(B) is derived from current § 190.07(c)(1)(i)(A). Here, the Commission would refer to ''all customer accounts of the same class'' rather than ''all accounts of the same class.'' This change is meant to clarify that this provision only applies to customer accounts.

Proposed § 190.08(c)(1)(ii) is derived from current § 190.07(c)(1)(ii), with two proposed changes: First, the Commission would recognize that an FCM may be taken into insolvency involuntarily, and proposes to account for that possibility by starting the period during which 100% of margin is credited in an involuntary case on the date of the bankruptcy filing. Second, taking into account prior changes made with respect to the use of letters of credit, the Commission would add a proviso at the end of the paragraph to describe how margin posted to substitute for a letter of credit would affect the calculation of funded balance.

Proposed § 190.08(c)(2) is derived from current § 190.07(c)(2), and would require the funded balance to be adjusted to correct for ongoing events including, but not limited to, those events listed in the proposed and current regulation. Current § 190.07(c)(2)(v) would be deleted from the proposed regulation since, under the revised definition of ''primary liquidation date,'' no account will be continuing to operate after the primary liquidation date, thus rendering current § 190.07(c)(2)(v) moot. In this paragraph the Commission would revise the term ''subsequent events'' to ''ongoing events'' for the same reasons discussed in § 190.08(b)(5).

Proposed § 190.08(d) is derived from current § 190.07(e). Both set forth instructions about how to value commodity contracts and other property for purposes of calculating net equity as set forth in the rest of proposed § 190.08. The Commission is proposing to delete current §§ 190.07(e)(2) (valuation of principal contracts) and (e)(3) (valuation of bucketed contracts) in favor of the more generalized approach to valuing property held by or for a commodity broker set forth in proposed § 190.08(d)(5), which allows the trustee a certain degree of flexibility in valuing such property. Proposed § 190.08(d)(5) is discussed in further detail below.

In addition, current § 190.07(e) contains, in the header language, instructions to the trustee about when the trustee may use the weighted average of the liquidation prices of commodity contracts and other property in computing the net equity of each customer. The Commission would retain the concept of using the weighted average of liquidation prices in certain circumstances, but would move such concept into other sections of proposed § 190.08(d); as such, this concept is discussed in further detail below.

Proposed § 190.08(d)(1) is derived from current § 190.07(e)(1), and would set forth instructions about how to value commodity contracts. The Commission would reorganize proposed § 190.08(d)(1) into two paragraphs: (i) Open commodity contracts, and (ii) liquidated commodity contracts.

In proposed § 190.08(d)(1)(i) regarding the valuation of open commodity contracts, the Commission would maintain the requirement that the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules. The Commission, however, would delete the requirement that the clearing organization's rules must be approved by the Commission. As noted above,[133] the Commission believes that the various processes set forth in part 40 of the Commission's regulations (including self-certification under § 40.6, voluntary submission for rule approval under § 40.5, and Commission review of certain rules of systemically important DCOs under § 40.10) are sufficient, and that a separate rule approval process for rules regarding valuation of open commodity contracts is no longer necessary.

In addition, current § 190.07(e)(1) provides that, if an open commodity contract is transferred, its value shall be determined as of the end of the settlement cycle in which it is transferred. The Commission would change the timing for valuation in proposed § 190.08(d)(1)(i) to the end of the last settlement cycle on the day preceding the transfer. This would allow the value of the open commodity contract to be known prior to the transfer. There would be other non-substantive revisions to the wording of

[133] *See* discussion of proposed § 190.04(e)(2) in section II.B.2 above.

proposed § 190.08(d)(1)(i) as compared to that in current § 190.08(e)(1).

Proposed § 190.08(d)(1)(ii) would be changed to clarify how to value commodity contracts that have been liquidated. Current § 190.07(e)(1) provides that the value of a liquidated commodity contract ''shall be equal to the net proceeds of liquidation.'' Proposed § 190.08(d)(1)(ii) instead provides that the value of a liquidated commodity contract ''shall equal the actual value realized on liquidation of the commodity contract.''

Proposed § 190.08(d)(1)(ii)(A) would allow the trustee to use the weighted average of liquidation prices for identical commodity contracts that are liquidated within a 24-hour period or business day, but not at the same price. This concept derives from text that is currently in § 190.07(e). This provision is important because it recognizes that, in a bankruptcy situation, the trustee may liquidate identical commodity contracts over a short period of time but may not be able to liquidate them all at the same price. In order to provide the trustee with an appropriate mechanism for determining the value of such commodity contracts, the Commission is proposing to allow the trustee to use the weighted average of liquidation prices of identical commodity contracts liquidated within a certain period of time but at different prices. The Commission proposes certain changes to the current text including, for example, the time period within which such contracts must be liquidated in order for the trustee to use the weighted average of the liquidation prices. While current § 190.07(e) applies this concept to commodity contracts liquidated ''on the same date,'' proposed § 190.08(d)(1)(ii)(A) would apply this concept to commodity contracts liquidated ''within a 24 hour period or business day (or such other period as the bankruptcy court may determine is appropriate).'' The Commission notes that settlement days and business days often do not fall within one calendar date. For instance, in accordance with proposed § 190.01, a ''business day'' begins at 8 a.m. one day and ends at 7:59:59 a.m. the next day that is a business day. On weekends, a ''business day'' begins at 8 a.m. on Friday morning and ends at 7:59:59 a.m. on Monday morning. Thus, the Commission would revise the time frame in proposed § 190.08(d)(1)(ii)(A) to bring it more in line with how settlement cycles and business days work.

Proposed § 190.08(d)(1)(ii)(B), which would provide instructions on how to value commodity contracts that are liquidated as part of a bulk auction by a clearing organization or similarly outside of the open market, is a new provision. It is important to recognize that commodity contracts are, at times, liquidated as part of a bulk auction or otherwise outside of the open market, and to provide for a mechanism by which to value commodity contracts that are liquidated in such a manner. The proposed regulation would value a commodity contract that is liquidated as part of a bulk auction at the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated. The Commission is not proposing to set the value of a commodity contract that is liquidated as part of a bulk auction at the auction price, because the auction will not necessarily establish the price for each particular position; rather, the auction might cover an entire portfolio, or a portfolio that is divided into separate ''lots'' that consist of related (but not necessarily identical) positions.

Proposed § 190.08(d)(2) is derived from current § 190.07(e)(4). Proposed § 190.08(d)(2) would incorporate the same weighted average concept discussed above with respect to proposed § 190.08(d)(1)(ii)(A), allowing a trustee to use the weighted average of the liquidation prices of identical securities that are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate), but not at the same price. As discussed above, allowing a trustee to use the weighted average of liquidation prices of identical securities liquidated within a certain period of time but at different prices provides the trustee with an appropriate mechanism for determining the value of such securities. For the same reasons stated above, the Commission would revise the time period within which such securities must be liquidated in order for the trustee to use the weighted average of the liquidation prices. In addition, for clarification purposes, the Commission is proposing that the value of liquidated securities shall equal the actual value realized on liquidation of the securities.

Proposed § 190.08(d)(3) is derived from current § 190.07(e)(5). While current § 190.07(e)(5) determines how to value ''cash commodities'' held in inventory, the Commission believes that this concept is more appropriately applied to all ''commodities'' held in inventory. Additionally, recognizing that the fair market value of a commodity held in inventory is not always readily ascertainable, the Commission would provide that, in such an event, the trustee may value such commodity in accordance with proposed § 190.08(d)(5), a catch-all provision providing the trustee with flexibility to value property using such professional assistance as they deem necessary.

Proposed § 190.08(d)(4) is new, and would be added by the Commission to be consistent with other changes regarding the use of letters of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract.

Proposed § 190.08(d)(5) is derived from current § 190.07(e)(5). Proposed § 190.08(d)(5) would provide the trustee with pragmatic flexibility in determining the value of customer property by allowing the trustee, in their discretion, to enlist the use of professional assistance to value customer property. In furtherance of the goal of providing flexibility to the trustee, the Commission would delete the requirement that the trustee seek approval of the court prior to enlisting professional assistance to value customer property.[134] Such a constraint, in the Commission's view, unduly restricts the trustee's actions in a bankruptcy situation and is unnecessary. In addition, for clarification purposes, the Commission is proposing that the value of property that is sold shall equal the actual value realized on sale of such property.

The Commission requests comment with respect to all aspects of proposed § 190.08. Specifically, the Commission seeks comment with regards to the proposed revisions to the calculation of the equity balance of a commodity contract set forth in proposed § 190.08(b)(1). Are there any unintended consequences from the proposed revisions and, if so, how can such consequences be mitigated? The Commission also seeks comment as to the appropriateness of the proposal to determine the value of an open commodity contract at the end of the last settlement cycle on the day preceding the transfer rather than at the end of the day of the transfer, as set forth in § 190.08(d)(1)–(2).

7. Regulation § 190.09: Allocation of Property and Allowance of Claims

Proposed § 190.09 is derived from current § 190.08. Generally, proposed § 190.09 would provide that the

[134] To be sure, the requirements of 11 U.S.C. 327 concerning the employment of professional persons would still apply. However, the regulation would no longer require the approval of the court to invoke the assistance of such an approved professional in valuing customer property, so long as such assistance falls within the scope of activity approved pursuant to Code section 327.

property of a debtor's estate must be allocated among account classes and between customer classes as provided in the proposed regulation. This property would constitute a separate estate of the customer class and the account class to which it is allocated and would be designated by reference to such customer class and account class.

There are three substantive changes in proposed § 190.09, and a significant number of technical changes. The substantive changes are as follows:

Proposed § 190.09(a)(1)(ii)(G) and (L) are two categories of property that are defined to be included in customer property in order better to protect customers from shortfalls in customer property (*i.e.,* cases where customer property is insufficient to cover claims for customer property).

Paragraph (a)(1)(ii)(G) would be a new category of property that constitutes customer property. It would include any cash, securities, or other property which constitutes current assets of the debtor, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of (i) the amount of the debtor's targeted residual interest amount pursuant to § 1.11 with respect to each account class, or (ii) the debtor's obligations to cover debit balances or under-margined amounts as provided in §§ 1.20, 1.22, 22.2 and, 30.7.[135] Each of the sets of regulations referred to in proposed § 190.09(a)(1)(ii)(G) requires an FCM to put certain funds into segregation on behalf of customers. To the extent the FCM has failed to comply with those regulatory requirements prior to the filing of the bankruptcy, this provision requires the bankruptcy trustee to fulfill that requirement, and allows the trustee to use the current assets of the debtor to do that. The Commission is of the view that proposed § 190.09(a)(1)(ii)(G) would be appropriate since an FCM is already required, under the Commission's regulations, to set aside the funds referred to for the benefit of its customers, and because the provision limits the amount of funds a trustee may take from the debtor's current assets to put into segregation for the FCM's customers. Proposed § 190.09(a)(1)(ii)(G) also fits within the definition of ''customer property'' in section 761 of the Bankruptcy Code, which refers to ''other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer.'' [136]

Proposed § 190.09(a)(1)(ii)(L) is the analog to current § 190.08(a)(1)(ii)(J) but with updated cross-references (and a new second sentence, discussed in the next paragraph). It would state that customer property includes any cash, securities, or other property in the debtor's estate, but only to the extent that the customer property under the other definitional elements is insufficient to satisfy in full all claims of the FCM's public customers. The Commission notes that in *In re Griffin Trading Co.,*[137] the United States Bankruptcy Court for the Northern District of Illinois ruled that the Commission exceeded its statutory authority by adopting current § 190.08(a)(1)(ii)(J) and held that it was invalid. This decision was vacated on appeal pursuant to a settlement reached by the parties. The property described in proposed § 190.09(a)(1)(ii)(L), like proposed § 190.09(a)(1)(ii)(G) discussed above, would appear to fit within the definition of ''customer property'' in section 761 of the Bankruptcy Code, which refers to ''other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer'' [138] because of the Commission's regulations regarding segregation of customer property. Thus, though current § 190.08(a)(1)(ii)(J) may be subject to challenge, the Commission continues to be of the view that section 20 of the CEA provides it with the authority to include proposed § 190.09(a)(1)(ii)(L) in part 190.

A new second sentence of proposed § 190.09(a)(1)(ii)(L) would note explicitly that customer property for purposes of these regulations includes any ''customer property,'' as that term is defined in SIPA, that remains after satisfaction of the provisions in SIPA regarding allocation of (securities) customer property. SIPA provides that such remaining customer property would be allocated to the general estate.[139] It would appear that any securities customer property that remains after satisfaction in full of securities claims provided for in that section of SIPA proceeding and would accordingly become property of the general estate should, to the extent otherwise provided in proposed § 190.09(a)(1)(ii)(L), and for the same reasons, become customer property in the FCM bankruptcy proceeding.

Proposed § 190.09(d) introductory text would govern the distribution of customer property, and has its analog in current § 190.08(d). While current § 190.08(d)(1)(i) and (ii) and (d)(2) require customers to deposit cash in order to obtain the return of specifically identifiable property, proposed § 190.09(d)(1)(i) and (ii) and (d)(2) would require instead the posting of ''substitute customer property,'' a term proposed to be defined in proposed § 190.01 to mean (in relevant part) ''cash or cash equivalents.'' ''Cash equivalents'' is proposed, in turn, to be defined as ''assets, other than United States dollar cash, that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value.'' [140]

The purpose of requiring customers to, in essence, ''buy back'' specifically identifiable property is to implement the pro rata distribution principle set forth in section 766(h) of the Bankruptcy Code, and discussed in proposed § 190.00(d)(5). More particularly, section 766(d) provides that if the value of specifically identifiable property exceeds the amount to which the customer is entitled under subsection (h) or (i) of section 766, then the customer may deposit cash with the trustee equal to the difference between the value of such property and the amount to which the customer is entitled, and the trustee then shall return or transfer the property.

Permitting customers to redeem specifically identifiable property with either cash or cash equivalents, rather than requiring cash, may mitigate the difficulty (and costs) such customers face in obtaining redemption, but will in any event fully implement the pro rata distribution principle. In addition, each of proposed § 190.09(d)(1)(i) and (ii) and (d)(2) would replace the phrase ''in an amount equal to'' with ''with a value equal to'' to account for the proposal that customers may now use cash equivalents, rather than just cash, to

[135] *See* ABA Cover Note at 15 (''recommend[ing] adding a provision to the customer property definition that deems property in the debtor's estate to be customer property to the extent of the FCM's obligation to maintain a targeted residual amount in segregation pursuant to CFTC Rule 1.11, or its obligation to cover debit balances or under-margined amounts in customer accounts under CFTC Rules 1.22, 22.2 or 30.7 . . . adding a provision that expressly covers an FCM's 'top-up' obligations prescribed under specific CFTC rules provides greater legal certainty.'')

[136] 11 U.S.C. 761(10)(A)(ix).

[137] 245 B.R. 291 (Bankr. N.D. Ill. 2000), *vacated,* 270 B.R. 882 (N.D. Ill. 2001).

[138] 11 U.S.C. 761(10)(A)(ix).

[139] *See generally* SIPA section 8(c)(1), 15 U.S.C. 78fff–2(c)(1).

[140] The header language in proposed § 190.09(d)(1) deletes the phrase ''other than a commodity contract,'' though this deletion does not have a substantive effect, and is meant for clarification purposes only.

redeem their specifically identifiable property.[141]

The remaining provisions of proposed § 190.09 include only technical changes:

The header language to the proposed regulation would note that property that is connected with certain cross-margining arrangements is subject to the provisions of appendix B, framework 1 of part 190. With the revisions in the header language to proposed § 190.09, the Commission has attempted to clarify that, where certain cross-margining arrangements are involved, allocation of customer property will be subject not just to proposed § 190.09, but also to the provisions in appendix B, framework 1.

Proposed § 190.09(a)(1), like its analog in current § 190.08(a)(1), would define the scope of ''customer property'' that is available to pay the claims of a debtor FCM's customers. Customers are entitled to a priority over other creditors of the debtor with respect to distributions of customer property.[142] The claims of public customers are satisfied ahead of those of non-public customers. Proposed § 190.09(a)(1)(i), derived from current § 190.08(a)(1)(i), and would list the categories of property that are included in the term ''customer property,'' specifically ''cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer, including a non-public customer.'' Proposed changes to these categories from the current regulation text would be as follows (to the extent not addressed below, the provisions in proposed § 190.09(a)(1)(i) would be the same as those in current § 190.08(a)(1)(i)):

- While current § 190.08(a)(1)(i)(C) refers to warehouse receipts, bills of lading, or other documents of title or property held or acquired by the debtor to fulfill a commodity contract, proposed § 190.09(a)(1)(i)(C) simply would refer back to the definition of ''physical delivery property'' set forth in proposed § 190.01.
- Proposed § 190.09(a)(1)(i)(D) is new, and would clarify explicitly that customer property includes cash delivery property, as well as any other property that the debtor received as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer.
- Proposed § 190.09(a)(1)(i)(F), which is the analog to current § 190.08(a)(1)(i)(E), would state that letters of credit are included in customer property, including any proceeds of a letter of credit drawn by the trustee pursuant to proposed § 190.04(c)(3). Substitute customer property posted by a customer pursuant to proposed § 190.04(d)(3) also would be included. While current § 190.08(a)(1)(i)(E) also discusses letters of credit, the changes made to proposed § 190.09(a)(1)(i)(F) are meant to be consistent with the new letters of credit provisions added elsewhere in proposed part 190.
- Proposed § 190.09(a)(1)(i)(G), which is the analog to current § 190.08(a)(1)(i)(F), would delete the phrase ''To the extent not otherwise included'' solely for clarification purposes.

Proposed § 190.09(a)(1)(ii), derived from current § 190.08(a)(1)(ii), would list the categories of ''[a]ll cash, securities, or other property'' that are included in customer property. Proposed changes to these categories from the current regulation text are as follows (to the extent not addressed below, the provisions in proposed § 190.09(a)(1)(ii) would be the same as those in current § 190.08(a)(1)(ii)):

- Proposed § 190.09(a)(1)(ii)(A), which is the analog to current § 190.08(a)(1)(ii)(A), would clarify that any cash, securities, or other property that is segregated *for customers* on the filing date is considered customer property.
- Proposed § 190.09(a)(1)(ii)(D) would make a number of changes to its analog in current § 190.08(a)(1)(ii)(D). First, proposed § 190.09(a)(1)(ii)(D) would include in customer property any ''cash, securities, or other property'' that *was* (rather than *is,* as the current regulation text states) property received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract. This change would be made for the sake of logical consistency with respect to time references; the reference is to the prior status of property that is *subsequently* recovered by the trustee. Second, proposed § 190.09(a)(1)(ii)(D) would delete the phrase ''which has been withdrawn'' as unnecessary. Lastly, proposed § 190.09(a)(1)(ii)(D) would add the phrase ''or is otherwise recovered by the trustee on any other claim or basis,'' to account for the fact that the trustee may recover such property by means other than their avoidance powers and that, no matter the means of recovery, such property should be included in customer property.
- Proposed § 190.09(a)(1)(ii)(E), which is the analog to current § 190.08(a)(1)(ii)(E), would change the phrase ''against a customer account'' to ''against a customer.'' Such change is made for clarification purposes only.
- Proposed § 190.09(a)(1)(ii)(G) is discussed above as a substantive change.
- Proposed § 190.09(a)(1)(ii)(H), which is the analog to current § 190.08(a)(1)(ii)(G), would delete the phrase ''unless including such property in the customer estate would not significantly increase the customer estate.'' The Commission views this restriction in the current regulation text as unnecessary and therefore proposes deleting it.
- Proposed § 190.09(a)(1)(ii)(K) is new, and would include in customer property any cash, securities, or other property which is a payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property. The Commission is of the view that adding this provision will ensure that any such cash, securities, or other property would become part of the pool of customer property, and is appropriate because the funds recovered pursuant to such insurance payment would, absent the conversion or misuse, have been available to pay customers.
- Proposed § 190.09(a)(1)(ii)(L) is discussed above as a substantive change.

Proposed § 190.09(a)(2), like its analog in current § 190.08(a)(2), would list categories of property that are not included in the ''customer property'' that is available to pay the claims of a debtor FCM's customers. Proposed changes to these categories from the current regulation text are as follows (to the extent not addressed below, the provisions in proposed § 190.09(a)(2) are the same as those in current § 190.08(a)(2)):

- Proposed § 190.09(a)(2)(iii), which is the analog to current § 190.08(a)(2)(iii), would state that forward contracts will not be included in customer property, but would add ''unless such contracts are cleared by a clearing organization or, in the case of forward contracts treated as foreign futures, a foreign clearing organization.'' This addition is meant to clarify that any forward contracts that are cleared by a clearing organization *are* included

[141] While section 766(d) would require the customer to deposit cash, section 20(a)(3) of the CEA permits the Commission to ''[n]otwithstanding title 11 . . . provide . . . by rule or regulation . . . the method by which the business of [a debtor] commodity broker is to be conducted or liquidated after the date of the filing of the petition'' in bankruptcy. It would appear that this power extends to enacting a regulation permitting a customer to post cash equivalents rather than cash in this situation. 7 U.S.C. 24(a)(3).

[142] However, consistent with section 766(h) of the Bankruptcy Code, certain claims involving administrative expenses connected with administering customer property take precedence over customer claims. 11 U.S.C. 766(h).

in customer property, so it is only uncleared forward contracts that will be excluded from the pool of customer property.[143]

• Proposed § 190.09(a)(2)(iv), which is the analog to current § 190.08(a)(2)(iv), would exclude from customer property any physical delivery property that is not held by the debtor and is delivered or received by a customer to fulfill the customer's delivery obligation under a commodity contract. The definition of the term ''physical delivery property'' in proposed § 190.01 specifically would note that any commodities or documents of title that are not held by the debtor, and are delivered or received by a customer to fulfill the customer's delivery obligation under a commodity contract outside the administration of the estate pursuant to proposed § 190.06(a)(2), are not subject to pro rata distribution. Thus, proposed § 190.09(a)(2)(iv) simply would import this concept into proposed § 190.09 by specifying that such physical delivery property is not considered ''customer property'' for purposes of allocation to customers.

• Proposed § 190.09(a)(2)(v), which is the analog to current § 190.08(a)(2)(v), would delete the word ''maintenance'' as it appears in the current regulation text, so as to eliminate any distinction between initial and maintenance margin. As proposed, the provision would not include in customer property any property deposited by a customer with the commodity broker, after the entry of an order for relief, that is not necessary to meet the initial *or* maintenance margin requirements applicable to that customer's account(s).

• Proposed § 190.09(a)(2)(viii) is new, and would clarify that any money, securities or other property held in a securities account to fulfill delivery, under a commodity contract, from or for the account of a customer, is excluded from customer property. Proposed § 190.09(a)(2)(viii) would be parallel to proposed § 190.09(a)(2)(vii) (which would be the same as current § 190.08(a)(2)(vii)), which excludes from customer property any money, securities or property held to margin, guarantee or secure security futures products if held in a securities account. These provisions, together, are meant to focus on securities futures contracts that are held in securities accounts, and that therefore would be protected under SIPA and would not constitute customer property for purposes of part 190.

Proposed § 190.09(a)(3) is new. It would reserve the right of the bankruptcy trustee to assert claims against any person to recover the shortfall of property enumerated in proposed §§ 190.09(a)(1)(i)(F) and 190.0(a)(1)(ii)(A) through (L). The purpose of proposed § 190.09(a)(3) is to clarify, for the avoidance of doubt, that any claims that the trustee may have against a person to recover customer property will not be undermined or reduced by the fact that the trustee may have been, or might be, able to satisfy customer claims by other means.

Proposed § 190.09(b) is analogous to current § 190.08(b).[144] The Commission would add the phrase ''or attributable to'' when discussing how to treat property segregated on behalf of or attributable to non-public customers. This addition is to clarify that this provision would apply both to property that is in the debtor's estate as of the time of the bankruptcy filing as well as property that is later recovered by the trustee and becomes part of the debtor's estate on a later date.

Proposed § 190.09(c) would set forth instructions regarding allocation of customer property, including a few changes from its analog in current § 190.08(c). Specifically, proposed § 190.09(c)(1)(i) would add ''or recovered by the trustee on behalf of or for the benefit of an account class'' when describing property that must be allocated to the specific account class. This addition is meant to clarify, similar to the addition discussed above with respect to proposed § 190.09(b), that this provision regarding allocation of customer property would apply both to (1) property that is in the debtor's estate as of the time of the bankruptcy filing as well as (2) property that is later recovered by the trustee and becomes part of the debtor's estate on a later date.

Proposed § 190.09(c)(1)(ii) is new. It would instruct the trustee with respect to the treatment of any property remaining after payment in full is made to allowed customer claims in a particular account class. Specifically, the new text would provide that such remaining property shall be allocated in accordance with proposed § 190.09(c)(2), which would set forth the order of allocation for any customer money, securities and property that cannot be traced to a specific customer account class. This new provision would also be consistent with the requirement, under section 766(h) of the Bankruptcy Code, that customer property must be distributed to customers in priority to all other claimants.

Proposed § 190.09(c)(2) would delete the restrictions that ''money, securities, and property received from or for the account of customers'' must also be ''on behalf of any account class which is received on behalf of the customer estate.'' The latter restriction is unnecessary: Any ''money, securities and property received from or for the account of customers'' should be treated as customer property, and needs to be allocated. Moreover, the reference to allocation as of ''the primary liquidation date'' is removed, because money, securities or property may be recovered or marshalled at a variety of times during the proceedings.

Proposed § 190.09(d)(1) and (2) were discussed above as substantive changes. Certain other changes to proposed § 190(d)(2), and changes to the remaining paragraphs of § 190.09(d), governing the distribution of customer property, are technical:

There would be a few additional changes to § 190.09(d)(2) from the text in current § 190.08(d)(2), including (1) replacement of the phrase ''[a]ny specifically identifiable commodity contract'' with ''[a]ny open commodity contract that is specifically identifiable property''; (2) replacement of the term ''customer'' with ''public customer''; and (3) replacement of the phrase ''adequate security for the non-recovery of any overpayments'' with ''to assure the recovery of any overpayments.'' These changes are all meant for clarification purposes only.

Proposed § 190.09(d)(3) is derived from current § 190.08(d)(3). Both the proposed and current regulations refer to the distribution, at the request of the customer, of ''like-kind securities.'' The purpose of this provision is to allow for distribution of securities that are interchangeable with the securities deposited by the customer.[145] However, it would appear that there is no commonly understood definition of ''like-kind securities.''

The Commission notes that SIPA addresses an analogous issue. SIPA section 7(b)(1), 15 U.S.C. 78fff–1(b)(1), provides that ''the trustee shall deliver

[143] *Cf.* 11 U.S.C. 761(4)(F)(ii) (including within the definition of ''commodity contract'' ''with respect to a futures commission merchant or clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization.'').

[144] *Cf.* 11 U.S.C. 766(h) (Notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account, as defined by Commission rule, regulation, or order, may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full.).

[145] In the context of dematerialized securities, it is impracticable to identify the exact securities deposited by a customer (*e.g.,* Class A Share #12345 of Acme, Inc.).

securities to or on behalf of customers to the maximum extent practicable in satisfaction of customer claims for *securities of the same class and series of an issuer . . . .*'' In order to clarify the meaning of like– kind securities, proposed § 190.03(d)(3) would adopt this approach, and would read, in relevant part that: The customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities *(i.e., securities of the same class and series of an issuer),* with a fair market value (inclusive of transaction costs) which does not exceed that portion of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

Additional changes in proposed § 190.09(d)(3) from the text of current § 190.08(d)(3) are (1) addition of a cross-reference to a portion of the definition of ''specifically identifiable property'' as set forth in proposed § 190.01; and (2) replacement of the phrase ''if that customer had had no open commodity contracts'' with ''but the customer has no open commodity contracts.''

Proposed § 190.09(d)(4) is substantially similar to current § 190.08(d)(4). The only difference is that proposed § 190.09(d)(4) would contain updated cross-references to proposed §§ 190.03(e) and (f), which discuss the customer proof of claim form.

Proposed § 190.09(d)(5) is derived from current § 190.08(d)(5). The proposed regulation would contain a few changes to the text of current § 190.08(d)(5) that are meant solely for clarification, including (1) the addition of the phrase ''with respect to a particular account class''; (2) the addition of the phrase ''in such account class''; and (3) updated cross-references.

Lastly, current § 190.08(d)(6) would be moved to proposed § 190.04(b)(1)(ii).

The Commission requests comment with respect to all aspects of proposed § 190.09. Specifically, the Commission seeks comment as to whether the proposed revisions to § 190.09(a)(1) would appropriately preserve customer property for the benefit of customers. In particular, the Commission seeks comment on whether proposed §§ 190.09(a)(1)(ii)(G), concerning property that other regulations require to be placed into segregation, and (L), concerning remaining shortfalls, are appropriately crafted. Moreover, is it advisable to permit customers to post ''substitute customer property'' rather than ''cash'' in proposed § 190.09(d)? Is it appropriate to clarify the term ''like-kind securities'' by reference to the concept, derived from SIPA, of ''securities of the same class and series of an issuer?''

8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual

The Commission is proposing to revise current § 190.10, which sets forth the provisions generally applicable to FCMs. Certain provisions in current § 190.10 would be moved to proposed §§ 190.02 and 190.03, as described above. Proposed § 190.10 would contain new and moved provisions that set forth an FCM's obligations during business as usual.

The most substantive change in proposed § 190.10 concerns paragraph (d). This provision is new, and would address letters of credit. It would prohibit an FCM from accepting a letter of credit unless certain conditions (1) are met at the time of acceptance and (2) remain true through its date of expiration.

First, the trustee must be able to draw upon the letter of credit, in full or in part, in the event of a bankruptcy proceeding, the entry of a protective decree under SIPA, or the appointment of FDIC as receiver pursuant to Title II of the Dodd-Frank Act. Second, if the letter of credit is permitted to be and is passed through to a clearing organization, the bankruptcy trustee for such clearing organization or (if applicable) FDIC must be able to draw upon the letter of credit, in full or in part, in the event of a bankruptcy proceeding, or where the FDIC is appointed as receiver pursuant to Title II.

As noted in § 190.00(c)(5), the concept of pro rata distribution would apply to all customers, including those posting letters of credit. Proposed § 190.04(d)(3) would describe how the trustee must treat letters of credit in bankruptcy. The trustee would be required to treat the letter of credit in a manner consistent with pro rata distribution and be permitted to draw upon the full amount of unexpired letters of credit or any portion thereof or treat the letter of credit as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer. Section 190.10(d) is intended to ensure that an FCM's treatment and acceptance of letters of credit during business as usual is consistent with and does not preclude the trustee's treatment of letters of credit in accordance with proposed §§ 190.00(c)(5) and 190.04(d)(3).[146]

The Commission has considered the impact that the implementation of this regulation would have on FCMs and their customers, since letters of credit are currently in use by the industry.[147] Accordingly, upon the effective date of the regulation, proposed § 190.10(d) would apply only to *new* letters of credit and customer agreements. In order to mitigate the impact of implementing this regulation with respect to *existing* letters of credit and customer agreements, the Commission proposes to include a reasonable transition period of one year from the effective date until § 190.10(d) would apply to existing letters of credit and customer agreements.

Proposed § 190.10(a) is also new. It would note that an FCM would be required to maintain current records relating to its customer accounts, pursuant to §§ 1.31, 1.35, 1.36, and 1.37 of this chapter, and in a manner that would permit them to be provided to another FCM in connection with the transfer of open customer contracts of other customer property. This provision would recognize that current and accurate records are imperative in arranging for the transfer of customer contracts and other property, both for the trustee of the estate of the defaulter and for an FCM that is accepting the transfer.[148]

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[146] The Commission notes that, unlike the case in *ConocoPhillips,* 2012 WL 4757866 at *5–*6, it is entirely clear that this regulation does not constitute an ''exercise of regulatory authority'' with respect to an ''identified banking product.'' Assuming for the sake of analysis that letters of credit constitute identified banking products, the Commission would not exercise any regulatory authority over them, and would not specify what should be done with any letter of credit. Rather, the Commission simply is proposing to exercise regulatory authority over FCMs, and prohibit them from accepting certain letters of credit (*i.e.,* those which do not meet the criteria specified in proposed § 190.10(d)) as collateral for CFTC-regulated futures, options, and swaps.

[147] The Commission notes that the Joint Audit Committee (''JAC'') forms for an Irrevocable Standby Letter of Credit (both Pass-Through and Non Pass-Through) would appear to be consistent with the requirements of proposed § 190.10(d).

*See https://www.cmegroup.com/clearing/audit/files/rm_FU_Irrevocable_Standby_LOC920.pdf*; *https://www.cmegroup.com/clearing/audit/files/S_irrstandbynonpassthroughloc.pdf.* Based on staff discussions with industry participants, the Commission understands that most letters of credit currently in use by the industry follow the JAC forms.

[148] As the ABA Cover Note observes:

Paragraph (a) requires an FCM to maintain current records relating to its customer accounts, and provides that those records may be provided to another FCM to facilitate transfer of open customer positions. The provision is not intended to expand an FCM's recordkeeping obligations under other Commission rules. It is intended to emphasize the importance of current and accurate records for an FCM that is accepting the transfer of customer positions and property from the debtor FCM.

ABA Cover Note at 15.

Proposed § 190.10(b) would concern the designation of hedging accounts. It would incorporate concepts contained in current §§ 190.04(e), 190.06(d), and the current Bankruptcy appendix form 3 instructions. As noted below, for purposes of this regulation, a customer would not need to provide, and an FCM would not be required to judge, evidence of hedging intent for purposes of bankruptcy treatment. Rather, proposed § 190.10(b) would permit the FCM to treat the account as a hedging account for such purposes based solely upon the written record of the customer's representation. Hedging treatment for these bankruptcy purposes would not be determinative for any other purpose.

Proposed § 190.10(b)(1) would require an FCM to provide a customer an opportunity to designate an account as a hedging account when the customer first opens the account, rather than when the customer undertakes its first hedging contract, as specified in current § 190.06(d)(1). Giving this opportunity to each customer at the outset would provide the opportunity to allow for clear instruction at a point when both customer and FCM are focused on the specifics of the relationship between them, and would enhance the ability of the FCM properly to account for the customer property. The proposed regulation would also require, consistent with current § 190.06(d)(2), that the FCM indicate prominently in its accounting records for each customer account whether the account is designated as a hedging account.

Proposed § 190.10(b)(2) would set forth the requirements for an FCM to treat an account as a hedging account: If, but only if, the FCM obtains the customer's written representation that the customer's trading in the account will constitute hedging as defined under any relevant Commission rule or rule of a DCO, DCM, SEF, or FBOT. This is in lieu of obtaining written hedging instructions as required under current § 190.06(d).[149]

In order to avoid the significant burden that would be associated with requiring FCMs to re-obtain hedging instructions for existing accounts, proposed § 190.10(b)(3) would provide that the requirements of paragraph (b)(1) and (2) do not apply to commodity contract accounts opened prior to the effective date of these revisions to part 190. Rather, the regulation would recognize expressly that an FCM may continue to designate existing accounts as hedging accounts based on written hedging instructions obtained under former § 190.06(d).

Finally, proposed § 190.10(b)(4) would permit an FCM to designate an existing futures, foreign futures or cleared swaps account of a particular customer as a hedging account, provided that the FCM obtains the representation required under proposed paragraph (b)(2) from such customer. As noted above with respect to § 190.10(b)(2), this treatment only would be relevant for purposes of hedging account treatment in bankruptcy.

Proposed § 190.10(c) is new. It would address the establishment of delivery accounts during business as usual.[150] As recognized in current § 190.05 (and, in particular, current § 190.05(a)(2)) and the definition in current § 190.01(ll)(3), (4), and (5), when a commodity contract is in the delivery phase, or when a customer has taken delivery of commodities that are physically delivered, associated property may be held in a ''delivery account'' rather than in the segregated accounts pursuant to, *e.g.,* § 1.20 or § 22.2.[151] The Commission is proposing to recognize that when an FCM facilitates delivery under a customer's physical delivery contract, and such delivery is effected outside of a futures account, foreign futures account, or cleared swaps account, it must be effected through (and the associated property held in) a delivery account. If, however, the commodity that is subject to delivery is a security, the FCM may effect delivery through (and the property may be held in) a securities account. The regulation would clarify that the property must be held in one of these types of accounts. The Commission is proposing to address the establishment of delivery accounts during business as usual because of their importance during bankruptcy, as addressed in proposed § 190.06.

Proposed 190.10(d) was addressed above as a substantive change.

Proposed § 190.10(e) would concern the disclosure statement for non-cash margin. It is derived from current § 190.10(c), with corresponding changes to cross-references. The reference in the required disclosure statement to notice (in the event of bankruptcy) by publication would be deleted, consistent with the changes to notice provisions in proposed § 190.03(a)(2).

The Commission notes, however, that the ABA Committee proposed to delete entirely the requirement that FCMs provide this disclosure statement, on the basis that the requirement was originally imposed in order to address a concern that customers might otherwise challenge pro rata distribution of non-cash collateral on the basis that they did not consent to such treatment. The ABA Committee stated that it ''does not believe that such a risk exists today under prevailing bankruptcy law.''

Do commenters believe that requiring this disclosure is helpful, either legally (with respect to pro rata distribution) or practically (with respect to enhancing customer understanding)? Should the form of disclosure be changed in some manner? Or do commenters believe that this requirement should be deleted?

The Commission also requests comment with respect to all other aspects of proposed § 190.10. Specifically, the Commission seeks comment with respect to the impact of proposed § 190.10(b) regarding the designation of hedging accounts and proposed § 190.10(c) regarding the establishment of delivery accounts during business as usual.

The Commission also specifically seeks comment on proposed § 190.10(d), regarding changes to the business as usual requirements for acceptance of letters of credit, and in particular seeks comment as to (a) whether its understanding is correct that most letters of credit currently in use by the industry follow the JAC forms, (b) the impact of additional requirements concerning letters of credit (as well as any alternative methods of achieving the goal of treating customers posting letters of credit consistent with the treatment of other customers), and (c) whether the proposed one year transition period is reasonable.

### *C. Subpart C—Clearing Organization as Debtor*

The Commission is proposing to promulgate a new subpart C of part 190 (proposed §§ 190.11–190.19), addressing the currently unprecedented context of a clearing organization as debtor.

#### 1. Regulation § 190.11: Scope and Purpose of Subpart C

When originally proposing part 190 in 1981, the Commission proposed to (and ultimately did) forego providing generally applicable rules for the

[149] *See* ABA Cover Note at 16.

[150] *See* proposed § 190.06 regarding the making and taking of deliveries during bankruptcy.

[151] *See* 48 FR at 8731 (Property segregated on behalf of a delivery account, under the allocation provisions, will be allocated only to that account class. This means that although this property will not be distributed to the extent its value exceeds a claimant's net equity claim and will be distributed pro rata among claimants with delivery claims which are of the same class, it will not be diluted by other types of customer claims. This solution reduces the dilution effect of proration without offending the basic principle of proration of equivalent claims.).

bankruptcy of a clearing organization.[152] The Commission explained that it had proposed no other rules with respect to the operation of clearing organization debtors—other than proposing that all open commodity contracts, even those in a deliverable position, be liquidated in the event of a clearing organization bankruptcy—because the Commission viewed it as highly unlikely that an exchange could maintain a properly functioning futures market in the event of the collapse of its clearing organization. The Commission noted that, under section 764(b)(2) of the Bankruptcy Code, it had the power to permit a distribution of the proceeds of a clearing organization liquidation free from the avoidance powers of the trustee. The Commission further explained that it was not proposing a general rule, because the bankruptcy of a clearing organization would be unique. Instead, the Commission was inclined to take a case-by-case approach with respect to clearing organizations, given the potential for market disruption and disruption of the nation's economy as a whole, in the case of a clearing organization bankruptcy, as well as the desirability of the Commission's active participation in developing a means of meeting such an emergency.[153]

Much has changed in the intervening 38 years. Markets move much more quickly, and thus the importance of quick action in respect to the bankruptcy of a clearing organization has increased. The Commodity Futures Modernization Act established DCOs as a separate registration category.[154] The bankruptcy of a clearing organization would remain unique—it remains the case that no clearing organization registered with the Commission has ever entered bankruptcy—and thus the need for significant flexibility remains, but the balance has shifted towards establishing ex ante the approach that would be taken.

Two clearing organizations for which the Commission has been designated the agency with primary jurisdiction have been designated as systemically important to the United States financial system pursuant to title VIII of Dodd-Frank.[155] If any clearing organization were to approach insolvency, it is possible, though not certain, that such an entity would be resolved pursuant to Title II of Dodd-Frank.[156]

Administration of a resolution under Title II of Dodd-Frank depends, in part, on clarity as to entitlements under chapter 7 of the Bankruptcy Code. Specifically, section 210(a)(7)(B) of Dodd-Frank [157] provides with respect to claims against the covered financial agency in resolution, that ''a creditor shall, in no event, receive less than the amount that the creditor is entitled to under paragraphs (2) and (3) of subsection (d), as applicable.'' Tracing to the cross-referenced subsection, section 210(d)(2) [158] provides that the maximum liability of the FDIC to a claimant is the amount that the claimant would have received if the FDIC had not been appointed receiver, and (instead), the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code.[159] Thus, it is important to have a clear ''counterfactual'' that establishes what creditors would be entitled to in the case of the liquidation of a clearing organization under chapter 7 (subchapter IV) of the Bankruptcy Code.

Accordingly, proposed § 190.11 would establish that this subpart C to part 190 applies to proceedings under subchapter IV to chapter 7 of the Bankruptcy Code where the debtor is a clearing organization.

The Commission requests comment regarding the proposed scope of subpart C of part 190 as set forth in proposed § 190.11. Do commenters support or oppose the decision to establish an explicit, bespoke set of regulations for the bankruptcy of a clearing organization?

2. Regulation § 190.12: Required Reports and Records

The operations of a clearing organization are extremely time-sensitive. For example, § 39.14 requires that a clearing organization complete settlement with each clearing member at least once every business day. It is thus critical that the Commission receive notice of a DCO bankruptcy in an extraordinarily rapid manner, and that the trustee that is appointed (and the Commission) are rapidly provided with critical documents, as discussed further below.

Proposed § 190.12(a)(1) would be analogous to proposed § 190.03(a), in that it would provide instructions regarding how to give notice to the Commission and to a clearing organization's members, where such notice would be required under subpart C of proposed part 190.[160] For a discussion of how these notice provisions differ from those in current part 190, please refer to the discussion of proposed § 190.03(a).[161]

Proposed § 190.12(a)(2) would require the clearing organization to notify the Commission either in advance of, or at the time of, filing a petition in bankruptcy (or within three hours of receiving notice of a filing of an involuntary petition against it).[162] Notice would need to include the filing date and the court in which the proceeding has been or will be filed. While the clearing organization would also need to provide notice of the docket

[152] At the time, the definition of clearing organization in section 761(2) of the Bankruptcy Code was an ''organization that clears commodity contracts on, or subject to the rules of, a contract market or board of trade. *See* Public Law 95–598 (1978), 92 Stat 2549.

[153] 46 FR 57535, 57545 (Nov. 24, 1981).

[154] Commodity Futures Modernization Act of 2000 Public Law 106–554 section 1(a)(5); Appendix E, section 112(f).

[155] *See* Dodd-Frank section 804 (designation of systemic importance), section 803(8) (definition of ''supervisory agency''), 12 U.S.C. 5463, 5462(8). These are CME and ICE Clear Credit. A third clearing organization (Options Clearing Corporation) has also been so designated, but the SEC is the supervisory agency in that case.

[156] Resolution under Title II would require a recommendation concerning factors specified in section 203(a)(2) of Dodd-Frank, 12 U.S.C. 5383(a)(2), by a ⅔ majority of the members then serving of each of the Board of Governors of the Federal Reserve System and of the FDIC, followed by a determination concerning a related set of factors specified in section 203(b), 12 U.S.C. 5383(b), by the Secretary of the Treasury in consultation with the President. Thus, the choice of resolution versus bankruptcy for a DCO that is, in the terminology of Dodd-Frank, ''in default or in danger of default,'' *see* Dodd-Frank section 203(c)(4), 12 U.S.C. 5383(c)(4), cannot be considered certain.

It is, however, clear that Title II applies to clearing organizations. *See, e.g.,* Dodd-Frank section 210(m), 12 U.S.C. 5390(m) (applying ''the provisions of subchapter IV of chapter 7 of the bankruptcy code'' to ''member property'' of ''commodity brokers''). Pursuant to section 761(16) of the Bankruptcy Code, ''member property'' applies only to a debtor that is a ''clearing organization.'' 11 U.S.C. 761(16).

[157] 12 U.S.C. 5390(a)(7)(B).

[158] 12 U.S.C. 5390(d)(2).

[159] For the sake of completeness, it should be noted that section 210(d)(2), 12 U.S.C. 5390(d)(2), provides, as an additional comparator, ''any similar provision of State insolvency law applicable to the covered financial company.'' Given Federal regulation of DCOs, it would appear that this phrase is inapplicable. Similarly, section 210(d)(3), 12 U.S.C. 5390(d)(3), which refers to covered financial companies that are brokers or dealers resolved by SIPC, is also inapplicable here, given the inconsistency in being both a DCO and a broker-dealer.

[160] While proposed § 190.03(a)(2) would apply to notice to an FCM's customers, and proposed § 190.12(a)(1)(ii) would apply to notice to a clearing organization's members, the means of giving notice are identical.

[161] *See* section II.B.1 above.

[162] Commodity broker bankruptcies are rare, and outside the experience of most chapter 7 trustees, who are chosen from a panel of private trustees eligible to serve as such for all chapter 7 cases. *See generally* 11 U.S.C. 701(a)(1), 28 U.S.C. 586(a)(1). Historically, Commission staff, on being notified of an impending commodity broker bankruptcy, have worked with the office of the relevant regional United States Trustee, *see generally* 28 U.S.C. 581 *et seq.,* to identify, and have then briefed, the chapter 7 trustee that would then be appointed. This would be even more important in the context of a clearing organization bankruptcy.

number, if the docket number is not immediately assigned, that information would be provided separately as soon as available.

It is also important to permit the trustee to begin to understand the business of the clearing organization as soon as practicable, and within hours. Accordingly, proposed § 190.12(b)(1) would require the clearing organization to provide to the trustee copies of each of the most recent reports filed with the Commission under § 39.19(c), which includes § 39.19(c)(1) (daily reports, including initial margin required and on deposit by clearing member, daily variation and end-of-day positions (by member, by house and customer origin), and other daily cash flows), § 39.19(c)(2) (quarterly reports, including of financial resources), § 39.19(c)(3) (annual reporting, including audited financial statements and a report of the chief compliance officer), § 39.14(c)(4) (event-specific reporting, which would include the most up-to-date version of any recovery and wind-down plans the debtor maintained pursuant to § 39.39(b),[163] and which may well include events that contributed to the clearing organization's bankruptcy), and § 39.19(c)(5) (reporting specially requested by the Commission or, by delegated authority, staff). In order to provide the trustee with an initial overview of the business and status of the clearing organization, with respect to quarterly, annual, or event-specific reports, the clearing organization would be required to provide any such reports filed during the preceding 12 months. These reports would need to be provided to the trustee as soon as practicable, but in any event no later than three hours following the later of the commencement of the proceeding or the appointment of the trustee. It is the Commission's expectation that in the event of an impending bankruptcy event, staff at the DCO would, as soon as practicable, be preparing these materials for transmission to the trustee.

Similarly, proposed § 190.12(b)(2) would require the debtor clearing organization, in the same time-frame, to provide the trustee and the Commission with copies of the default management plan and default rules and procedures maintained by the debtor pursuant to § 39.16 and, as applicable, § 39.35. While some of this information may have previously been filed with the Commission pursuant to § 39.19, it is important that the Commission have readily available what the clearing organization believes are the most up-to-date versions of these documents. Moreover, given that these documents must be provided to the trustee, providing copies to the Commission should impose minimal additional burden (particularly if the documents are provided in electronic form).

Current § 39.20(a) requires a DCO to maintain records of all activities related to its business as such, and sets forth a non-exclusive list of the records that are included in that term. To enable the trustee and the Commission further to understand the business of the clearing organization, proposed § 190.12(c) would require the clearing organization to make copies of such records available to the trustee and to the Commission no later than the business day after the commencement of the proceeding. In order to inform the trustee and the Commission better concerning the enforceability in bankruptcy of the clearing organization's rules and procedures, the clearing organization is similarly required to make available any opinions of counsel or other legal memoranda provided to the debtor, by inside or outside counsel, in the five years preceding the commencement of the proceeding, relating to the enforceability of those arrangements in the event of an insolvency proceeding involving the debtor.[164]

The Commission requests comment with respect to all aspects of proposed § 190.12. In particular, are the reports and records identified in proposed § 190.12 to be provided to the Commission useful and appropriate? Are the proposed time deadlines appropriate? Are there additional reports and records that should be included in the regulation?

3. Regulation § 190.13: Prohibition on Avoidance of Transfers

Proposed § 190.13 would implement section 764(b) of the Bankruptcy Code, protecting certain transfers from avoidance (sometimes referred to as ''claw-back''), with respect to a debtor clearing organization. It is analogous to proposed § 190.07(e) (and current § 190.06(g)), with certain changes. Specifically, while proposed § 190.07(e) approves FCM transfers unless they are explicitly disapproved, proposed § 190.13 requires explicit Commission approval for DCO transfers. While an FCM can transfer only a portion of its customer positions, a DCO must maintain a balanced book, and thus must transfer all of its customer positions (or at least all positions in a given product set). Given the importance of transferring open commodity contracts and the property margining such contracts in the event of a DCO bankruptcy, the Commission is proposing that any such transfer should require explicit Commission approval.

Thus, whereas current § 190.06(g)(1)(iii) provides that a pre-relief transfer by a clearing organization cannot be avoided as long as it is *not disapproved* by the Commission, proposed § 190.13(a) would instead provide that a pre-relief transfer of open commodity contracts and the property margining or securing such contracts cannot be avoided as long as it was *approved* by the Commission, either before or after such transfer. Similarly, while current § 190.06(g)(2)(i) provides (for all commodity brokers, including clearing organizations) that a post-relief transfer of a customer account cannot be avoided as long as it is *not disapproved* by the Commission, proposed § 190.13(b) would instead provide that a post-relief transfer of open commodity contracts and the property margining or securing such contracts made to another clearing organization cannot be avoided as long as it was *approved* by the Commission, either before or after such transfer.

The Commission requests comment with respect to all aspects of proposed § 190.13. In particular, do commenters agree with the approach of requiring explicit approval of transfers by clearing organization debtors?

4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date

Proposed § 190.14(a) would provide discretion to the trustee to design the proof of claim form and to specify the information that is required. Broad discretion would appear to be appropriate, given the bespoke nature of a clearing organization bankruptcy.

Proposed § 190.14(b) addresses continued operation of a DCO. Proposed § 190.14(b)(1) would provide that, after

[163] *See* § 39.19(c)(4)(xxiv).

[164] The trustee of a corporation in bankruptcy controls the corporation's attorney-client privilege for pre-bankruptcy communications. *Commodity Futures Trading Comm'n* v. *Weintraub,* 471 U.S. 343 (1985). Production to the Commission pursuant to the proposed regulation would not waive that privilege (although voluntary production would). *See, e.g., U.S.* v. *de la Jara,* 973 F.2d 746, 749 (9th Cir. 1992) (''a party does not waive the attorney-client privilege for documents which he is *compelled* to produce'') (emphasis in original); Office of Comptroller of the Currency Interpretative Letter, 1991 WL 338409 (With respect to ''internal Bank documents'' that are ''subject to the attorney-client privilege'' and are ''requested by OCC examiners for their use during examinations of the Bank,'' OCC ''has the power to request and receive materials from national banks in carrying out its supervisory duties. It follows that national banks must comply with such requests. That being the case, it is our position that when national banks furnish documents to us at our request they are not acting voluntarily and do not waive any attorney-client privilege that may attach to such documents.'').

the order for relief, the debtor clearing organization would cease making calls for either variation or initial margin, except as otherwise provided in § 190.14(b).

Proposed § 190.14(b)(2) would allow for the possibility that the trustee believes that continued operation of the debtor clearing organization would be both useful and practicable, in which event the trustee may request permission of the Commission to operate the clearing organization for up to six calendar days after the order for relief, to the extent practicable, in accordance with the rules and procedures of the debtor, and with respect to open commodity contracts of the debtor.

In this context, usefulness would be addressed in paragraph (b)(2)(i), namely that such continued operation would facilitate accomplishing promptly (the outer limit of which would be no more than six calendar days) either (A) transfer of the clearing operations to another DCO or (B) resolution of the DCO pursuant to Title II of Dodd-Frank. (*i.e.,* that such transfer or entry into a Title II resolution proceeding was not practicable to accomplish before the order for relief, but could be accomplished within a brief period thereafter).

Practicability would be addressed in paragraph (b)(2)(ii). If the rules of the debtor clearing organization compel the termination of all or substantially all outstanding contracts under the relevant circumstances (*e.g.,* upon an order for relief), then continued operation would not be practicable. Moreover, cooperation by the members of the clearing organization would be required for practicability. Thus, it would be necessary that all (or substantially all) of the members of the clearing organization (other than those which are themselves subject to a bankruptcy proceeding) are both able and willing to make variation payments as owed during the temporary timeframe.

The reason for the six calendar day outer limit is that six calendar days is one less than seven calendar days, the maximum under section 764(b) of the Bankruptcy Code.

Proposed § 190.14(b)(3) would require the Commission, upon receiving such a request, to consider it promptly (as a practical matter, a failure to grant such a request within a relatively small number of hours during business days would likely make continued operation impracticable). Where the Commission is persuaded that the trustee's conclusions with respect to usefulness and practicability are well grounded (a standard that is intended to grant the Commission wide discretion in making a decision, which discretion appears necessary in light of the unprecedented and exigent circumstances), the Commission may grant the request. The proposed regulation would also permit the Commission to grant the request for fewer calendar days than the trustee has requested, but then to renew permission to continue operations, so long as the total calendar days of continued operation total no more than six.

Proposed § 190.14(c)(1) would require the trustee to liquidate, no later than seven calendar days after the order for relief, all open commodity contracts that had not earlier been terminated, liquidated or transferred. However, such liquidation would not be required if the Commission (whether at the request of the trustee or sua sponte) determines that such liquidation would be inconsistent with the avoidance of systemic risk [165] or, in the expert judgment of the Commission, would not be in the best interests of the debtor clearing organization's estate.[166] The trustee would be directed to carry out such liquidation in accordance with the rules and procedures of the debtor clearing organization, to the extent applicable and practicable.

Proposed § 190.14(c)(2) would, analogously to existing § 190.08(d)(3) and proposed § 190.09(d)(3), permit the trustee to, rather than liquidating securities and making distributions in the form of cash, instead make distributions to members in the form of securities that are equivalent (*i.e.,* securities of the same class and series of an issuer) to those that were originally delivered to the debtor by the clearing member or such member's customer.

Proposed § 190.14(d) would require the trustee to use reasonable efforts to compute the funded balance of each customer account immediately prior to the distribution of any property in the account, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' Proposed § 190.14(d) is analogous to proposed § 190.05(b), modified for the context of a DCO bankruptcy. Similarly to proposed § 190.05(b), the Commission's objective in proposed § 190.14(d) would be to provide the bankruptcy trustee with the latitude to act reasonably given the circumstances they are confronted with, recognizing that information may be more reliable and/or accurate in some insolvency situations than in others. However, at a minimum, the trustee would be required to calculate each customer's funded balance prior to distributing property, to achieve an appropriate allocation of property between customers.

The Commission requests comment with respect to all aspects of proposed § 190.14. In particular, the Commission seeks comment on the framing of the concepts of usefulness and practicability in the context of permitting the trustee to continue to operate a DCO in insolvency, in accordance with proposed § 190.14(b)(2), in order to, facilitate the transfer of clearing operations to another DCO or placing the debtor DCO into resolution pursuant to Title II of Dodd-Frank. Is there a better way to frame either of these terms? Moreover, is it appropriate to provide for the possibility that the trustee may be permitted to delay liquidating contracts?

5. Regulation § 190.15: Recovery and Wind-Down Plans; Default Rules and Procedures

Proposed § 190.15 would favor implementation of the debtor's default rules and procedures maintained pursuant to § 39.16 and, as applicable, § 39.35, and any recovery and wind-down plans maintained by the debtor and filed with the Commission, pursuant to §§ 39.39 and 39.19, respectively. Section 39.16 requires each DCO to, among other things, ''adopt rules and procedures designed to allow for the efficient, fair, and safe management of events during which clearing members become insolvent or default on the obligations of such clearing members to the'' DCO. In adopting § 39.35, the Commission explained that it ''was designed to protect SIDCOs, Subpart C DCOs, their clearing members, customers of clearing members, and the financial system more broadly by requiring SIDCOs and Subpart C DCOs to have plans and procedures to address credit losses and liquidity shortfalls beyond their prefunded resources.'' [167] Similarly, in adopting § 39.39, the Commission explained that it is ''designed to protect the members of such DCOs and their customers, as well as the financial system more broadly, from the

[165] *See* section 3(b) of the CEA, 7 U.S.C. 5(b) (It is the purpose of the CEA to ensure the avoidance of systemic risk.).

[166] *See* section 20(a)(3) of the CEA, 7 U.S.C. 24(a)(3) (Notwithstanding title 11, the Commission may provide with respect to a commodity broker that is a debtor the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition.).

[167] 78 FR 72476, 72492 (December 2, 2013).

consequences of a disorderly failure of such a DCO.'' [168]

Proposed § 190.15(a) would provide that the trustee shall not avoid or prohibit any action taken by the DCO debtor that was reasonably within the scope of, and was provided for, in any recovery and wind-down plans maintained by the debtor and filed with the Commission, subject to section 766 of the Code. This is intended to provide finality and legal certainty to actions taken by a DCO to implement its recovery and wind-down plans, which are developed subject to Commission regulations.

Proposed § 190.15(b) would instruct the trustee to implement, in consultation with the Commission, the debtor DCO's default rules and procedures maintained pursuant to § 39.16, and, as applicable, § 39.35, as well as any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the trustee's reasonable discretion and to the extent that implementation of such default rules and procedures is practicable.

Similarly, proposed § 190.15(c) would instruct the trustee to, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission, to the extent reasonable and practicable. These proposed regulations are intended to provide the trustee, who will need quickly to take action to manage the DCO (and any member default), with a roadmap to manage such action, which roadmap is based on the rules, procedures, and plans the DCO has developed in advance, and subject to the requirements of the Commission's regulations.

The Commission requests comment with respect to all aspects of proposed § 190.15. In particular, is it appropriate to steer the trustee towards implementation of the debtor DCO's default rules and procedures and recovery and wind-down plans in proposed § 190.15(b) and (c)? Are the qualifiers concerning discretion, reasonability and practicability appropriate and sufficient?

6. Regulation § 190.16: Delivery

Proposed § 190.16(a) would instruct the trustee to use reasonable efforts to facilitate and cooperate with completion of delivery in a manner consistent with proposed § 190.06(a) (which would instruct trustees of FCMs in bankruptcy to foster delivery where a contract has entered delivery phase before the filing date or where it is not practicable for the trustee to liquidate a contract moving into delivery position after the filing date) and the pro rata distribution principle addressed in proposed § 190.00(c)(5). As noted in discussing proposed § 190.06(a), it is important to address deliveries to avoid disruption to the cash market for the commodity and to avoid adverse consequences to parties that may be relying on delivery taking place in connection with their business operations. However, given the potential for competing demands on the trustee's resources, including time, this instruction would be limited to requiring ''reasonable efforts.''

Proposed § 190.16(b) would carry forward, to the context of a DCO in bankruptcy, the delineation between the physical delivery property account class and the cash delivery property account class that would be set forth in proposed § 190.06(b). Specifically, physical delivery property that is held in delivery accounts for the purpose of making delivery would be treated as physical delivery property, as are the proceeds from any sale of such property. By contrast, cash delivery property that is held in delivery accounts for the purpose of paying for delivery would be treated as cash delivery property, as would any physical delivery property for which delivery is subsequently taken.

The Commission requests comment with respect to all aspects of proposed § 190.16. Specifically, the Commission seeks comment as to whether it is appropriate, in the context of a clearing organization bankruptcy, to separate the physical delivery account class from the cash delivery account class. If so, should the physical delivery account class for a clearing organization be further divided into separate sub-classes for each type of physical delivery property? If so, what should be the definition of a ''type of physical delivery property''? Alternatively, might it be more prudent in the context of a clearing organization to treat the delivery account class as a single, undivided account class?

7. Regulation § 190.17: Calculation of Net Equity

Proposed § 190.17(a) with respect to net equity is parallel to proposed § 190.18(a) with respect to customer property. Proposed § 190.17(a)(1) would confirm that a member of a clearing organization may have claims in separate capacities, that is, claims on behalf of its public customers (customer account) and claims on behalf of itself and its non-public customers (affiliates) (house account), and, within those separate customer classes, further separated by account class. The member would be treated as part of the public customer class with respect to claims based on commodity customer accounts carried as ''customer accounts'' by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account. Proposed § 190.17(a)(2) would direct that net equity shall be calculated separately with respect to each customer capacity and, within such customer capacity, by account class.

Proposed § 190.17(b)(1) would confirm that the calculation of members' net equity claims—and, thus, the allocation of losses among members and their accounts—is based on the full application of the debtors' loss allocation rules and procedures, including the default rules and procedures referred to in §§ 39.16 and 39.35. These pre-existing loss allocation rules and procedures are the contract between and among the members and the DCO, and thus the Commission preliminarily believes it is appropriate to give them effect regardless of the bankruptcy of the DCO—and regardless of the timing of any such bankruptcy (*i.e.,* regardless of whether such loss allocation rules and procedures have been applied fully prior to the order for relief). While certain DCOs may have discretion, consistent with governance procedures, as to precisely when they call for members to meet assessment obligations, the Commission believes that allocation of losses should not depend on the happenstance of when default management or recovery tools were used—*e.g.,* when assessments were called for, or when such assessments were met.

DCOs also often have rules to ''reverse the waterfall''—that is, to allocate to members' accounts recoveries on claims against defaulting members [169] in reverse order of the allocation of the losses.[170] Proposed § 190.17(b)(2) would

[168] *Id.* at 72494.

[169] These recoveries might be based on prosecution of such claims in an insolvency or receivership proceeding, or, in the reasonable commercial judgment of the DCO, the settlement or sale of such claims.

[170] For example, if the DCO rules allocate losses in excess of the defaulters' available resources first to the DCO's own contributions, second to the mutualized default fund contributions of members other than the defaulter, third to assessments, and fourth to gains-based haircutting (pro rata), all of which tools were in fact used in a particular case, then recoveries on claims against the defaulting members would be allocated (to the extent available) first to those member accounts for which gains were haircut, pro rata based on the aggregate amount of such haircuts per member account, until all such haircuts have been reversed, second to

implement such rules in bankruptcy, that is, to adjust members' net equity claims (and the basis for distributing any such recoveries) in light of such recoveries. This regulation would similarly implement DCO loss allocation rules in other contexts, for example, (i) rights to portions of mutualized default resources that are either prefunded or assessed and collected, and, in either event, not used, as well as (ii) rules that would allocate to members recoveries against third parties for non-default losses that are, under the DCO's rules, originally borne by members.

Proposed § 190.17(c) would adopt by reference the equity calculations set forth in proposed § 190.08, to the extent applicable.[171]

Section 766(i) of the Bankruptcy Code (1) allocates a debtor DCO's customer property (other than member property) to the DCO's customers (*i.e.,* clearing members) ratably based on the clearing members' net equity claims based on their (public) customer accounts, and (2) allocates a debtor DCO's member property to the DCO's clearing members ratably based on the clearing members' net equity claims based on their proprietary (*i.e.,* house) accounts. Proposed § 190.17(d) would implement this provision by defining funded balance as a clearing member's pro rata share of member property (for a clearing member's house accounts) or customer property other than member property (for accounts for a clearing member's public customers). The pro rata amount is calculated with respect to each account class available for distribution to customers of the same customer class. Moreover, given that calculation of funded balance for FCMs is an analogous exercise, calculations would be made in the manner provided in the relevant regulation, proposed § 190.08(c), to the extent applicable.[172]

The Commission requests comment with respect to all aspects of proposed § 190.17. Is it appropriate to base these calculations on the full application of the debtors' loss allocation rules and procedures, including the default rules and procedures referred to in §§ 39.16 and 39.35?

8. Regulation § 190.18: Treatment of Property

Proposed § 190.18(a), with respect to customer property, is parallel to proposed § 190.17(a) with respect to net equity. It would provide that property of the debtor clearing organization's estate is allocated between member property, and customer property other than member property, as provided in proposed § 190.18, in order to satisfy claims of clearing members, as customers of the debtor. The property so allocated would constitute a separate estate of the customer class (*i.e.* member property, and customer property other than member property) and the account class to which it is allocated, and would be designated by reference to such customer class and account class.

Proposed § 190.18(b) would set out the scope of customer property for a clearing organization.[173] It is based in large part on proposed § 190.09(a) (scope of customer property for FCMs). Specifically, proposed § 190.18(b)(1)(i)(A) through (G) are based on proposed § 190.09(a)(1)(i)(A) through (G). Proposed § 190.09(a)(1)(i)(H) would not be mapped over because loans of margin are not applicable to DCOs.[174]

Proposed § 190.18(b)(1)(ii) (A) through (D) are based on proposed § 190.09(a)(1)(ii)(A), (D), (E), and (F)) respectively, while proposed § 190.18(b)(1)(ii)(E) would adopt by reference § 190.09(a)(1)(ii)(H) through (K), as if the term debtor used therein refers to a clearing organization as debtor. Proposed § 190.09(a)(1)(ii)(B), (C), (G), and (L)) would not be mapped over because they would not be applicable based on the differences in business models, structures, and activities between FCMs and of DCOs.

Proposed § 190.18(b)(1)(iii) would be unique to a clearing organization. It would include as customer property any guarantee fund deposit, assessment, or similar payment or deposit made by a member, to the extent any remains following administration of the debtor's default rules and procedures. It also would include any other property of a member that, pursuant to the debtor's rules and procedures, is available to satisfy claims made by or on behalf of public customers of a member.

Proposed § 190.18(b)(2), which would identify property that is not included in customer property, would adopt by reference proposed § 190.09(a)(2), as if the term debtor used therein refers to a clearing organization as debtor and to the extent relevant to a clearing organization.[175]

Proposed § 190.18(c) would allocate customer property between customer classes. It would operate in the following order of preference: Allocation to customer property other than member property is favored over allocation to member property so long as the funded balance in any account class for members' public customers is less than one hundred percent of net equity claims. Once all account classes for customer property other than member property are fully funded (*i.e.,* at one hundred percent of net equity claims), any excess could be allocated to member property.

Thus, proposed § 190.18(c)(1) would allocate any property referred to in proposed § 190.18(b)(1)(iii) (guarantee deposits, assessments, etc.) first to customer property other than member property (*i.e.,* to benefit public customers) to the extent any account class therein is not fully funded, and then to member property. This is a change from the proviso in current § 190.09(b), which would allocate such property to member property. This change is intended to favor public customers, consistent with the policy embodied in section 766(h) of the Bankruptcy Code.

Similarly, proposed § 190.18(c)(2) would allocate any excess funds in any account class for members' house accounts first to customer property other than member property to the extent that any account class therein is not fully funded, and then any remaining excess to house accounts, to the extent that any account class therein is not fully funded. Finally, proposed § 190.18(c)(3) would allocate any excess funds in any account for members' customer accounts first to customer property other than member property to the extent that any account class therein is not fully funded, and then any remaining excess to house accounts, to the extent that any account class therein is not fully funded.

Proposed § 190.18(d) would allocate customer property among account classes within customer classes.

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those members who paid assessments, pro rata based on the amount of such assessments paid, until all such assessments have been repaid, third to members whose mutualized default-fund contributions were consumed, pro rata based on such default-fund contributions, until all such contributions have been repaid, and fourth to the DCO to the extent of its own contribution.

[171] For a discussion of the proposed changes between current § 190.07 and proposed § 190.08, which both set forth the methodology for calculating net equity, please see sections II.B.5 and II.B. 6 above.

[172] For a discussion of the proposed changes between current § 190.07(c) and proposed § 190.08(c), which both set forth the methodology for calculating funded balance, please see sections II.B.5 and II.B.6 above.

[173] This is another provision prescribed pursuant to the Commission's authority under section 20(a)(1) of the CEA, 7 U.S.C. 24(a)(1).

[174] For a discussion of the proposed changes between current § 190.08(a) (on which proposed § 190.09(a) is based) and proposed § 190.09(a), please see section II.B.7 above.

[175] For a discussion of the proposed changes between current § 190.08(a)(2) (on which proposed § 190.09(a)(2) is based) and proposed § 190.09(a)(2), see section II.B.7 above.

Proposed § 190.18(d)(1) would confirm that, where customer property is tied to a specific account class—that is, where it is segregated on behalf of, readily traceable on the filing date to, or recovered by the trustee on behalf of or for the benefit of an account class within a customer class—the property must be allocated to the customer estate of that account class (that is, the account class for which it is segregated, to which it is readily traceable, or for which it is recovered).

Pursuant to proposed § 190.18(d)(2), customer property which cannot be allocated in accordance with the previous paragraph would be allocated in a manner that promotes equality of percentage distribution among account classes within a customer class. Thus, such property would be allocated first to the account class for which funded balance—that is, the percentage that each member's net equity claim is funded—is the lowest. This would continue until the funded balance percentage of that account class equals the funded balance percentage of the account class with the next lowest percentage of funded claims. The remaining customer property would be allocated to those two account classes so that the funded balance for each such account class remains equal. This would continue until the funded balance percentage of those two account classes is equal to the funded balance of the account class with the next lowest percentage of funded claims, and so forth, until all account classes within the customer class are fully funded.

Proposed § 190.18(e) would confirm, however, that where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.

Proposed § 190.18(f) would be the analog in the DCO context to proposed § 190.09(a)(3) in the context of FCMs. It would reserve the right of the trustee to assert claims against any person to recover the shortfall of property enumerated in proposed § 190.18(b)(1)(i)(E), (b)(1)(ii), and (b)(1)(iii). The purpose of proposed § 190.18(f), as with proposed § 190.09(a)(3), would be to clarify that any claims that the trustee may have against a person to recover customer property will not be undermined or reduced by the fact that the trustee may have been able to satisfy customer claims by other means.

The Commission requests comment with respect to all aspects of proposed § 190.18. In particular, the Commission seeks comment on the comprehensiveness of the scope of customer property for a clearing organization in proposed § 190.18(b). The Commission also requests comment on the appropriateness of the proposed allocation of customer property between customer classes in proposed § 190.18(c) and within customer classes in proposed § 190.18(d).

9. Regulation § 190.19: Support of Daily Settlement

As the Commission noted in proposing § 39.14(b), ''[t]he daily settlement of financial obligations arising from the addition of new positions and price changes with respect to all open positions is an essential element of the clearing process at a DCO.'' [176] Indeed, Congress confirmed this by requiring that each DCO complete money settlements not less frequently than once each business day.[177]

In the ordinary course of business, variation settlement payments are, at a set time or times each day,[178] sent to the DCO from the customer and proprietary accounts of each clearing member with net losses in such accounts (since the last point of computation of settlement obligations for that member) and then sent from the DCO to the customer and proprietary accounts of each clearing member with net gains in such accounts over that time period.

There is no necessary relationship between the aggregate amount of payments to the DCO from all clearing member customer accounts with net losses and the aggregate amount of payments from the DCO to clearing members' customer accounts with net gains. On the other hand, it is the case that, for each business day, the sum of variation settlement payments to the clearinghouse from clearing members' customer and house accounts with net losses will equal the sum of variation settlement payments from the clearinghouse to clearing members' customer and house accounts with net gains.[179] Those variation settlement payments will be received into the DCO's accounts at one or more settlement banks from the accounts of the clearing members with net losses and subsequently be disbursed from the DCO's accounts at settlement banks to the accounts of the clearing members with net gains.[180] Depending on the settlement bank and operational arrangements of the particular DCO, the variation settlement funds will remain in the DCO's accounts between receipt and disbursement for a time period of between several minutes and several hours.

It is crucial to the settlement process that the variation settlement payments that flow into the DCO from accounts with net losses are available promptly to flow out of the DCO as variation settlement to accounts with net gains. Accordingly, the Commission is proposing § 190.19(a), pursuant to section 20(a)(1) of the CEA,[181] to provide that, upon and after an Order for Relief, such funds [182] are to be included in the customer property of the DCO, that they will be considered traceable to, and shall promptly be distributed to, member and customer accounts entitled to payment with respect to the same daily settlement. This customer property would be allocated to (i) member property and (ii) customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

Section 190.19(b) would deal with cases where there is a shortfall in funds received pursuant to paragraph (a) (*i.e.,* settlement payments received by the DCO). This generally would occur in case of a member default. Proposed paragraph (b)(1), to the extent of such shortfall, would supplement the available settlement funds in

[176] 76 FR 3608, 3708 (Jan. 11, 2011).

[177] *See* Core Principle E(i), 7 U.S.C. 7a–1(c)(2)(E)(i).

[178] DCOs are required to effect settlement with each clearing member at least once each business day. They are additionally required to have the capability to effect a settlement with each clearing member on an intraday basis. *See* § 39.14(b).

[179] Thus, while (for each settlement cycle), customer account losses ($x$) plus house account losses ($y$) will equal customer account gains ($p$) plus house account gains ($q$) (that is, $x + y = p + q$), $x$ would only equal $p$ by random chance.

[180] In some cases, the DCO will use one settlement bank, and all settlement funds will flow into and out of that bank. In other cases, the DCO may use a system of settlement banks, and the DCO may, after receiving payments from members with payment obligations, move funds between and among the settlement banks (possibly through a ''concentration bank'') to match the settlement funds at each bank to the DCO's settlement obligations to members who are entitled to settlement payments.

[181] 7 U.S.C. 24(a)(1) (Notwithstanding title 11 of the United States Code, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11, by rule or regulation that certain cash, securities, other property, or commodity contracts are to be included or excluded from customer property or member property.).

[182] Because deposits of initial margin described in § 39.14(a)(iii) are separate from the variation settlement process, they are treated separately in proposed § 190.19(a). Such funds would be member property to the extent that they are deposited on behalf of members' house accounts, and customer property other than member property to the extent that they are deposited on behalf of members' customer accounts.

accordance with the DCO's default rules and procedures (adopted pursuant to § 39.16 for all DCOs and, for DCOs subject to subpart C of part 39, § 39.35) and any recovery plans and wind-down plans maintained pursuant to § 39.39 and submitted to the Commission pursuant to § 39.19.[183] These funds would be allocated in the same proportion as referred to in paragraph (a).

Four types of property would be included as customer property: (i) Initial margin held for the account of a member that has defaulted on a daily settlement, including initial margin segregated for the customers of such member. This would be restricted to the extent that such margin may only be used to the extent that such use is permitted pursuant to parts 1, 22, and 30 (which include provisions restricting the use of customer margin); (ii) Assets of the debtor to the extent dedicated to such use as part of the debtor's default rules and procedures, or as part of any recovery and wind-down plans described in the previous paragraph, (such assets are sometimes referred to as ''skin in the game''); (iii) Prefunded guarantee or default funds maintained pursuant to the DCO debtor's default rules and procedures; and (iv) Payments made by members pursuant to assessment powers maintained pursuant to the DCO debtor's default rules and procedures.

Paragraph (b)(2) would provide that, to the extent that the funds that are included as customer property pursuant to paragraph (a), supplemented as described in paragraph (b)(1), such funds would be allocated between (i) member property and (ii) customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

The Commission requests comment with respect to all aspects of proposed § 190.19.

*D. Appendix A Forms*

The Commission is proposing to delete forms 1 through 3 contained in appendix A and would replace form 4 with a streamlined proof of claim form. Current forms 1 through 3 include (i) a schedule of the trustee's duties in operating the debtor FCM's estate, (ii) a form for requesting customer instructions regarding non-cash property; and (iii) a form for requesting instructions from a customer concerning transfer of hedging positions. The forms contain outdated provisions that require unnecessary information to be collected. The Commission believes these changes provide a trustee with flexibility to act based on the specific circumstance of the case, while still acting consistently with the rules.

As noted in proposed § 190.03(f), the trustee would be permitted, but not required, to use the revised template proof of claim form proposed as new appendix A. That template is intended to implement proposed § 190.03(e), and includes cross-references to the detailed paragraphs of that section. Similarly, the proposed instructions would also be designed to aid customers in providing information and documentation to the trustee that will enable the trustee to decide whether, and in what amount, to allow each customer's claim consistent with part 190.

The Commission requests comment with respect to all aspects of proposed revisions to the appendix A template proof of claim form. Is the information called for by the template fit for the goal of providing the trustee with the information they will need to determine whether and in what amount to allow a claim? Is any of the information called for unnecessary, unhelpful, or disproportionately burdensome? Does the form fail to request any information that is necessary to accomplish that goal? Are the proposed instructions clear and correct?

*E. Appendix B Forms*

Appendix B to the current part 190 regulations contains special bankruptcy distribution rules. These rules are broken into two frameworks. Framework 1 provides special rules for distributing customer funds when the debtor FCM participated in a futures-securities cross-margining program that refers to that framework. Framework 2 provides special rules for allocating as shortfall in customer funds to customers when the shortfall is incurred with respect to funds held in a depository outside the U.S. or in a foreign currency.

Framework 1 is applicable to specific cross-margining programs that explicitly refer to that distributional framework. The framework establishes separate pools of cross-margining and non-cross-margining funds and subordinates customer claims for cross-margining wherever that would be to the benefit of customer claims for non-cross-margining.

The ABA Committee proposed clarifying changes to framework 1, and one substantive change:[184] The ABA Committee ''propose[s] deleting the specific limitation that customers must be market professionals, should the Commission decide to expand the scope of customers that may participate in futures-securities cross-margining programs.''[185]

More recent cross-margining programs established in Commission Orders pursuant to section 4d of the CEA treat all customer claims (whether involving cross-margining or not, whether involving securities or not) equally, and do not refer to Framework 1. Accordingly, it is already possible for customers who are not market professionals to participate in cross-margining programs, including those that involve securities. There thus appears no need substantively to change framework 1. On the other hand, framework 1 will continue to apply to the programs established pursuant to Orders that refer to that framework, and so it would appear helpful to make clarifying changes.

The Commission is accordingly proposing the clarifying changes suggested in the ABA Submission, but is not proposing the substantive change incorporated in the ABA Submission. It would retain the current instructions and examples following the first three paragraphs in appendix B, framework 1 entirely unchanged.

The Commission is proposing to retain framework 2 with some clarifying changes to the opening paragraph; no substantive change is intended. It would retain the current instructions and examples following the first paragraph in appendix B, framework 2 entirely unchanged.

The Commission requests comment with respect to all aspects of the proposed revisions to the opening paragraph of appendix B, framework 2.

*F. Technical Corrections to Other Parts*

1. Part 1

The Commission is proposing several technical corrections and updates to part 1 in order to update cross-references. These are as follows:

- In § 1.25(a)(2)(ii)(B) the Commission would revise the cross-reference to specifically identifiable property, since the definition would be updated in proposed § 190.01.
- In § 1.55(d) introductory text and (d)(1) and (2), references to current § 190.06 would be removed consistent with the revisions to proposed § 190.10(b).
- In §§ 1.55(f) and 1.65(a)(3) introductory text and (a)(3)(iii) the Commission would update references to the customer acknowledgment in proposed § 190.10(e).

[183] *See* § 39.19(c)(4)(xxiv).

[184] *See* ABA Submission at 58–59.

[185] *See* ABA Cover Note at 17.

2. Part 4

In part 4, the Commission is proposing minor technical corrections: In §§ 4.5(c)(2)(iii)(A), 4.12(b)(1)(i)(C) and 4.13(a)(3)(ii)(A) the Commission would change the cross-references to the proposed defined term for ''in-the-money-amount.''

3. Part 41

In part 41, the Commission would is proposing one technical correction. In § 41.41(d), the Commission would delete the cross-reference to the recordkeeping obligations in current § 190.06, pursuant to the revisions to proposed § 190.10(b).

## III. Revisions Proposed By the ABA Committee That Have Not Been Proposed by the Commission

As noted in section I.A above, this NPRM has benefited greatly from the ABA Submission. In this section, the Commission will address those points where this proposal departs most significantly from the ABA Submission and ABA Cover Note.

First, as discussed in section II.A.1 above, the Commission has, in proposed § 190.00(d)(2)(ii), proposed a more direct approach to addressing the issue of constructive and other trusts than the approach suggested in the ABA Submission.

Second, as discussed in section II.B.3 above, the Commission would propose in § 190.05(f) to modify the application to the trustee of the residual interest provisions in § 1.11 rather than to exempt the trustee from those provisions completely as suggested in the ABA Submission.

Third, sections III A–E of the ABA Cover Note recommend that the Commission make changes to Commission Rules outside part 190, including (A) the definition of Foreign Option in § 30.1(d), (B) the definition of Proprietary Account in § 1.3, (C) the definition of Variation Margin in § 1.3, (D) part 22 regulations concerning non-swap and non-futures OTC transactions cleared by a DCO, and (E) part 31 regulations for Leverage Transaction Merchants. The ABA Committee ''emphasize[s], though, that [these proposed changes] are not prerequisites for the Model Part 190 Rules to work as drafted. The Proposed Model Part 190 Rules stand on their own.'' [186]

While these proposals merit due consideration, the Commission has determined, in light of practical limits to staff time and resources, to address these proposals at a later time and separately from these proposed revisions to part 190. By contrast, the ''Technical Housekeeping Changes'' proposed in section III F of the ABA Cover Note are more simple, and have been addressed in today's proposal, as discussed in section II.F above.

The ABA Submission also included proposed revisions to appendix B, framework 1 (Special Distribution of Customer Funds When FCM Participated in Cross-Margining). As discussed in section II.E above, the Commission is proposing the clarifying changes included in the ABA Submission, but is declining to ''delet[e] the specific limitation that customers must be market professionals.'' [187]

Finally, the ABA Cover Note suggests that the Commission delete framework 2 (Special Allocation of Shortfall To Customer Claims When Customer Funds For Futures Contracts and Cleared Swaps Customer Collateral are Held In A Depository Outside Of The United States Or In A Foreign Currency) on the grounds that the framework is complicated and unnecessary.[188] While the operation of framework 2 is undeniably complicated, it appears still to be necessary in order to protect those customers who post collateral in the form of U.S. dollars required to be held in the United States.[189] Indeed, staff recently issued a no-action letter to Eurex Clearing conditioned upon FCMs providing customers with a written disclosure statement describing ''the operation of Framework 2 of Part 190 of the Commission's regulations in the event of an FCM bankruptcy.'' [190] Accordingly, while the Commission would welcome proposals to simplify framework 2, it does not intend to delete or amend that framework at this time.

## IV. Cost-Benefit Considerations

### *A. Introduction*

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[191] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors (collectively referred to herein as ''Section 15(a) Factors'').

The Commission recognizes that the proposed changes to part 190 could create benefits, but also could impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed rulemaking in quantitative terms, including costs related to matters addressed in the Paperwork Reduction Act [192] (''PRA-related costs''), where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed rules in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed rules.

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed herein; the potential costs and benefits of the alternatives discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed rules; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs from all members of the public, but particularly from FCMs, DCOs, and persons with experience as bankruptcy and SIPA trustees (or professionals who have provided support to such trustees), who can provide quantitative cost data or other learning based on their respective experiences. Commenters may also suggest other alternatives to the proposed approaches.

### *B. Baseline*

The baselines for the Commission's consideration of the costs and benefits of this proposed rulemaking are: (1) The Commission's current regulations in part 190, which establish bankruptcy rules in the event of an FCM bankruptcy; (2) current appendix A to part 190, which contains four bankruptcy forms (form 1—Operation of the Debtor's Estate—Schedule of Trustee's Duties; form 2—Request for Instructions Concerning Non-Cash property Deposited with (Commodity

[186] ABA Cover Note at 18–19.

[187] *Id.* at 17.

[188] ABA Cover Note at 17.

[189] *Cf.* § 1.49(e).

[190] *See* CFTC Staff Letter 18–31 at 7.

[191] Section 15(a) of the CEA, 7 U.S.C. 19(a).

[192] 44 U.S.C. 3501 *et seq.*

Broker); form 3—Request for Instructions Concerning Transfer of Your Hedging Contracts Held by (Commodity Broker); and form 4—Proof of Claim); and (3) current appendix B to part 190, which contains two frameworks setting forth rules concerning distribution of customer funds or allocation of shortfall to customer claims in specific circumstances. The Commission seeks comment on all aspects of the baseline laid out above.

*C. Overarching Concepts*

1. Changes to Structure of Industry

The Commission is proposing several revisions in proposed part 190 in order to take into account the changes to the structure of the industry since part 190 was originally published in 1983. In particular, the Commission would recognize that FCMs and DCOs now operate in a different world where matters such as market moves, transactions, and movements of funds tend to happen much more quickly. These changes result from a number of factors, in particular advances in technology and the global nature of underlying markets. While trading through FCMs in the 1980's took place predominantly through open-outcry during what were then considered business hours in the United States, in the 21st Century, FCMs and DCOs are responsible for trades that take place continuously from Sunday afternoon through Friday afternoon (U.S. Eastern time), due to overnight electronic trading, as well as trading in time zones that are up to 16 hours ahead of U.S. Eastern time (Sydney, Australia, from approximately October through March).

As a result, several of the changes the Commission is proposing to part 190 would address these changed circumstances. For instance, proposed § 190.03(b)(2) would remove the current deadline of three days following the entry of an order for relief for the trustee or DSRO to notify the Commission its intent to transfer open commodity contracts. Instead, proposed § 190.03(b)(2) would provide that the trustee or DSRO must notify the Commission of an intent to transfer ''[a]s soon as possible.'' As discussed further below, this change would be in recognition of the fact that a DCO or upstream FCM is unlikely to hold a position open for three days following entry of the order for relief, and that the trustee would be expected to be working on transferring any open positions immediately upon appointment.[193] The Commission believes that the revisions in proposed part 190 that would address the computerized and fast-paced nature of the industry would benefit all parties involved in a bankruptcy proceeding, since the rules would reflect how the industry actually works today and would not unnecessarily delay the administration of a bankruptcy proceeding.

2. Trustee Discretion

In several places in proposed part 190, the Commission would attempt to provide additional flexibility and discretion to the bankruptcy trustee in taking certain actions.[194] For instance, proposed § 190.03(e) and (f) permit the trustee flexibility to modify the proof of claim form to take into account the particular facts and circumstances of the case. Proposed § 190.03(a)(2) would provide that the trustee the discretion to ''establish and follow procedures reasonably designed for giving adequate notice to customers under this part.'' This discretionary approach would be in contrast to the customer notice procedures in current part 190, which are more prescribed and depend on the type of notice being given.[195]

The Commission is of the view that, in general, affording more discretion to the bankruptcy trustee in appropriate circumstances is beneficial, and indeed necessary, where matters are unique and fast-paced, as they often are in commodity broker bankruptcy proceedings. Moreover, each formal approval the trustee is required to obtain takes significant time and involves significant administrative costs, to the detriment of customers, In many areas, it is unlikely that a prescriptive approach can be designed that will reliably be ''fit for purpose'' in all plausible future circumstances.

Therefore, increased discretion of the trustee would benefit the estate by allowing the trustee to make decisions that are uniquely tailored to the particular case, rather than being compelled to follow a procrustean framework, or being required to request formal approval from the Commission or other parties before implementing those decisions. This approach leads to approaches that are better tailored to the specifics of the circumstances, reductions in administrative costs (to the benefit of customers and/or other creditors) and faster distributions of customer property (to the benefit of customers). It is also intended to mitigate the negative externalities arising from the distressed circumstances that tend to result in further reduction in the value of customer assets.

The Commission recognizes, however, that with increased discretion comes a risk of trustee mistake or misfeasance; in other words, a trustee making decisions that turn out not to be in the best interests of the customers or other creditors. While this is certainly a potential cost in situations where the trustee is given increased discretion or flexibility, the Commission believes that this potential cost would be mitigated by (1) the high degree of informal (and, where necessary, formal) involvement of Commission staff in FCM and DCO bankruptcy matters,[196] and (2) the fact that such discretion would not be unbounded and would apply only in particular circumstances, as discussed

[193] Another example appears in proposed § 190.04(b)(4), which provides that a trustee shall liquidate all open commodity contracts in any commodity contract account that is in deficit or for which the customer fails to meet a margin call made by the trustee within a reasonable time. The provision further provides that, ''absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day.'' Proposed § 190.04(b)(4) thus allows for the possibility that, in the event of exigent circumstances, a ''reasonable time'' could be deemed by the trustee to be less than one hour, a possibility that accounts for the fast-paced nature of the industry.

Other revisions that reflect changes to the structure of the industry are reflected in proposed § 190.00(c)(6)(iv), which makes clear that the delivery provisions contained in the proposed regulations apply to any commodity that is subject to delivery under a commodity contract, whether the commodity itself is tangible or intangible, including virtual currencies, and in the definition of ''physical delivery property'' contained in proposed § 190.01, which reflects the fact that a document of title for a commodity can be electronic.

[194] The alternative, to forego providing such flexibility or discretion, would invert the benefits and costs discussed below.

[195] Other examples include proposed § 190.04(d)(3), providing the trustee with discretion to request that a customer deliver substitute customer property with respect to a letter of credit, which ''may equal the full face amount of the letter of credit or any portion thereof, to the extent required or may be required in the trustee's discretion to ensure pro rata treatment among customer claims within each account class;'' proposed § 190.08(d)(5), providing that a trustee shall value certain property ''using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances;'' and proposed § 190.14(a), providing that a trustee in a clearing organization bankruptcy may, in their discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee.

[196] As a formal matter, the Commission has the right to appear and be heard on any issue in any such case. *See* 11 U.S.C. 762(b). As a practical matter, trustees and their counsel have, in previous commodity broker bankruptcies, consulted with Commission staff frequently and on an ongoing basis, particularly in making and implementing important decisions.

below. Therefore, the Commission's judgment in granting discretion to the trustee would apply these principles.

An additional risk related to increased discretion is the possibility that parties that are dissatisfied with the trustee's exercise of discretion may challenge it in court, potentially leading to increased litigation costs. The Commission believes that this risk is mitigated by (1) the fact that certain of these decisions would be made in contexts where the trustee would be seeking an order of the bankruptcy court approving the trustee's approach (and thus the trustee's discretion would be subject to judicial review within a proceeding in which interested parties have an opportunity to object) and (2) the likelihood that bankruptcy courts would respect the Commission's rules granting the trustee discretion, thereby mitigating the cost of such litigation.

Instances where the revisions to proposed part 190 would afford more flexibility or discretion to the bankruptcy trustee are discussed in further detail where they appear in each provision below.

3. Cost Effectiveness and Promptness Versus Precision

In its proposed revisions to part 190, the Commission is endeavoring to effect a proper balance between cost effectiveness and promptness, on the one hand, and precision, on the other hand. Current part 190 favors cost effectiveness and promptness over precision in certain respects, particularly with respect to the concept of pro rata treatment, where, following the policy choice made by Congress in section 766(h) of the Bankruptcy Code, the Commission is proposing that it is more important to be cost effective and prompt in the distribution of customer property (*i.e.,* in terms of being able to treat customers as part of a class) than it is to value each customer's entitlements on an individual basis. The proposed revisions to part 190 would take this concept further, recognizing that there are additional circumstances where cost effectiveness and promptness in the administration of a bankruptcy proceeding should have higher priority than precision. For instance, proposed § 190.05 would provide that the bankruptcy trustee shall use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts and other property as of the close of each business day, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' The quoted language would allow the trustee to avoid more precise calculations where such precision would not be cost effective or could not reasonably be accomplished on a prompt basis (for example, in a situation where price information for particular assets or contracts was not readily available).[197] The Commission believes that these revisions emphasizing cost effectiveness and promptness over precision would further the policy embodied in section 766(h) of the bankruptcy code and benefit parties involved in a bankruptcy proceeding overall, as they would lead to (1) in general, a faster administration of the proceeding, (2) customers receiving their share of the debtor's customer property more quickly, and (3) a decrease in administrative costs. There could, however, be corresponding costs to this approach for some customers in that they may lose out on being treated precisely in terms of their individual circumstances (and may receive a smaller distribution of customer property than otherwise).

4. Unique Nature of Bankruptcy Events

The Commission would recognize in proposed part 190 that there is no one-size-fits-all approach to the administration of the bankruptcy of an FCM or a DCO, and that it would be important that the rules allow the trustee, in conducting that administration, to take into account the unique nature of each of these events. The revisions to proposed part 190, therefore, would address the uniqueness of these bankruptcy events and would allow for the bankruptcy trustee to tailor their approach in the way that most makes sense given the individual circumstances of the case at hand.[198] History has shown that FCM bankruptcies play out in very different ways, and several of the Commission's proposed revisions to part 190 would address that reality. For instance, proposed § 190.03(e) and (f), addressing the customer proof of claim form in an FCM bankruptcy, would allow the trustee, in their discretion, to modify the proof of claim form to take into account the particular facts and circumstances of the particular bankruptcy case rather than using, unmodified, a standardized proof of claim form that may not be appropriate for those circumstances. Similarly, proposed § 190.14(a) would allow the trustee in a DCO bankruptcy, ''in its discretion based upon the facts and circumstances of the case,'' to instruct each customer to file a proof of claim form containing such information as is deemed appropriate by the trustee. These provisions would reflect the fact that each FCM and DCO bankruptcy would present individual circumstances, and that the proof of claim form would likely have to be modified to take into account the unique facts and circumstances of each case. The Commission believes that the revisions of this type would benefit all parties involved in a bankruptcy proceeding by better tailoring such a proceeding to the unique needs of the particular case.

5. Administrative Costs are Costs to the Estate, and Often to the Customers

In many instances in this proposal, the Commission has noted that a certain provision would impose or reduce administrative costs. The Commission notes that, in each of these cases, administrative costs would be a cost to the estate of the debtor, since administrative expenses that the bankruptcy trustee would incur in administering the estate (including for the time of the trustee, accountants, counsel, consultants, etc.) would be passed onto the estate itself, which means that, in the event of a shortfall, such costs would be ultimately be borne by the customers of the debtor, who would receive smaller dividends on their claims as the value of the debtor's estate decreases.[199] By a parity of reasoning, reducing such administrative costs would reduce the shortfall, and increase recoveries by customers.

[197] Another example of advancing the overarching concept of favoring cost effectiveness over precision is in proposed § 190.08(d)(5), which would provide that, in computing net equity, a trustee may value all customer property not otherwise listed in proposed § 190.05(d) using such professional assistance as the trustee deems necessary. This provision, which would replace more specific valuation instructions that currently appear in part 190, would recognize that it is more cost effective for the trustee to enlist whatever professional help they need to value certain types of customer property rather than prescribe certain valuation methods for every type of customer property they may encounter in the course of a bankruptcy proceeding, and thereby would emphasize cost effectiveness over precision.

[198] Circumstances that may vary include the accuracy of the commodity broker's records at the time of bankruptcy, whether the bulk of an FCM's customer accounts were transferred in the days after the filing date (or otherwise migrated in the days before), the number of customer accounts, the existence and extent of a shortfall in customer funds, and the complexity of the positions carried by the commodity broker.

[199] While such costs could in certain cases be borne instead by general creditors, section 766(h) permits customer property to be used to meet ''claims of a kind specified in section 507(a)(2)'' of the Bankruptcy Code (which in turn include claims for the expenses of administering the estate) ''that are attributable to the administration of customer property.''

6. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to the overarching concepts described above. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the overarching concepts discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

*D. Subpart A—General Provisions*

1. Regulation § 190.00: Statutory Authority, Organization, Core Concepts, Scope, and Construction

a. Consideration of Costs and Benefits

Proposed § 190.00 would contain general provisions applicable to all of proposed part 190 that would set forth the concepts that guide the Commission's bankruptcy regulations. While all of proposed § 190.00 is new, in that current part 190 does not contain an analogous regulation, there would be cost-benefit implications only for certain provisions within proposed § 190.00, since the bulk of proposed § 190.00 is designed to explain concepts that would be either (1) not different from those contained in current part 190, but would be simply made explicit in the proposed rules, or (2) new, in that they would not be contained in current part 190, but simply would be concepts that are meant to clarify how revised substantive provisions operate. In the latter case, cost and benefit considerations are addressed with respect to the substantive provisions.

The Commission believes that there would be no cost-benefit implications to the following provisions within proposed § 190.00:

- Proposed § 190.00(a), which would set forth the statutory authority pursuant to which the Commission is proposing to adopt proposed part 190.
- Proposed § 190.00(b), which would describe how the proposed rules are organized into three subparts. The Commission notes that, while the addition of DCO-specific rules in this proposal would be new, the cost-benefit implications of the DCO-specific provisions (proposed §§ 190.11 through 190.18) are discussed separately below.
- Proposed § 190.00(c)(2), which would provide that proposed part 190 establishes four separate account classes, each of which would be treated differently under the proposed rules. In the Commission's view, this provision would be a mere clarification, as current part 190 also establishes different account classes for different types of cleared commodity contracts, and would treat each account class differently.
- Proposed § 190.00(c)(3), which would explain the distinction between ''public customers'' and ''non-public customers,'' and the priority that both public and non-public customers enjoy with respect to distributions of customer property. Both of these concepts exist in current part 190 and would be merely clarified and explained further in proposed § 190.00(c)(3).
- Proposed § 190.00(c)(4), which would clarify that the policy preference behind the rules in subpart B of part 190 is to transfer a debtor FCM's customers' open commodity contract positions to another FCM (frequently referred to as ''porting'' customer positions) rather than liquidating those customer positions.
- Proposed § 190.00(c)(5), which would explain that proposed part 190 applies the concept of pro rata distribution when it comes to shortfalls of property in a particular account class. In the Commission's view, this provision would not add anything new to part 190 and would be merely explanatory, as current part 190, consistent with section 766(h) of the Bankruptcy Code, also rests on the concept of pro rata distribution.
- Proposed § 190.00(d)(1)(i)(A), which would provide that the definition of ''commodity broker'' in proposed part 190 covers both ''futures commission merchants'' and ''foreign futures commission merchants'' because both are required to register as a FCMs under the CEA and Commission regulations.
- Proposed § 190.00(d)(1)(ii), which would provide that proposed part 190 applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under the CEA when the debtor also is an FCM. In the Commission's view, this provision would be merely explanatory.
- Proposed § 190.00(d)(2)(i), which would state that the bankruptcy trustee may not recognize any account class that is not one of the account classes enumerated in proposed § 190.01. This provision, again, would be a mere clarification that is not meant to add anything new to proposed part 190.
- Proposed § 190.00(d)(3), which would set forth the transactions that are excluded from the definition of ''commodity contract.'' This provision, in the Commission's view, merely would explain and carry over concepts that are already embedded in current part 190.
- Proposed § 190.00(e), which would set forth rules of construction concerning amendments to statutes and regulations referred to in proposed part 190, and defining the relationship between proposed part 190 and statutes and other regulations. In the Commission's view, these rules of construction would have no cost-benefit implications, as they merely would make explicit the Commission's expectations with respect to a very narrow set of issues involved in reading and interpreting the provisions in proposed part 190.

The Commission believes that there would be cost-benefit implications to the following provisions within proposed § 190.00:

- Proposed § 190.00(c)(1) would state that proposed part 190 is limited to a commodity broker that is (1) an FCM as defined by the CEA and Commission regulations, or (2) a DCO under the CEA and Commission regulations. Current part 190 applies to a broader set of ''commodity brokers,'' including FCMs, clearing organizations, commodity options dealers, and leverage transaction merchants. This proposed narrowing of the application of part 190 (by excluding the empty categories of commodity options dealers and leverage transaction merchants) would benefit the Commission, the bankruptcy estate, and customers by allowing the Commission to propose regulations that are better tailored to the new, narrower, set of commodity brokers that are covered by the proposed regulations (and thus, less complex).[200] There would a corresponding cost, in that the Commission would need to develop such regulations, if and when a commodity options dealer or leverage transaction merchant registers as such.
- Proposed § 190.00(c)(6) would discuss the treatment of commodity contracts that require delivery performance. As in current part 190, proposed part 190 would reflect a policy preference for a bankruptcy trustee to liquidate commodity contracts that settle via delivery before they move into a delivery position. When that cannot be done, however, and when parties to a commodity contract incur delivery obligations, the regulations in proposed part 190 would direct the trustee to use reasonable efforts to allow a customer to fulfill its delivery obligation directly, outside administration of the debtor's estate, when the rules of the relevant

[200] Moreover, prescribing regulations that are intended to be applicable to entities that, at some unknown point in the future, enter these empty categories risks poor tailoring due to lack of data concerning the characteristics of those unknown future entrants.

market or clearinghouse allow delivery to be fulfilled (1) in the normal course directly by the customer, (2) by substitution of the customer for the commodity broker, or (3) through agreement of the buyer and seller to alternative delivery procedures. This is contrast to current § 190.05(b), which requires a DCO, DCM, or SEF to enact rules that permit parties to make or take delivery under a commodity contract outside the debtor's estate, through substitution of the customer for the commodity broker. The proposed regulations, in allowing for more flexibility in how a customer could effect delivery outside of the debtor's estate, would benefit customers by allowing for a more bespoke approach to effecting delivery when customers incur delivery obligations under their open commodity contracts. There, however, would be costs in acting in such a bespoke fashion in contrast to following standards established during business as usual.

• Proposed § 190.00(d)(1)(i)(B) would note that there are currently no registered leverage transaction merchants or commodity options dealers, and that the Commission would adopt rules with respect to leverage transaction merchants or commodity options dealers at such time as an entity registers as one of those categories of commodity brokers. This change would benefit the Commission in terms of cost effectiveness by allowing the Commission to propose bankruptcy rules specifically tailored to leverage transaction merchants or commodity options dealers only in the event an entity registers as such. In the event that happens, there would be costs involved in doing so. It is possible that the cost of such a separate rulemaking or rulemakings would be greater than the marginal costs of proposing and finalizing such rules as part of this rulemaking.

• Proposed § 190.00(d)(1)(iii), would provide that proposed part 190 shall serve as guidance as to the distribution of customer property and member property in a proceeding in which the FDIC is acting as receiver pursuant to title II of Dodd-Frank. Section 210(m)(1)(B) of title II,[201] requires the FDIC, where the covered financial company or bridge financial company is a commodity broker, to apply the provisions of subchapter IV as if the financial company were a debtor for purposes of such subchapter. This provision would have the benefits associated with transparently providing to FDIC during business-as-usual the guidance of the agency with regulatory and supervisory responsibility for supervising commodity brokers (*i.e.,* FCMs and DCOs).[202]

• Proposed § 190.00(d)(2)(ii) would provide that no property that would otherwise be included in customer property shall be excluded from customer property because it is considered to be held in a constructive, resulting, or other trust that is implied in equity. This provision would have the benefit of supporting the statutory policy of pro rata distribution for the pool of customers, by ensuring that all property that properly belongs in the category of ''customer property'' would be considered such customer property. It would mitigate the friction costs of particular customers structuring their relationships with their FCMs in order to establish such a trust for the purpose of thwarting their exposure to pro rata distribution, as well as the friction costs of litigation within the bankruptcy proceeding over the effectiveness of such structures in achieving that goal.

• However, this approach would impose costs on those customers, if any there be, who would otherwise endeavor to rely on the trust concept to shield certain of their property from entering the pool of customer property. Such customers might (despite opposition from the Commission and the trustee) otherwise be successful in litigation over the effectiveness of such arrangements, or may obtain settlements that would benefit their individual claims (albeit to the detriment of other customers, and to the policy of pro rata distribution).

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.00. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

2. Regulation § 190.01: Definitions

a. Consideration of Costs and Benefits

Proposed § 190.01 would set forth definitions as they are used for purposes of proposed part 190. In the Commission's view, only certain of the definitions in proposed § 190.01 would have any cost-benefit implications, and these are discussed in more detail below. The rest of the definitions would set forth in proposed § 190.01, in the Commission's view, would not impose any costs or benefits, as the changes to the definitions would be minor (in the vein of, for example, updating cross-references or updating language to reflect the changes in the rest of proposed part 190) or merely would clarify the current definition.

Where, in the Commission's view, a definition in proposed § 190.01 would have cost-benefit implications, those implications are discussed in more detail below:

• ''Account class,'' ''cash delivery property,'' and ''physical delivery property:'' The definition of the term ''account class'' would be expanded to include definitions of each type of account class set forth in proposed part 190: futures account, foreign futures account, cleared swaps account, and delivery account. Including a specific definition of each type of account class would benefit all parties involved in a bankruptcy proceeding by ensuring that all parties would have a common understanding of how these various types of accounts would be defined for purposes of part 190.

• The proposed definition of ''account class'' also would remove the category in current part 190 of ''leverage account'' because, as noted above, there are currently no registered leverage transaction merchants. Rather, the Commission would adopt rules with respect to leverage transaction merchants (and, accordingly, with respect to leverage accounts) at such time as an entity registers as such. Removal of the category of ''leverage account'' from the ''account class'' definition would benefit market participants by allowing the Commission to propose bankruptcy rules specifically tailored to leverage transaction merchants (and, accordingly, to leverage accounts) in the event an entity registers as such. As noted above with respect to § 190.00(d)(1)(i)(B), in the event of the registration of a leverage transaction merchant, there would be costs involved in proposing and finalizing such

[201] 12 U.S.C. 5390(m)(1)(B).

[202] DCOs operate nearly 24-hours a day, between Sunday afternoon and Friday evening. Moreover, the risks that a DCO is required to manage are based on market movements and events (including in OTC markets) that may occur whether or not the DCO is able to operate. Accordingly, FDIC staff (in cooperation with Commission staff) engage in significant efforts to plan for the unlikely event that resolution under Title II would be necessary for a DCO.

Thus, there is a public benefit to facilitating FDIC's efforts in resolution planning for DCOs by setting forth clearly guidance as to the distribution of customer property and member property in a DCO resolution proceeding.

tailored rules. It is possible that the cost of such a separate rulemaking or rulemakings would be greater than the marginal costs of proposing and finalizing such rules as part of this rulemaking.

The proposed definition of ''account class'' also would split ''delivery accounts'' into separate physical and cash delivery account classes. Because cash delivery property is, in some cases, more difficult to trace to specific customers and more vulnerable to loss,[203] this separate treatment of physical delivery property and cash delivery property would benefit customers with physical delivery property by allowing for more prompt distribution of such physical delivery property. This separation would also benefit the estate, because the trustee would not have to wait to distribute physical delivery property to customers while attempting to trace cash delivery property, which could result in a more prompt resolution of the bankruptcy as a whole. However, there would be potential added costs in the form of complications, in that the trustee will have to deal with two delivery account subclasses rather than one delivery account class. Moreover, in the event of a shortfall, some customers could ultimately obtain larger recoveries, while others could obtain smaller recoveries.

Pursuant to section 4d of the CEA, certain contracts and associated collateral that would be associated with one account class may instead (pursuant to, *e.g.,* Commission regulation [204] or order) be commingled with a different account class.[205] The purpose of such arrangements is to associate such contracts with an account class in which they are risk-reducing related to other contracts in that latter account class.

Paragraph (2) of the definition of account class confirms that such arrangements will be respected in bankruptcy, that is, such contracts and associated collateral will be treated as being part of the account class into which they are commingled. The benefit of this treatment in bankruptcy would be to foster such risk-reducing (and margin-efficient) arrangements during business as usual; there would be no associated costs in bankruptcy.

Finally, paragraph (3) of the definition addresses cases where a commodity broker's account for a customer is non-current, or otherwise inaccurate, a matter over which the customer has, at best, limited control. Paragraph (3) would confirm that a commodity broker is considered to maintain an account for a customer where it establishes internal books and records for the customer's contracts and collateral and related activity, regardless of whether the commodity broker has kept those internal books or records current or accurate. The benefit of this treatment would be to treat customers in accordance with their entitlements, regardless of whether the commodity broker has maintained its books and records current or accurate.

- ''Customer,'' ''Customer class,'' ''public customer,'' and ''non-public customer:'' The definition of the terms ''public customer'' and ''non-public customer'' would be revised to include separate definitions of those terms for FCMs and DCOs. This change would reflect the new organization of proposed part 190, which would include separate provisions for when the debtor is (1) an FCM (subpart B), and (2) a DCO (subpart C). The ''public customer'' definition for FCMs also would be revised to define that term with respect to each of the relevant account classes.

These changes likely would result in the benefit of clarifying and making more transparent who qualifies as a ''public'' versus a ''non-public'' customer, a categorization which would have an effect on the distribution of property to which each customer is entitled. This clarity and transparency would, in turn, tend to reduce the administrative costs (to the estate and to claimants) involved in the claims allowance process, as well as the likelihood (and cost) of litigation by dissatisfied claimants. These changes could, however, impose costs on any customers (if they exist) for whom, under current part 190, it would not be clear which category they fall into. Given that the pool of customer property would be different for public and non-public customers, a hypothetical customer who could have been considered ''public'' under current part 190 but would be categorized as ''non-public'' under proposed part 190 could receive less in the distribution of customer property (with other customers receiving more).

- ''Futures, futures contract:'' The Commission is proposing to add a definition for the terms ''futures'' and ''futures contract'' to clarify what those terms mean for purposes of proposed part 190. This clarification would serve the goals of clarity and transparency (and, consequently, reducing administrative costs) by making it more explicit, and transparent, which types of transactions are considered ''futures'' and therefore form part of the futures account or foreign futures account.
- ''House account:'' The definition of the term ''house account'' would be revised to include separate definitions of that term for FCMs, foreign FCMs and DCOs, in a manner that clarifies the connection between the concept of a ''house account'' in part 190 and the concept of a proprietary account in § 1.3. This change would reflect the new organization of proposed part 190, which now includes separate provisions for when the debtor is (1) an FCM (subpart B), or (2) a DCO (subpart C). This change would serve the goals of clarity and transparency (and, consequently, reducing administrative costs) by clarifying what precisely constitutes a house account for purposes of each type of proceeding.
- ''Primary liquidation date:'' The definition of the term ''primary liquidation date'' would be revised to remove the reference to accounts being held open for later transfer, as currently reflected in § 190.03(a). The concept of holding certain commodity contracts open for later transfer would be removed from proposed part 190 in favor of a policy of transferring as many open commodity contracts as possible within a particular timeframe after entry of an order for relief [206] or, if that is not possible, liquidating such commodity contracts. The proposed definition of ''primary liquidation date'' would reflect this preferred policy. This change in policy would benefit some customers, who would be able to avoid having their open commodity contracts liquidated in favor of transferring such contracts to another commodity broker. It could, however, impose costs on any customers, if they exist,[207] who might have benefited from having their open commodity contracts held open for transfer after the primary liquidation date (by, for instance, being able to transfer such contracts to a preferred commodity broker). In the hypothetical event that a larger number of contracts is liquidated rather than transferred, that additional quantum of liquidation may result in additional (downward) pressure on prices. This policy shift

[203] These reasons for this difficulty and vulnerability are discussed above in section II.B.4 in the explanation of the changes to proposed § 190.06(b).

[204] *See* § 39.15(b)(2), which provides a mechanism for these arrangements to be implemented pursuant to clearing organization rules.

[205] Securities positions may also be commingled in an account class subject to section 4d of the CEA, 7 U.S.C. 6d.

[206] *See* proposed § 190.04(a)(1).

[207] Given that the clearing organization for such contracts may not be willing to permit such contracts to be held open for an extended period of time, the existence of such customers is indeed hypothetical.

could also impose administrative costs, since the bankruptcy trustee may expend time and effort to carry out its obligation to use its ''best efforts'' to transfer all open commodity contracts prior to the primary liquidation date.

• ''Specifically identifiable property:'' The Commission is proposing to revise the definition of the term ''specifically identifiable property'' to update, clarify and streamline the current definition of that term. These updates, clarifications and streamlining edits would serve the goals of clarity and transparency (and, consequently, reducing administrative costs). Of course, increasing clarity and transparency may be to the detriment of those customers (if any there be) for whom such clarity results in assignment to a less favorable category.

• ''Substitute customer property:'' The definition of the term ''substitute customer property'' would be added to refer to cash or cash equivalents delivered to the trustee by or on behalf of a customer in order to redeem specifically identifiable property or a letter of credit. This provision would benefit customers who, in a bankruptcy event, would like to redeem their specifically identifiable property or letters of credit and, under the current rules, have no way to do so.[208] Introducing the concept of substitute customer property could impose administrative costs, however, because the trustee would have to expend time and resources on accounting for the substitute customer property and ensure that such property ends up in the proper pool of customer property once received.

• ''Swap:'' The Commission would amend the definition of ''cleared swap'' that appears in the current rules in order to clarify what this term means for purposes of proposed part 190. This clarification would serve the goals of clarity and transparency (and, consequently, reducing administrative costs).

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.01. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits to the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

3. Regulation § 190.02: General

a. Consideration of Costs and Benefits

Proposed § 190.02(a)(1) would provide that the bankruptcy trustee may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in proposed part 190. This is in contrast to current § 190.10(b)(1), which provides only that a bankruptcy trustee may request an exemption from, or extension of, any time limit prescribed in current part 190. This change could benefit the estate, the Commission, and customers by allowing the trustee to request an exemption from a requirement in proposed part 190 that would lower administrative costs and increase timeliness. This change could, however, impose administrative costs if the trustee's request is ill-founded and the Commission were nonetheless to grant the request.

The Commission does not believe that there would be any cost-benefit implications to proposed § 190.02(a)(2) and (3), (b), (c), (d), and (e), as those sections largely align with the provisions in current part 190 from which they would be derived.

Proposed § 190.02(f) is a new paragraph which would explicitly allow a receiver appointed due to a violation or imminent violation of the customer property protection requirements of section 4d of the CEA or of the regulations thereunder, or of the FCM's minimum capital requirements in § 1.17 of this chapter, to file a petition for bankruptcy of such FCM in appropriate cases. This provision may benefit customers, in that a bankruptcy proceeding may be necessary to protect customers' interests in customer property. However, this provision could also impose costs on the customers, who may not receive as much as they otherwise would have under the receivership. In addition, there could be additional administrative costs that result from this provision, as the bankruptcy trustee would have to spend time and resources overseeing a bankruptcy proceeding that might not be entered into under the current rules; these costs could possibly be greater than the costs of continuing to administer the FCM under receivership.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.02. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

4. Section 15(a) Factors—Subpart A

a. Protection of Market Participants and the Public

Subpart A of the proposed rules would increase the protection of market participants and the public by clearly setting forth how customers of FCMs and DCOs will be classified and treated, and how their accounts will be categorized and treated, in the event of an FCM or DCO insolvency. The goal of subpart A of the proposed rules would be to promote clarity in terms of how the insolvency of an FCM or DCO would proceed, and to increase transparency to the customers of FCMs and DCOs as to how their property would be treated in the event of such an insolvency.

b. Efficiency, Competitiveness, and Financial Integrity

Subpart A of the proposed rules would promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of FCMs and DCOs and the financial integrity of derivatives transactions carried by FCMs and/or cleared by DCOs by clearly communicating the goals and core concepts involved in such insolvencies, and by setting forth clear definitions that have been updated to account for current market practices. These effects would, in turn, enhance the competitiveness and financial integrity of U.S. FCMs and DCOs, by enhancing market confidence in the protection of customer funds and positions entrusted to U.S. FCMs and DCOs, even in the case of insolvency.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. To the extent that the proposed regulations would mitigate the need for liquidations in conditions of distress, they would avoid negative impacts on price discovery.

d. Sound Risk Management Practices

Subpart A of the proposed rules would generally promote sound risk management practices by setting forth the core concepts to which the bankruptcy trustee must adhere in

[208] Benefits and costs associated with the use of substitute customer property are addressed further below in connection with proposed § 190.04(d)(3) in section IV.E.2.

administering an FCM or DCO bankruptcy.

e. Other Public Interest Considerations

Some of the FCMs or DCOs that might enter bankruptcy are very large financial institutions, and some are (or are part of larger groups that are) considered to be systematically important. An effective bankruptcy process that efficiently facilitates the proceedings is likely to benefit the financial system (and thus the public interest), as that process would help to attenuate the detrimental effects of the bankruptcy on the financial network.

*E. Subpart B—Futures Commission Merchant as Debtor*

1. Regulation § 190.03: Notices and Proofs of Claims

a. Consideration of Costs and Benefits

Proposed § 190.03(a)(1) would replace the requirement in current § 190.10(a) that all mandatory or discretionary notices be sent to the Commission via overnight mail with the requirement of sending the notices by electronic mail.[209] This change would result in a benefit to all parties required to provide notices to the Commission because they would be able to avoid the costs of sending such notice in hardcopy form via overnight mail. These revisions would also allow the Commission to receive such notices—and thus, to act—much more expeditiously.

Proposed § 190.03(a)(2), which is new, would replace the more specific procedures for providing notice to customers that appear in current § 190.02(b), allowing the trustee to establish and follow procedures ''reasonably designed'' for giving adequate notice to customers.[210] Proposed § 190.02(a)(2) also would provide that the trustee's procedures for providing notice to customers should include ''the use of a prominent website as well as communication to customers' electronic addresses that are available in the debtor's books and records.'' Such a generalized and more modernized approach to notifying customers would benefit the debtor's estate by leading to administrative cost savings, as the trustee would be able to choose cost effective means of providing notice to customers within the more flexible bounds of the proposed regulation. Similarly, it would benefit parties interested in the proceedings, by permitting the trustee flexibly to choose methods of notification that are more prompt and effective. On the other hand, affording the trustee increased discretion in how to provide notice to customers would carry the potential cost of trustee misfeasance and abuse of such discretion, as discussed above.

Proposed § 190.03(b)(1) would revise the time in which a commodity broker must notify the Commission of a bankruptcy filing. In particular: (1) In the event of a voluntary bankruptcy filing, the commodity broker would be required to notify the Commission and the appropriate DSRO as soon as practicable before, and in any event no later than, the time of filing, and (2) in the event of an involuntary bankruptcy filing or an application for a protective decree under SIPA, the commodity broker would be required to notify the Commission and the appropriate DSRO immediately upon the filing of such petition or application. These revisions would codify expectations that (1) in a voluntary bankruptcy proceeding, the commodity broker will provide advance notice to the Commission ahead of the filing to the extent practicable, and (2) in an involuntary bankruptcy proceeding, the commodity broker notify the Commission immediately upon the filing. With respect to a voluntary bankruptcy filing, the Commission expects that both the Commission and the relevant DSRO would be aware of any financial circumstances in the lead-up to a bankruptcy filing in accordance with the mandatory reporting requirements in § 1.12; the revision in proposed § 190.03(b)(1) merely would codify the expectation that the FCM would notify the Commission of the actual bankruptcy filing as soon as practicable before, and in no event later than, the time of the filing. In addition, proposed § 190.03(b)(1) also would allow a commodity broker to provide the relevant docket number of the bankruptcy proceeding to the Commission ''as soon as known,'' while not waiting on notifying the Commission of the filing itself, to account for the potential time lag between the filing of a proceeding and the assignment of a docket number. These revisions would foster the ability of the Commission and its staff to perform their duties by providing the Commission with notice of any bankruptcy proceeding as soon as possible.

Proposed § 190.03(b)(2) would remove the current deadline of three days after the order for relief by which the trustee, the relevant DSRO or a clearing organization must notify the Commission of an intent to transfer or to apply to transfer open commodity contracts in accordance with section 764(b) of the Bankruptcy Code, instead instructing such parties to give such notice ''[a]s soon as possible'' of an intent to transfer. The Commission expects that the bankruptcy trustee would begin working on transferring any open commodity contracts as soon as the trustee is appointed and that, by the end of three days following entry of the order for relief, any such transfers likely will be either completed, actively in process or determined not to be possible. Indeed, the Commission does not expect that a DCO would be likely to hold a position open for more than three days following entry of the order for relief unless a transfer is actively in process and imminent. Thus, while the Commission recognizes that the ''[a]s soon as possible'' language is somewhat vague, given past experience, the Commission views the current timeframe of three days after entry of the order for relief as generally too long, and it is not clear what precise shorter period of time would be generally appropriate, given the unique circumstances of each case. Under different circumstances, that is, where transfer arrangements cannot be made within three days after the order for relief, this revision would benefit the estate and some customers by removing time constraints that could be construed to prohibit notification after expiration of the deadline (and thus, prohibit the trustee from forming the intent to transfer after that time).

The revision would also enhance the Commission's ability to fulfil its responsibilities to customers and the markets by facilitating prompt notice of an intent to transfer. On the other hand, by giving the trustee, DSRO, or clearing organization more latitude for providing notice of an intent to transfer, there would be the potential cost of misfeasance in waiting an unreasonable amount of time to provide such notice (or to form such intent), which could ultimately impose additional costs on

[209] *See also* proposed § 190.03(d), which is proposing to adopt this new method of providing notice to the Commission for any court filings filed in a bankruptcy.

[210] Proposed § 190.03(a)(2) would be referenced throughout proposed § 190.03 as the proper procedure for providing notice to customers in various circumstances. As an example, proposed § 190.03(c)(1) deletes the requirement in current § 190.02(b)(1) that the trustee publish notice to customers regarding specifically identifiable property in a newspaper for two consecutive days prior to liquidating such property, in favor of the more flexible approach for notice set forth in proposed § 190.03(a)(2). Similarly, *see* proposed § 190.03(c)(3), which requires a trustee appointed in an involuntary proceeding to notify customers of the commencement of such a proceeding, and § 190.03(c)(4), which requires the trustee to notify customers that an order for relief has been entered, both of which require that such notice be made in accordance with the flexible notice provisions set forth in proposed § 190.03(a)(2).

customers who would have benefited from an earlier transfer.

Proposed § 190.03(c)(1) would no longer require the trustee to publish notice to customers with specifically identifiable property in a newspaper of general circulation serving the location of each branch office of the debtor prior to liquidating such property, instead requiring notification to customers with specifically identifiable property in accordance with proposed § 190.03(a)(2). Administrative costs would decrease, as the trustee would thus be relieved of the cost of identifying, and publishing notice in, such newspapers. Moreover, under the proposed regulation, the trustee would no longer have to wait seven days after the second publication date to commence liquidation of specifically identifiable property. Rather, under proposed § 190.03(c)(1), the trustee would be free to commence liquidation of specifically identifiable property starting on the seventh day after entry of the order for relief, which would benefit the estate, and potentially the affected customers, by allowing the trustee more freedom (from the time constraints set forth in the current regulations) in liquidating the specifically identifiable property, which could ultimately result in a better price. Moreover, by using the notice provisions that would be set forth in proposed § 190.03(a)(2) to notify customers with specifically identifiable property, such customers would benefit from receiving notice on a ''prominent website'' and, more specifically, at their electronic addresses to the extent such addresses are in the debtor's books and records, thereby increasing the chances that a customer who would like their specifically identifiable property returned could request such a return within the specified timeframe.

Proposed § 190.03(c)(2) would provide the bankruptcy trustee with authority to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor's records as specifically identifiable property.[211] This would be a change from the current framework, under which the trustee treats customers with specifically identifiable property on a bespoke basis; specifically, to the extent the trustee does not receive transfer instructions regarding a customer's specifically identifiable open commodity contracts, the trustee would be required to liquidate such contracts within a certain time period. To the extent the trustee would exercise the authority derived from proposed § 190.03(c)(2), they would be required to notify each relevant customer and request instructions whether to transfer or liquidate the open commodity contracts. To the extent the trustee would not exercise such authority, the trustee would treat these open commodity contracts the same as other customer property and effect a transfer of such contracts. This new framework would reduce administrative costs and benefit the bankruptcy estate by allowing the trustee to rely on hedging designations made during business as usual, thereby allowing the trustee to make swift and cost effective decisions regarding the treatment of open commodity contracts during a bankruptcy situation. However, it is possible that some customers would have been in a better position if treated on a bespoke basis.

The Commission does not believe that there would be any cost-benefit implications to proposed § 190.03(c)(3) or (4), other than those discussed above with respect to the new notice provision referenced in each, or to proposed § 190.03(d).

Proposed § 190.03(e), like its analog in current § 190.02(d), would set forth the information required from customers regarding their claims against the debtor. As revised, proposed § 190.03(e), would reorganize and add certain information items to those listed in the current regulation including, for example, account numbers for accounts held by the claimant with the debtor,[212] whether the account is an individual retirement account for which there is a custodian,[213] and information regarding any accounts held by the claimant with the debtor that are not commodity contract accounts.[214] The Commission anticipates that, while customers are likely to have this information at their disposal, there could be costs associated with gathering it all in one place. However, this additional and more detailed information would benefit the estate, the bankruptcy court and customers alike by allowing all parties to have a fuller, more detailed and more transparent picture of the customer claims against the debtor. It would foster the reduction of administrative costs and the prompt administration of the estate. Moreover, the Commission is of the view that clarifying several of the information items listed in proposed § 190.03(e) and revising the proof of claim form to match more closely the text of the proposed regulation would result in benefits to all parties involved in an FCM bankruptcy—the estate, the bankruptcy court, and the customers—by making the bankruptcy claims process more prompt and cost effective.

This proposed regulation also would provide that the specific items referred to would be included ''in the discretion of the trustee.'' This discretion would permit the trustee to tailor the information requested to the specifics of the debtor's prior business, as well as the already-available records. This would permit the trustee to limit or to increase the information requested, in appropriate cases, with a corresponding increase in cost effectiveness. To be sure, there could be corresponding costs (both in administrative expense and time) if the set of information requested by the trustee in the exercise of their discretion turns out, in retrospect, to be overly narrow (or broad).

Proposed § 190.03(f) is a new paragraph which would provide the trustee with flexibility to modify the customer proof of claim form set forth in appendix A to proposed part 190. Specifically, proposed § 190.03(f) would allow the trustee to modify the proof of claim form to take into account the particular facts and circumstances of the case. This provision would benefit the estate because the trustee would be able to modify the proof of claim form in a way that gathers the information necessary in a manner that is both effective and cost effective based on the specific facts of the case, and the trustee would no longer be required to get an order from the bankruptcy court to make such modifications, thereby saving time and resources. This new proposed section would also benefit customers, who would be able to take advantage of the more streamlined and tailored proof of claim forms developed by the trustee, and would therefore spend less time filling out such forms, and the estate, which would bear less administrative cost in evaluating such forms. Again, there could be corresponding administrative costs if the set of information in a modified proof of claim form turns out, in retrospect, to be overly narrow (or broad).

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.03. Are there additional costs or benefits that the Commission should consider? Is the information called for in proposed § 190.03(e) and the template proof of claim form in fact readily available to customers? If not, what changes should be made?

[211] *See* proposed § 190.10(b)(2) for the process of designating an account as a ''hedging account.''

[212] Proposed § 190.03(e)(3)(i).

[213] Proposed § 190.03(e)(3)(vii).

[214] Proposed § 190.03(e)(4).

Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? In particular, what desirable results may be sacrificed by deleting existing requirements for newspaper publication? What are the costs associated with newspaper publication? Do the cost savings from deleting the requirement outweigh the associated loss?

Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

2. Regulation § 190.04: Operation of the Debtor's Estate—Customer Property

a. Consideration of Costs and Benefits

In proposed § 190.04(a), the Commission would revise current § 190.02(e). The revisions would identify explicitly a policy by which the trustee should use best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers, while largely retaining the current provisions. The proposed changes would set forth a clear policy for trustees to follow, which would benefit customers of the failed FCM in a more streamlined description of the transfer process that is consistent with the core concepts set forth in this part. Thus, the Commission estimates that there would be very little to no cost to the changes.

In addition in proposed § 190.04(a)(1), the Commission is proposing to replace the term ''equity'' with ''property,'' in order to clarify that the transfer is for all types of property that the commodity broker is holding on behalf of customers, rather than limited to equity. The Commission is also proposing to add the word ''public'' before ''customer'' to clarify that the transfers discussed in the regulation related to the open commodity contracts and property of the debtor's public customers. In each case, the Commission believes that the changes would clarify the existing regulation to conform to how it has been interpreted in the past, as demonstrated by industry practice. Thus, the type of property transferred would be unlikely to change. Nevertheless, the clarification would benefit customers of the failed FCM by minimizing the likelihood of future disputes concerning qualification of property for transfer. As compared to the text of the current regulation, the revision would be intended to reduce costs for customers and would be designed to increase the amount of property transferred following a default. Based on how the existing regulation has been interpreted in the past, as demonstrated by industry practice in prior bankruptcy proceedings, no additional costs would be anticipated.[215]

Proposed § 190.04(a)(2) is derived from current § 190.02(e)(2) and concerns transfers by a commodity broker against which an involuntary petition in bankruptcy has been filed. As discussed in more detail in section II.B.2 above, both the current and the proposed regulations require such a commodity broker to use best efforts to effect a transfer within seven calendar days. The current regulation also limits such a commodity broker to trading for liquidations only unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court. Proposed § 190.04(a)(2) deletes this limitation. Rather, proposed § 190.04(e)(4) more generally would cover limitations on the business of an FCM in bankruptcy. Similarly any requirement to transfer customers would be more properly addressed by § 1.17(a)(4).[216] Accordingly, the benefit would be the removal of redundant regulation (and corresponding mitigation of administrative costs). The Commission does not anticipate any resulting increase in cost.

In proposed § 190.04(b)(1), the Commission is clarifying and updating conditions under which the trustee may make variation and maintenance margin payments on behalf of the FCM debtor's customers via five changes to the current regulation, § 190.02(g)(1). First, the proposed regulations would replace the phrase ''variation and maintenance margin payments'' with ''payments of initial margin and variation settlement'' which, in the Commission's view, more accurately would describe the types of payments being reflected in this provision. Second, the proposed regulation would replace the phrase ''to a commodity broker'' with ''to a clearing organization, commodity broker, foreign clearing organization or foreign futures intermediary'' to account for the various types of entities to which a margin payment described in this provision may be made. Third, the proposed revisions would permit the trustee to make margin payments pending *transfer* or liquidation rather than just pending liquidation. Fourth, the proposal would delete the phrase ''required to be liquidated under current paragraph (f)(1) of this section'' and instead applies more broadly to any open commodity contracts. In sum, the revisions would clarify that payments can be made prior to pending transfers or liquidation, not just pending liquidation. The revision would benefit the customers of the FCM debtor in clarifying that the trustee has two paths in treating open commodity contracts—transfer, and if transfer is not possible, liquidation. This change would clarify powers the trustee already had available under the Bankruptcy Code and would have no associated costs. More specifically, the changes would describe more accurately the types of payments that the trustee would be able to make and to account specifically for the types of entities to which the trustee would be able to make the types of payments referred to in this paragraph. Finally, the deletion in the last portion of the paragraph is being proposed in order to prevent a misreading of the current provision, which could be read to prohibit margin payments for contracts that are being held open, which would undermine the trustee's ability to hold the contracts open. The revisions to proposed § 190.04(b)(1) would clarify the current regulatory text, which should benefit stakeholders. The Commission does not anticipate any increased cost from the changes.

Proposed § 190.04(b)(1)(i) is derived from current § 190.02(g)(1)(i), which would prevent the trustee from making any payments of behalf of any commodity contract account that is in deficit, to the extent within the trustee's control. The proposal would add the explicit phrase ''to the extent within the trustee's control'' and would add a proviso noting that the regulation shall not be construed to prevent a clearing organization, foreign clearing organization, FCM or foreign futures intermediary carrying an account of the debtor from exercising its rights to the extent permitted under applicable law. The proposal would recognize that certain accounts may be held on an omnibus basis on behalf of many customers. To the extent the trustee is making a margin payment with respect

[215] The Commission is proposing the same change—the addition of the word ''public'' before ''customers'' to proposed § 190.04(a)(2). The anticipated cost and benefit analysis of the change would be the same as in proposed § 190.04(a)(1).

[216] Reg. § 1.17(a)(4) provides that an FCM that is not in compliance with the minimum financial requirements established by § 1.17, or is unable to demonstrate such compliance as required by § 1.17(a)(3), or cannot demonstrate that it has sufficient access to liquidity to operate as a going concern, must transfer all customer accounts and immediately cease doing business as an FCM until such time as it is able to demonstrate compliance. The FCM is nonetheless authorized to trade for liquidation purposes only unless otherwise directed by the Commission or the DSRO, or may be allowed by the Commission or the DSRO up to 10 business days in which to achieve compliance without having to transfer accounts.

to such an omnibus account, it may be out of the trustee's control to only make payment with respect to those customer accounts that are not in deficit. Thus, this change would reflect the nature of the omnibus accounts that are part of the regulatory and statutory framework. The proviso similarly would clarify that this prohibition on making margin payments on behalf of accounts in deficit is not intended to prohibit entities from exercising legal rights to margin under applicable law. Due to the structure of the accounts and the explicit requirement of lack of trustee control, any payments that would be made under the new provision would have been made pursuant to Commission authorization under the current regulation. Thus, neither provision would add any new regulatory burden and the Commission does not estimate that there would be any additional cost associated with the proposed changes.

Proposed § 190.04(b)(1)(ii) is a new regulation that would add an explicit restriction that the trustee cannot make a margin payment with respect to a specific customer account that would exceed the funded balance of that account. This restriction would support the pro rata distribution principle discussed in proposed § 190.00(c)(5), and would benefit the other customers of the FCM debtor—any payment of customer property in excess of a particular customer's funded balance would be to the detriment of other customers. This change would be a clarification of the statutory requirements applicable to the customer account.[217]

Proposed § 190.04(b)(1)(iii) would be a minor, non-substantive clarification of current § 190.02(g)(1)(ii), that would not create any changes from the status quo with regards to costs and benefits.

In proposed § 190.04(b)(1)(iv)–(v), the Commission is expanding current § 190.02(g)(1)(iii) to clarify that margin must only be used (*i.e.,* paid to a clearing organization or upstream intermediary) consistent with section 4d of the CEA. Proposed § 190.04(b)(1)(vi) would revise the language in current § 190.02(g)(1)(iv), which states that ''no payments need be made to restore initial margin.'' The current regulation implies that the trustee *may* make such upstream payments, but does not specify the circumstances in which the trustee may do so. As discussed in detail in section II.B.2 above, proposed § 190.04(b)(1)(vi) would state explicitly the conditions under which the trustee may make payments to meet margin obligations. Together, these changes protect customers who make payments after the order for relief by ensuring that they fully benefit from those payments (and thus encourage customers to make such payments in appropriate circumstances). Moreover, more clearly permitting the trustee, for the purpose of curing customer margin deficiencies, to use funds in an account class that exceed the sum of all of the net equity claims for that account class, would facilitate the orderly transfer of positions and contracts following the default, lessening the potential for further roiling markets. Finally, these changes taken together also benefit the broader group of customers of the FCM debtor by clarifying the treatment of funds in segregated accounts, and thus mitigating administrative costs.

These changes would be a clarification of the statutory requirements applicable to funds in the customer account. While there would be accounting requirements associated with funds in segregated accounts, substantially all of the costs of such accounting are already incurred pursuant to the segregation rules. Thus, the Commission does not anticipate that there would be any material additional costs associated with this change.

Proposed § 190.04(b)(2) would clarify and update existing § 190.02(g)(2). The current regulation requires retail-level analysis for determining whether to issue margin calls based on the funded balance of the account, and does not grant the trustee discretion as to whether to do so. It is based on a model of the FCM continuing in business.

The Commission is proposing to revise this provision to delete the highly prescriptive conditions, and instead to allow the trustee discretion as to whether to issue margin calls to customers who are undermargined. The revision would benefit public customers of the FCM debtor by giving the trustee the flexibility to recognize that there may be situations in which issuing a margin call is impracticable because the trustee is operating the FCM in ''crisis mode'' and may be pending wholesale transfer of liquidation of open positions.

It is, however, possible that the trustee would exercise their discretion poorly, or in a manner that, in retrospect, would be seen to be to the detriment of the estate, and that the trustee would have failed to issue a margin call in a situation in which a public customer would have paid the call (and in which the balance of administrative cost and amount recovered would mean that, in retrospect, it would have profited the estate if the call was made). Such failure could result in a cost to the estate of the FCM debtor to the extent that such funds are not available. The balance of the revisions would cause no change to the related costs and benefits.

Proposed § 190.04(b)(3) would retain the concept in current § 190.02(g)(3) with updated cross-references. There Commission does not anticipate that there would be any costs or benefits to the proposed minor revisions.

Proposed § 190.04(b)(4) would combine parts of current §§ 190.03(b)(1) and (2) and 190.04(e)(4). The proposal would make two changes. First, while the current provision would require the trustee to liquidate open commodity contracts if the account is on the threshold of deficit, the proposed revision also would apply to an account that is already in deficit. The revision would clarify the applicability of current authority to a situation that is already implicit in the current rule. The benefit would be a less ambiguous rule that clearly sets forth the applicability of the trustee's authority (and thus results in reduced administrative costs). The Commission does not anticipate any increased cost associated with the change. Relatedly, the proposed rule would change ''payment of margin'' to ''mark-to-market calculation.'' This change would not require the trustee to make additional calculations but, if a calculation made by the trustee would reveal that the mark-to-market value of the account is a deficit, the trustee would be instructed to liquidate the account as soon as practicable rather than to wait for the time that payment would be due. The benefit of this change would be to liquidate accounts in deficit more promptly (thus mitigating potential further losses), the cost would be the cost of engaging in such liquidation, as well as the possibility that, absent prompt liquidation, the deficit would have been mitigated due to favorable intervening changes in market value (or, potentially, an intervening deposit of additional collateral by the customer).

Second, the Commission is also proposing to add the concept of ''exigent circumstances'' as a new exception to the general and long-established rule that a minimum of one hour is sufficient notice for a trustee to liquidate an undermargined account. The revision would benefit other customers of the debtor FCM by giving

[217] While there would be a corresponding detriment to the customers who may have benefited from such excess payments, those customers would only be losing something that runs counter to the statutory goal of pro rata distribution. Moreover, there are no likely incentive effects because, on this issue, customers stand behind the ''veil of ignorance''—it is difficult to identify, *ex ante,* which customers would be in the group of gaining customers (or in the group of losing customers).

the trustee flexibility to respond to market conditions following an FCM default, and by recognizing that in stressed markets or in situations where communication protocols cannot practicably be followed, liquidation with one hour notice may be insufficiently prompt. This may mitigate losses to the estate. However, customers who are required to make payments more promptly would bear associated costs, from making such payments in a reduced time frame, or from having contracts liquidated that would otherwise not have been liquidated if the customer had more time to make payment.

The Commission is proposing to delete current § 190.03(b)(3), which permits the trustee to liquidate open commodity contracts where the trustee has received no customer instructions with respect to such contracts by the sixth calendar day following the entry of the order for relief. Under the proposed model, the trustee would liquidate as many open commodity contracts as possible. The Commission is of the view that this change would reflect actual practice in commodity broker bankruptcies in recent decades. The estate would benefit from such a model in that they would be permitted to deal with the customers as a group, requiring less tailored analysis of individual customer positions. The trustee would have more flexibility and could be more cost effective. Many customers would benefit from the trustee being able to act with such flexibility and cost effectiveness. However, some others could fare less well due to losing the tailored treatment under the current model.

The Commission is proposing to add § 190.04(b)(5) to guide the trustee in assigning liquidating positions to the FCM debtor's customers when only a portion of the open contracts are liquidated. Under the status quo, the trustee must allocate liquidating positions. The benefit of this new provision would be that it presents a clear and transparent mechanism by which the trustee is to allocate the positions. This mechanism would protect the customer account as a whole, by establishing a preference for assigning liquidating transactions to individual customer accounts in a risk-reducing manner: First to commodity contract accounts that are in deficit, next, to commodity contract accounts that are under-margined, and finally to liquidate any remaining open commodity contracts. Consistent with the pro rata distribution principle in § 190.00(c)(5), to the extent that there are multiple accounts in any of these groups, the trustee would be instructed to allocate the transactions on a pro rata basis, thereby minimizing the risk of further losses on the positions and reducing the risk of creating any additional debts for the debtor estate. The allocation mechanism would be, however, subject to the trustee's exercise of reasonable business judgement. It is possible that such judgment could be exercised in a poor manner (or in a manner that, in retrospect, turns out to be regrettable), with resultant cost to the FCM debtor estate.

Proposed § 190.04(c) would incorporate and clarify current § 190.03(b)(5) regarding the liquidation of contracts moving into the delivery position. Current § 190.03(b)(5) requires the liquidation of open commodity contracts that are not settled in cash (*i.e.,* those that settle via physical delivery of a commodity) where the contract would move into delivery position.

The proposed revision would amend this provision using more explicit language regarding physical delivery and includes an explicit reference addressing how options move into the delivery position (portions of this provision are moved from current § 190.02(f)(1)(ii)). These clarifications are likely to reduce administrative costs, to the benefit of the estate (and, ultimately, customers). There would be no cost associated with the revision.

Proposed § 190.04(d) would clarify and update portions of current §§ 190.02(f) and 190.04(d) regarding the liquidation and valuation of open positions. The proposal would make three changes to the header text in § 190.04(d) from the text in current § 190.02(f): Adding the phrase ''except as otherwise set forth in this paragraph (d)'' to account for any exceptions that are included in the paragraphs under the header language; adding cross-references to proposed § 190.04(e) when discussing liquidation in the market and book entry via offset (as that provision contains instructions on how to effect such liquidation); and deleting the phrase ''subject to limit moves and to applicable procedures under the Bankruptcy Code.'' These changes would be non-substantive and would not have associated costs or benefits.

In proposed § 190.04(d)(1), the Commission is proposing to make two changes to current § 190.02(f)(1). The proposal would delete the reference in current § 190.02(f)(1)(i)) to dealer option contracts since such term no longer would be used in the proposal. Additionally, the proposal would revise the language of current § 190.02(f)(1)(ii) to add references to the provisions of proposed § 190.03(c)(2) (concerning the trustee's option to treat hedging accounts as specifically identifiable property) and proposed § 190.09(d)(2) (concerning the payments that customers on whose behalf specifically identifiable commodity contracts would be transferred must make to ensure that they do not receive property in excess of their pro rata share). These revisions would be non-substantive and would not have associated costs.

Proposed § 190.04(d)(2) would clarify and update current § 190.02(f)(2) and would contain a number of proposed revisions. The current regulation applies only to specifically identifiable property other than open commodity contracts, while the proposal would apply to specifically identifiable property, other than open commodity contracts *or physical delivery property.* While the current regulation requires liquidation of such property if the fair market value of the property drops below 90% of its value on the date of the entry of the order for relief, the proposal would (in paragraph (d)(2)(i)) change that figure to 75% of the fair market value. The proposed regulation (in paragraph (d)(2)(ii)) would add an additional new condition that would require liquidation where failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account, which corresponds to the general policy of liquidating any accounts that are in deficit. Finally, the proposal (in paragraph (d)(2)(iii)), while similar to current § 190.02(f)(2)(ii), would include updated cross-references that would discuss the return of specifically identifiable property. The proposal would benefit customers (including those customers with specifically identifiable property in a delivery account) by giving the trustee greater discretion to forego or postpone liquidation of specifically identifiable property in appropriate cases. It is, however, possible that the trustee would exercise their discretion poorly, or in a manner that in retrospect is regrettable, and postpone liquidation of specifically identifiable property or fail to liquidate specifically identifiable property when the estate would have realized more from a prompt liquidation of the property. Such failure could result in a cost to the estate of the FCM debtor to the extent that such funds are not available.

Proposed § 190.04(d)(3) is new and would codify the Commission's longstanding policies of pro rata distribution and equitable treatment of customers in bankruptcy, as described

in proposed § 190.00(c)(5) above, as applied to letters of credit posted as margin. Under the new provision, the trustee could request that a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract. The amount of the substitute customer property to be posted could, in the trustee's discretion, be less than the full face amount of the letter of the credit, if such lesser amount is sufficient to ensure pro rata treatment consistent with proposed §§ 190.08 and 190.09. If necessary, the trustee could require the customer to post property equal to the full face amount of the letter of credit to ensure pro rata treatment. Pursuant to paragraph (d)(3)(i), if such a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee could draw upon the full amount of the letter of credit or any portion thereof (if the letter of credit has not expired). Under paragraph (d)(3)(ii), the trustee would be instructed to treat any portion of the letter of credit that is not fully drawn upon as having been distributed to the customer. However, the amount treated as having been distributed would be reduced by the value of any substitute customer property delivered by the customer to the trustee. Any expiration of the letter of credit after the date of the order for relief would not affect this calculation. Pursuant to paragraph (d)(3)(iii), letters of credit drawn by the trustee, or substitute customer property posted by a customer, would be considered customer property in the account class applicable to the original letter of credit.

These proposed new provisions could impose costs on customers that use letters of credit as collateral for their positions in that such customers could be considered to have received distributions up to the full amount of the letter of credit or the trustee may draw upon the full amount of the letter of credit. Under the status quo, the Commission has intended to ensure the customers using letters of credit to meet margin obligations are treated in an economically equivalent manner to those who have posted other types of collateral, so that there is no incentive to use such letters of credit to circumvent the pro rata distribution of margin funds as set forth in section 766(h) of the Bankruptcy Code.[218] However, the treatment was not explicitly codified previously in the Commission's regulations. The proposal would support the policy of pro rata treatment of customers embodied section 766(h) of the Bankruptcy Code by clarifying that letters of credit cannot be used to avoid pro rata distribution of margin funds. It would also avoid concentrating losses on those customers (who are likely to be smaller customers) that cannot qualify for, or cannot afford the cost of, letters of credit, or otherwise do not use letters of credit as collateral.

In the proposal, § 190.04(e)(1)(i) would strike the requirement in current § 190.04(d)(1)(i) that a clearing organization must obtain approval pursuant to section 5c(c) of the CEA for its rules regarding liquidation of open commodity contracts. The current regulation is superfluous in light of the regulatory framework set forth in part 40 of the Commission's regulations. In addition, proposed § 190.04(e)(1)(i) would add language that would apply the current provision to cases where the debtor FCM is a member of a foreign clearing organization, a new defined term added to § 190.01.

The first change simply would remove a superfluous regulatory requirement. It would have the benefit of enabling clearing organizations to avoid the cost of seeking rule approval. There would be potential costs, in that an ill-conceived rule could be more readily identified, and addressed, in a rule approval process. The second change would provide a benefit by recognizing that there are circumstances in which the trustee must liquidate the open commodity contracts where the debtor is a member of a foreign clearing organization. Since the current regulation is silent as to the trustee's handling of the debtor's contracts where it is a member of a foreign clearing organization, the trustee arguably could have some discretion as to the handling of these contracts. However, where there are applicable rules of the foreign clearing organization, it is likely that the trustee would handle such contracts as specified in the proposed rule—and would liquidate such contracts pursuant to those rules. Accordingly, benefits and costs arising from the rule change likely would be minimal.

Proposed § 190.04(e)(2) is derived from current § 190.04(d)(1)(ii) with one change: The Commission is proposing to delete the rule approval requirement. As with § 190.04(e)(1)(i), the proposed deletion would remove a redundant regulatory requirement in light of the part 40 rule filing framework, and would enable clearing organizations to avoid the cost of seeking rule approval. As discussed immediately above, there would be both potential benefits and costs to foregoing the rule approval process.

The proposal would add a new, clarifying provision in § 190.04(e)(3), confirming that an FCM or foreign futures intermediary through which a debtor FCM carries open commodity contracts may exercise any enforceable contractual rights the FCM or foreign futures intermediary has to liquidate such commodity contracts. In addition, proposed § 190.04(e)(3) would add a provision that the liquidating FCM or foreign futures intermediary must use ''commercially reasonable efforts'' in the liquidation and provides the trustee a damages remedy if the FCM or foreign futures intermediary fails to do so. Damages would be the only remedy; under no circumstance could the liquidation be voided.

The proposed change would benefit carrying FCMs by confirming explicitly that carrying FCMs are allowed to exercise enforceable contractual rights to liquidate contracts. This will reduce administrative costs by reducing ambiguity. At the same time, clarification of the damages remedy protects creditors of the debtor FCM's estate in the event that the carrying FCM does not use commercially reasonable efforts in liquidating the open contracts. Thus, the regulation itself would provide the estate with a potential mitigant for the costs in the form of a damages remedy.

The remainder of the proposed changes to § 190.04(e)(4) and (f) would be non-substantive language changes and clarifications and updated cross-references and would not have associated costs or benefits.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.04. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

3. Regulation § 190.05: Operation of the Debtor's Estate—General

a. Consideration of Costs and Benefits

In proposed § 190.05, the Commission is revising parts of current § 190.04 and adding certain provisions. Current § 190.04 provides that the trustee ''*shall* comply with all of the provisions of the [CEA] and of the regulations thereunder

[218] *See, e.g.,* 48 FR at 8718–19.

as if it were the debtor'' and ''*must* compute a funded balance for each customer account which contains open commodity contracts as of the close of business day subsequent to the order for relief until the final liquidation date'' (emphasis added).

In both proposed § 190.05(a) and (b), the Commission would make revisions providing the trustee with more flexibility to act in a bankruptcy situation. Proposed § 190.05(a), for example, would provide that the trustee ''shall use reasonable efforts'' to comply with the CEA and the Commission's regulations. Proposed § 190.05(b) would require the trustee to ''use reasonable efforts'' to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day until such open commodity contracts and other property in such account have been transferred or liquidated, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' These two revisions would benefit the estate by recognizing that a bankruptcy could be an emergency event, that perfectly reliable information could be unavailable or inordinately expensive to obtain, and that therefore the trustee should be allowed some measure of flexibility to act reasonably given the particular circumstances of the case. On the other hand, affording the trustee increased discretion in complying with the CEA and the Commission's regulations, and in computing a funded balance for each customer account, could carry the potential cost of trustee mistake, misfeasance, or abuse of such discretion, as discussed above. The Commission also notes that, in proposing to add the phrase ''which shall be as accurate as reasonably practicable under the circumstances'' with respect to the trustee's computation of funded balance, the Commission would be incorporating the principle of prioritizing cost effectiveness over precision, as discussed in more detail in the overarching concepts above.

Whereas current § 190.04(b) would require a trustee to compute a funded balance only for those customer accounts with open commodity contracts, proposed § 190.05(b) would expand the scope of customer accounts for which a trustee would be required to compute a funded balance to those accounts with open commodity contracts or other property (including, but not limited to, specifically identifiable property). This expansion of the trustee's duties would represent an administrative cost, as the trustee would have to expend time and resources at the close of business each business day to compute the funded balance of all customer accounts. However, this revision would also result in a benefit to those customers whose accounts hold property but no open commodity contracts, in the form of enhanced information about their financial position (including with regard to collateral, the value of which may change on a daily basis, and with regard to the percentage distribution currently available). These customers would, under the proposed revision, receive daily computations of the funded balance of their accounts with the debtor.

In addition, as noted above, proposed § 190.05(b) only would require the trustee to compute the daily funded balance of customer accounts until the open commodity contracts and other property in such account has been transferred or liquidated, rather than until the final liquidation date, as current § 190.04(b) provides. This would benefit both the estate, because the trustee would no longer be required to compute the funded balance of customer accounts that do not contain any property, and would also result in some benefit to the customers, who would no longer continue to receive daily account funded balance computations once their accounts do not contain any property.

Proposed § 190.05(c)(1) would impose certain administrative costs because it would expand the scope of records required to be maintained by the debtor from ''records of the computations required by this part'' in current § 190.04(c)(1) to ''records required under this chapter to be maintained by the debtor, including records of the computations required by this part'' in proposed § 190.05(c)(1). The proposed paragraph would revise downward the amount of time that such records are required to be kept, from ''the greater of the period required by § 1.31 of this chapter or for a period of one ear after the close of the bankruptcy proceeding for which they were compiled'' in current § 190.04(c)(1) to ''until such time as the debtor's case is closed'' in proposed § 190.05(c)(1). This revision would benefit the estate because it would limit the amount of time the trustee would have to maintain the relevant records, thereby mitigating the administrative costs associated with maintaining them.

While current § 190.04(c)(2) requires the records referred to in the previous paragraph to be available during business hours to the Court, parties in interest, the Commission and the Department of Justice, proposed § 190.05(c)(2) no longer would require that such records be available to the Court or to parties in interest. This revision would be unlikely to impact either costs or benefits, as the Court itself would not be reviewing these records, and parties in interest should already have access to these records under the discovery rules in the Bankruptcy Code.

Proposed § 190.05(d) is a new provision. It would require the bankruptcy trustee to use all reasonable efforts to continue to issue account statements for customer accounts that contain open commodity contracts or other property, and to issue account statements reflecting any liquidation or transfer of open commodity contracts or other property promptly after such liquidation or transfer. This provision would result in administrative costs, as the trustee would have to expend time and resources issuing account statements to customers, but would benefit customers because it would allow them to keep track of their commodity contracts (and the continued availability of hedges) and the property in their accounts, including in particular when such contracts and property are liquidated or transferred, even during a bankruptcy.

Proposed § 190.05(e)(1) would allow a bankruptcy trustee to effect transfers of customer property in accordance with proposed § 190.07, but would require the trustee to obtain court approval prior to making any other disbursements to customers. This provision would benefit the estate and customers by allowing the trustee, without court approval, to port customers' positions and associated property to a solvent FCM as quickly as possible in a bankruptcy situation. In the event that too much customer property (that is, an amount in excess of the ultimate pro rata share) is transferred for those customers whose positions are being ported, and cannot be offset or clawed back, it could result in costs to other customers, for whom less than their pro rata share would be available.

Proposed § 190.05(e)(2) would allow the bankruptcy trustee to invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and any other customer property, in obligations of or guaranteed by the United States, so long as the obligations are maintained in depositories located in the United States or its territories or possessions. The proposed regulation would expand the scope of customer property that the trustee is permitted to invest in such a

manner to include ''any other customer property.'' This change would benefit customers, in that additional customer property could be invested (in this limited manner).

Proposed § 190.05(f) is a new provision that does not appear in current part 190. It would, for the first time, require the trustee to apply the residual interest provisions contained in § 1.11 ''in a manner appropriate to the context of their responsibilities as a bankruptcy trustee pursuant to'' the Bankruptcy Code and ''in light of the existence of a surplus or deficit in customer property available to pay customer claims.'' This explicit requirement to continue to apply the residual interest requirements set forth in § 1.11 could result in administrative costs, since the trustee would require resources to do so. However, this provision would benefit customers by making it more likely that they would receive what they are entitled to receive from the debtor's estate.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.05. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

4. Regulation § 190.06: Making and Taking Delivery Under Commodity Contracts

a. Consideration of Costs and Benefits

Proposed § 190.06 would revise current § 190.05 regarding the making and taking of deliveries under commodity contracts.

Specifically, proposed § 190.06(a)(2) would replace current § 190.05(b), which requires a DCO, DCM, or SEF to enact rules that permit parties to make or take delivery under a commodity contract outside the debtor's estate, through substitution of the customer for the commodity broker. Under the proposed revision, the trustee would use ''reasonable efforts'' (rather than ''best efforts'' under current § 190.06(a)(1)) to allow a customer to deliver physical delivery property that is held directly by the customer in settlement of a commodity contract, and to allow payment in exchange for such delivery, and for both of these to occur outside the debtor's estate, where the rules of the exchange or clearing organization prescribe a process for delivery that allows delivery to be fulfilled either (A) in the ordinary course by the customer, (B) by substitution of the customer for the commodity broker, or (C) through agreement of the buyer and seller to alternative delivery procedures. Management of contracts in the delivery positions involves a significant degree of tailored administration. Under the best efforts standard, the trustee could spend more time focusing on the needs of a few customers, which could detract from the trustee's ability to manage the estate more broadly. Accordingly, the change from ''best efforts'' to ''reasonable efforts'' would benefit creditors of the estate as the trustee would not need to provide a disproportionate amount of individualized treatment to such contracts. However, particular customers that would otherwise have received the trustee's focused treatment under the ''best efforts'' standard could suffer a cost from the change.

Proposed § 190.06(a)(3) would revise current § 190.05(c)(1)–(2) by providing additional guidance to address situations when the trustee determines that it is not practicable to effect delivery outside the estate and therefore, delivery is made or taken within the debtor's estate. The revisions would clarify the current regulation. They also would provide the trustee with the flexibility to act ''as it deems reasonable under the circumstances of the case,'' but would set an outer bound to that discretion in requiring the trustee to act ''consistent with the pro rata distribution of customer property by account class.'' This provision again would have the benefits and costs of enhanced discretion discussed above, but would include an outer bound to that discretion.

In proposed § 190.06(a)(4) the Commission would add a new provision to reflect that delivery may need to be made in a securities account.[219] Transfers would be subject to limits based on the customer's funded balance for a commodity contract account and exceeding the minimum margin requirements for that account. Further, customers would be required not to be undermargined or have a deficit balance in any other commodity contract accounts. The new provision would benefit customers who require the delivery of securities, and the trustee, by permitting those securities to be delivered to the proper type of account. By setting limits, the provision would mitigate the risk of transferring too much value out of the commodity contract account (and creating a risk of an undermargin or deficit balance).

Proposed § 190.06(b) is also new and would create an account class for physical delivery property held in delivery accounts and the proceeds of such physical delivery property. This account class would further be sub-divided into separate physical delivery and cash delivery account subclasses. In general, creating the delivery account class would help protect customers with property in delivery accounts following a default, because delivery accounts are not subject to the Commission's segregation requirements. The further sub-division into sub-classes would recognize that cash is more vulnerable to loss, and more difficult to trace, as compared to physical delivery property and would be likely to benefit those with physical delivery claims. Since cash is more vulnerable to loss and more difficult to trace, then under the proposal, customers in the cash delivery sub-class would be more likely to get a pro rata distribution that is less than that in the physical delivery property sub-class. The benefits and costs of creating these sub-classes were discussed more fully above in reference to the definition of account class in proposed § 190.01.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.06. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

5. Regulation § 190.07: Transfers

a. Consideration of Costs and Benefits

Proposed § 190.07 would revise current § 190.06 regarding transfers. First, in proposed § 190.07(a)(3) the Commission would revise current § 190.06(a)(3). The current regulation would provide that no clearing organization or other self-regulatory organization may adopt, maintain in effect, or enforce rules that prevent the acceptance by its members of transfers of open commodity contracts and the equity margining or securing of such contracts from FCMs with respect to which a petition in bankruptcy has been

[219] This would only be relevant for debtor FCMs that are also broker-dealers.

filed, if the transfers have been approved by the Commission. The revised regulation would change ''prevent'' to the more general term ''[i]nterfere with,'' thus proscribing a potentially broader range of conduct in order to promote transfers. However, the revised regulation would include the proviso that it (1) does not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts, and (2) should not be interpreted to limit a DCO's ability adequately to manage risk. The revision would modify, in a balanced fashion, the standard for clearing organization and SRO rules that are adopted, maintained, in effect, and enforced and where transfers are approved by the Commission. While clearing organizations and SROs will need to comply with the revised standard, the compliance cost should not be different than under the prior standard. Accordingly, there would not be any material cost associated with the change. The clarification that the regulations do not limit contractual risk management rights would provide a benefit to clearing organizations and their members in clarifying that the regulation would not nullify the contracts in this regard, and would not have an associated cost.

In proposed § 190.07(b)(1), the Commission would clarify current § 190.06(c)(1) to set forth that it is the transferee FCM itself who has the responsibility to determine whether it would be in violation of regulatory minimum financial requirements upon accepting a transfer, it is not the trustee's duty. Under current Commission regulations, FCMs are responsible for meeting the requirements under such regulations for customer accounts. The proposed revision would recognize these obligations under already existing regulations and would clarify that such obligations apply when an FCM is a transferee. Accordingly, the Commission does not anticipate any material cost from this proposed revision. Under one interpretation of the current regulation, the trustee would need to do further diligence in order to make the determination whether the transferee would continue to meet minimum financial requirements. Where time is of the essence in making a transfer, and given the transferee's superior knowledge as to its own financial status, it would be more appropriate to leave this responsibility with the transferee,[220] and not to impose any such responsibility on the trustee. The trustee's resources could be better spent on other tasks for the debtor estate. Accordingly, the proposed clarification would reduce administrative burden as well.

Proposed § 190.07(b)(3) is a new provision. It would permit a transferee to accept open commodity contracts and associated property prior to completing customer diligence requirements, provided that such diligence is completed as soon as practicable thereafter, and no later than six months after transfer. It recognizes that customer diligence processes would have already been required to have been completed by the debtor FCM with respect to each of its customers as part of opening their accounts. The proposal would provide a benefit to customers and transferee clearing members and trustees, by facilitating the transfer process.[221] If such flexibility were not provided, under the current regulations, transfer might not be accomplished, or may not be accomplished promptly, and liquidation might be the only available option. As discussed in proposed § 190.00(c)(4), it is preferable to avoid liquidation, as liquidation is much more disruptive to markets and to the customers of the defaulted FCM. The proposal would recognize the importance of the account opening diligence requirements and would mitigate the risk from delay by requiring the diligence to be performed as soon as practicable and setting an outer limit at six months, unless that time is extended by the Commission.

Proposed § 190.07(b)(4) is also new. It would clarify that account agreements governing a transferred account are deemed assigned to the transferee until and unless a new agreement is reached. The provision would also explain that consequences for breaches pre-transfer are borne by the transferor rather than the transferee. Proposed § 190.07(b)(4) would codify the industry understanding regarding the legal implications for transfer agreements and thus the primary benefit is to provide transparency to the industry. The Commission does not anticipate that there would be material costs associated with the change.

Proposed § 190.07(b)(5) would carry forward current § 190.02(c), and would provide that in the event of transfer, customer instructions that are received by the debtor with respect to any open commodity contracts or specifically identifiable property should be transmitted to the transferee, who should comply with such instructions to the extent practicable. The slight revisions to current § 190.02(c) would be merely clarifications, and there would be no costs or benefits associated with such revisions.

Proposed § 190.07(c) would revise current § 190.06(e). The proposed revision would change the language ''all accounts are eligible for transfer'' in current § 190.06(e)(1) to ''all commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer . . .'' This change would recognize explicitly that accounts can be transferred if the accounts are intended for trading commodities, but do not include any open commodity contracts at the time of the order for relief. The revision would clarify the current language and would not change the types of accounts that can be transferred. Accordingly, the Commission does not anticipate that there would be material added cost associated with the revision.

Proposed § 190.07(d) would revise special rules for transfers under section 764(b) of the Bankruptcy Code, set forth in primarily in current § 190.06(f). Proposed § 190.07(d)(2)(i) would state that the Commission will not disapprove such a transfer for the sole reason that it was a partial transfer.'' Current § 190.06(f)(3)(i) sets forth that the Commission will not disapprove such a transfer for the sole reason that it was a partial transfer if it would prefer the transfer of accounts, the liquidation of which could adversely affect the market or the bankrupt estate. The revision would be made to promote transfer. Cost and benefit considerations related to transfer are as discussed above.[222]

Several changes would be proposed in § 190.07(d)(2)(ii). First, the Commission would clarify that associated property (*i.e.,* collateral) would be transferred along with open commodity contracts, and thus would insert the term ''property'' throughout the section. This change would clarify the current regulation and would not have an associated cost. Second, the

[220] The focus here is on the responsibilities of the transferee in contrast to those of the trustee. This is without prejudice to any review of the transferee's status by any DCOs or SROs of which the transferee is a member, or of any regulators (including the Commission) with jurisdiction over the transferee.

[221] The corresponding costs would arise from the possibility that the transferee's diligence would reveal problems that had been missed by the debtor FCM's customer diligence process, or arose subsequent to the time that the original process was conducted, and that conducting the revised diligence more promptly would sooner reveal the concerns, thus permitting them to be addressed more expeditiously.

[222] *See* section II.B.5 above.

Commission would create a limitation on partial transfers where netting sets would be broken and customers' net equity claims would increase. Trustees would therefore not permit partial transfers where individual customers would be in a worse position (with respect to margin) if the partial transfer were completed. While this provision would require the trustee to consider the impact of partial transfer, under current regulations, the trustee is already required to consider the extent to which a partial transfer would impact customer net equity claims against the FCM debtor's estate. The revised regulation would provide a benefit to customers by codifying this limitation. Third, § 190.07(d)(2)(ii) would be revised to add language that clarifies that liquidation could either crystalize gains or have the effect of reducing the required margin. This change would have a similar impact to the limitation on partial transfers just considered. It would codify a consideration the trustee should already be addressing, and as such, would not create an additional cost. Finally, the Commission would insert language in § 190.07(d)(2)(ii) that would clarify that the trustee is required to protect customers holding spread or straddle positions from the breaking of netting sets, but only to the extent practicable, given the circumstances. The inserted language would steer the trustee toward respecting spreads and straddles, but would give the trustee more flexibility than the current regulation, so that the trustee can respond to the stressed market conditions and provide the best outcome for the FCM debtor estate and customers generally. The proposed insertion would recognize that there may be circumstances where partial transfer is not practicable and implies that the trustee makes that decision. It is therefore possible that certain customers holding spread or straddle positions could have positions liquidated or not transferred under the revised provision, or could have spreads or straddles broken because of the trustee's exercise of discretion.[223]

Proposed § 190.07(d)(3) is new and would permit a letter of credit associated with a commodity contract to be transferred with an eligible commodity contract account. If the letter of credit cannot be transferred (either because of its terms or because the transfer would result in a greater recovery of value for the customer then the customer is entitled to) and the customer does not deliver substitute property, the provision would permit the trustee to draw upon all or a portion of the letter of credit and treat the proceeds as customer property in the applicable account class. The proposed regulation would codify the Commission's current intention with regards to letters of credit [224] and the current practice trustees have used. It would ensure that letters of credit are treated in an economically similar fashion to other types of collateral and that customers using letters of credit would not be given any differential economic benefit, thus serving the goal of pro rata distribution. There could be administrative costs incurred by the estate associated with drawing upon a letter of credit, as well as costs to the customer that posted the letter of credit as collateral. Such costs may be mitigated if the customer delivers substitute property, as set forth in the proposed regulation.

Proposed § 190.07(d)(4) is also new and would require a trustee to use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable. While this provision would impose an administrative cost on the estate, it is already a best practice for trustees; keeping delivery property with the underlying contract positions is necessary for (and thus would benefit) the delivery process. Therefore, the additional administrative cost from the revised regulation would be minimal. There would be no cost to customers, who would benefit from the codification of a standard for the trustee.

Proposed § 190.07(d)(5) would revise current § 190.06(e)(2) by making several clarifications. The revised provision would prevent prejudice to customers and prohibit the trustee from making transfers that would result in insufficient customer property being available to make equivalent percentage distributions to all equity claim holders in the applicable account class. This change would be a clarification of the current requirements. It would support achieving the statutory policy of pro rata distribution, but would work to the detriment of any customer who, absent the provision, would otherwise benefit from a larger distribution. The Commission is further proposing to clarify that the trustee should make determinations based on customer claims reflected in the FCM's records, and, for customer claims that are not consistent with those records, should make estimates using reasonable discretion based in each case on available information as of the calendar day immediately preceding transfer. The benefit here would be that the trustee is given discretion to make decisions based on the overarching principle set forth above, valuing cost effectiveness over precise values of entitlement. However, the same potential costs would apply—risk of mistake or misfeasance.

Proposed § 190.07(e) would revise current § 190.06(g). The proposal would add language to clarify that transfers are approved by the Commission pursuant to the procedure set forth in the Bankruptcy Code and adding specific citations to the Code. Throughout proposed § 190.07(e), the Commission would insert ''or customer property'' following ''the transfer of commodity contract accounts'' to clarify that transfers of commodity contract accounts include the associated customer property. These revisions would be clarifications or reorganizations, and there would be no costs or benefits associated with the revisions.

Proposed § 190.07(e)(1)(iii) would add a provision that would prohibit the trustee from avoiding a transfer from ''a receiver that has been appointed for the FCM that is now a debtor.'' The new provision would be added in order to respect the actions of a receiver that is acting to protect the property of the FCM that has become the debtor in bankruptcy. It would provide certainty to the actions of such a receiver, whose duties, among others, include protecting the customer property of the FCM. However, to the extent that the receiver takes actions that are, considered in retrospect, mistaken or ill-advised, a possibility which cannot be foreclosed given the exigencies of an FCM receivership, the proposal would prevent the correction of such actions.

In proposed § 190.07(e)(2)(i), the Commission would revise current § 190.06(g)(2)(i) to modify the term ''SRO/commodity broker'' to ''clearing organization'' because the only entities who can perform the transfers that are subject to the provision are the trustee, and, in certain circumstances, clearing organizations. This revision would be a clarification and would not have any associated cost.

Proposed § 190.07(f) would revise § 190.06(h) regarding Commission action. The provision would clarify that the Commission may prohibit the transfer of a particular set or sets of the commodity contract accounts, or permit the transfer of a particular set or sets of commodity contract accounts that do not comply with the requirements of the

[223] *See* trustee discretion discussion in section IV.C.2 above.

[224] *See ConocoPhillips,* 2012 WL 4757866, and related discussion in section II.B.2 above.

section. In addition, the Commission would clarify that the transfers of the commodity contract accounts includes the associated customer property. These revisions would be clarifications and would not have any associated costs.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.07. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

6. Regulation § 190.08: Calculation of Allowed Net Equity

a. Consideration of Costs and Benefits

In proposed § 190.08, the Commission would incorporate much of current § 190.07, though with certain revisions, but also would delete parts of current § 190.07.

The Commission is proposing to delete current § 190.07(b)(6), (c)(2)(v), and (d) [225] from the proposed rule text, all of which involve how to adjust the calculation of allowed net equity with respect to accounts remaining open after the primary liquidation date. The reason for these proposed deletions is that under the revised definition of the term ''primary liquidation date,'' all commodity contracts would be liquidated or transferred prior to the primary liquidation date—none would be held open for transfer thereafter. Therefore, since no accounts would remain open subsequent to the primary liquidation date, these sections would be rendered moot. Accordingly, the Commission does not anticipate any associated costs or benefits.

Proposed § 190.08(b) would set forth the steps for a trustee to follow when calculating each customer's net equity. While proposed § 190.08(b) would contain several revisions from its analog in current § 190.07(b), most of the revisions would be non-substantive and would clarify, not change, the meaning of the provisions in current § 190.07(b). The cost and benefit considerations of the substantive changes to proposed § 190.08(b) are discussed below.

First, proposed § 190.08(b)(1) would set forth instructions for determining the equity balance of each commodity contract account of a customer. Proposed § 190.08(b)(1)(ii) would provide instructions on how to calculate a customer's ledger balance, which goes into determining that customer's equity balance. Proposed § 190.08(b)(1)(ii)(A)(*4*) is new, and would provide that a customer's ledger balance includes ''the face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract.'' This treatment would balance the fact that any portion of a posted letter of credit that is not drawn upon would be treated as distributed to the customer. This new provision could result in administrative costs, since the trustee could, if a particular customer has posted a letter of credit as margin for a commodity contract, be required to take the extra step of determining the value of such letter of credit in calculating that customer's equity balance. However, this provision could benefit customers posting letters of credit: Absent this addition to the rule text, such customers were not explicitly guaranteed that their letters of credit would be taken into account in calculations of their equity balance.[226]

Second, proposed § 190.08(b)(2) would provide instructions to the trustee regarding how to determine whether accounts are held in the same capacity or in separate capacities, for purposes of aggregating the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Proposed § 190.08(b)(2)(viii), similar to current § 190.07(b)(2)(viii), would note that futures accounts, delivery accounts, and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities, although such accounts may be aggregated in accordance with paragraph (b)(3) of the section. Current § 190.07(b)(2)(viii) is subject to one exception, paragraph (b)(2)(ix) of the section, which sets forth that an omnibus customer account of an FCM shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such person. Proposed § 190.08(b)(2)(viii) would also be subject to exception from paragraph (b)(ix) and would add another exception, from paragraph (b)(2)(xiv), which would reflect that accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers. This change provides additional cross-references and clarifies the existing regulations, but does not change any obligations. Accordingly, there is no cost from the revisions.

Proposed § 190.08(b)(2)(xi), like its analog in current § 190.07(b)(2)(xi), would state that certain retirement or pension accounts maintained with the debtor FCM shall be deemed to be held in a separate capacity from an account held in an individual capacity by the retirement or pension plan administrator, or by any employer, employee, participant, or beneficiary with respect to such plan. While current § 190.07(b)(2)(xi) would refer only to retirement or pension plans under ERISA, proposed § 190.08(b)(2)(xi) would expand the scope of retirement and pension plans that would be described in this provision to include such plans under similar Federal, state or foreign laws or regulations. This provision could result in administrative costs, because the trustee would need to ensure that all accounts in the name of a retirement or pension plan as described in proposed § 190.08(b)(2)(xi) would be properly categorized as being held in a separate capacity from accounts held in an individual capacity by the plan administrator, or by any employer, employee, participant, or beneficiary with respect to such plan. The benefit of this change would be to foster the achievement of the statutory policies favoring retirement accounts and pension plans.

While the Commission would make certain revisions in proposed § 190.08(b)(3), (b), and (5), as described above, the Commission views such revisions as non-substantive and would merely clarify the text in the current analogous provisions. Thus, the Commission would not expect these changes to result in any costs or benefits.

Proposed § 190.08(c) would set forth instructions for calculating each customer's funded balance. As noted

[225] In addition, as noted above, because the Commission is proposing to delete current § 190.07(d) from the proposed rule text, the Commission is also proposing to delete the reference to such provision in proposed § 190.08(a).

[226] The Commission considered similar costs and benefits when it proposed adding other references to letters of credit in proposed § 190.08. For instance, proposed § 190.08(c), which would set forth instructions for calculating the funded balance, includes in the computation ''the value of letters of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract related to all customer accounts of the same class.'' In addition, proposed § 190.08(d)(4) would set the value of a letter of credit ''received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract'' as its face amount less the amount, if any, drawn and outstanding. These new provisions regarding letters of credit could result in administrative costs, in that they could involve certain additional steps being taken by the trustee with respect to calculating the allowed net equity of each customer when certain customers have posted letters of credit to margin their commodity contracts, but they would also benefit customers posting letters of credit, who would have explicit assurance that any such letters of credit would be taken into account in such calculations.

above in section II.B.6, the references to calculation as of the primary liquidation date would be deleted, because the funded balance (*i.e.,* each customer's pro rata share of the customer estate with respect to an account class) is relevant both before the primary liquidation date as well as after.

In addition, proposed § 190.08(c)(1)(ii) would provide that, in calculating each customer's funded balance, the trustee should add any margin payment made between (i) the entry of the order for relief or, in an involuntary case, the date on which the petition for bankruptcy is filed, and (ii) the primary liquidation date. In the analogous current provision, the text did not account for the possibility of an involuntary proceeding, so the Commission is proposing to add text to account for such possibility. This revision would promote the goal of fair distribution. It would likely benefit those customers of a debtor in an involuntary bankruptcy proceeding who make margin payments between the date on which the petition for bankruptcy is filed and the primary liquidation date, in that those payments would be taken into account when the trustee is calculating their funded balance under the proposed rules; it would correspondingly act to the detriment of other customers.

In proposed § 190.08(d), the Commission is proposing in general to implement changes to provide more flexibility to the trustee in valuing commodity contracts and other property held by or for a commodity broker. For instance, the Commission is proposing to delete current § 190.07(e)(2) and (3), regarding the valuation of principal contracts and bucketed contracts, respectively, in favor of the more generalized approach to valuing property set forth in proposed § 190.08(d)(5). Moreover, in proposed § 190.08(d)(5), which is based on current § 190.07(e)(5), the Commission is proposing to delete the requirement that the trustee seek approval of the court prior to enlisting professional assistance to value customer property. These changes would benefit the estate by providing the trustee with more flexibility to determine how to value certain customer property, including whether or not to enlist professional assistance in doing so. Likewise, these revisions would serve the goal of a pro rata distribution to customers, as the accurate valuation of customer property can benefit from the input of a professional. On the other hand, affording the trustee increased discretion in how to value commodity contracts and other property held by a debtor could carry the potential cost of mistake, misfeasance or abuse of discretion by the trustee, as discussed above, or possibly by the professional whose service is retained.

With respect to some of the specific provisions within proposed § 190.08(d), the Commission is proposing substantial changes with respect to the valuation of commodity contracts. First, the Commission is proposing to separate more explicitly the instructions concerning the valuation of (1) open commodity contracts, and (2) liquidated commodity contracts. With respect to open commodity contracts, the Commission would retain the provision that the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules. However, the Commission is proposing that such clearing organization rules no longer need to be approved by the Commission in order to be used in valuing such contracts for purposes of computing net equity. The benefits and costs of that change in approach are discussed above with respect to proposed § 190.04(e).

With respect to commodity contracts that have been transferred, proposed § 190.08(d)(1)(i) would provide that such contracts be valued at the end of the last settlement cycle on the day preceding such transfer, rather than at the end of the settlement cycle in which it is transferred. Again, this revision would benefit both the estate and customers by making it practical to calculate the value of the transferred commodity contracts prior to the transfer.

With respect to liquidated commodity contracts, the Commission is proposing that the value of such contracts shall equal the value realized on liquidation of the contract. However, in certain circumstances, proposed § 190.08(d)(1)(ii) also would allow the trustee to either (1) use the weighted average of commodity contracts liquidated within a 24-hour period or business day, or (2) use the settlement price calculated by a clearing organization for commodity contract liquidated as part of a bulk auction by a clearing organization. With respect to the weighted average provision, the Commission is proposing to change the time period within which such contracts must be liquidated in order for the trustee to use the weighted average, from ''on the same date'' (as provided in current § 190.07(e)) to ''within a 24 hour period or business day.'' This change would benefit the estate and the goal of pro rata distribution, since it has been proposed in order to bring the time frame more in line with how settlement cycles and business days work.[227] In addition, the Commission is proposing to add the provision regarding valuation in the case of a bulk auction by a clearing organization. In the Commission's view, such an addition would benefit the estate by providing the trustee with another option for determining appropriately the value of commodity contracts that were liquidated as part of a bulk auction.

In proposed § 190.08(d)(4), which would set forth the valuation method for commodities held in inventory, the Commission is proposing to allow the trustee, in circumstances where the fair market value of the commodity held in inventory is not readily ascertainable, to value the commodity in accordance with proposed § 190.08(d)(5), discussed above. This change would benefit both the estate, since the trustee would have the flexibility to value a commodity held in inventory using such professional assistance as they deem necessary, as well as the customers, who would benefit from a more appropriate valuation due to the trustee's increased flexibility in determining such valuation. It would again, however, involve the costs of possible mistake, misfeasance or abuse of discretion discussed above.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.08. Are there additional costs or benefits that the Commission should consider? Are there any alternatives (*e.g.,* approaches that will more likely lead to accurate valuation) that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? In particular, do the proposed rules strike an appropriate balance of discretion and prescription? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

7. Regulation 190.09: Allocation of Property and Allowance of Claims

a. Consideration of Costs and Benefits

In proposed § 190.09, the Commission would incorporate much of current

[227] The trading day is generally not the same as the calendar day, but instead may run from *e.g.,* 5 p.m. on one business day until 4:59 p.m. on the next. Closing prices for contracts would thus be set at the end of the trading day, not at the end of the calendar day.

This consideration of costs and benefits also applies to proposed § 190.08(d)(2), which would incorporate the same weighted average concept as in proposed § 190.08(d)(1)(ii)(A).

§ 190.08, though with certain revisions and additions. Proposed § 190.09(a)(1) would define the scope of ''customer property'' that is available to pay the claims of a debtor FCM's customers, and proposed § 190.09(a)(1)(i) would set forth the categories of ''cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer'' that are included in customer property. The Commission is proposing certain substantive changes to the categories listed in proposed § 190.09(a)(1)(i), as discussed below:

- First, proposed § 190.09(a)(1)(i)(D) is a new paragraph that would provide that customer property includes any property ''received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer.'' While the Commission's intention was always to include such property within the definition of ''customer property,'' clarifying this explicitly would benefit both the estate and customers by avoiding confusion or potential litigation.
- Second, proposed § 190.09(a)(1)(i)(F) would provide that letters of credit, including proceeds of letters of credit drawn by the trustee, or substitute customer property, constitute ''customer property.'' This paragraph would be revised to be consistent with the other letters of credit provisions that would be added throughout the proposed part 190. The Commission does not anticipate that this provision would result in any material costs or benefits, as current § 190.08(a)(1)(i) already includes a provision regarding letters of credit.[228]

Proposed § 190.09(a)(1)(ii) would set forth the categories of ''[a]ll cash, securities, or other property'' that would be included in customer property. The Commission is proposing certain substantive changes to the categories listed in § 190.09(a)(1)(ii), as discussed below:

- First, proposed § 190.09(a)(1)(ii)(D) would provide that any cash, securities, or other property that was property received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract and that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis constitutes customer property. The current version of this provision refers only to the trustee's avoidance powers (leaving out the possibility for recovery other than through avoidance powers). The Commission's proposed revisions to this paragraph would benefit the estate, by assuring that any property they recover would be included in the pool of customer property, no matter the method of recovery, rather than going to some other creditor (to be sure, those other creditors would receive correspondingly less).
- Second, proposed § 190.09(a)(1)(ii)(G) is new, and would provide that any current assets of the debtor in the greater of (i) the amount that the debtor would be obligated to be set aside as its targeted residual interest amount, or (ii) the debtor's obligations to cover debit balances or under-margined amounts, constitutes customer property. This new provision would result in administrative costs, because the trustee would need to take the extra step of determining whether any current assets of the debtor need to be set aside as customer property and, if so, how much. This provision would benefit customers (and serve the policy of protecting customer collateral), however, because it would mitigate the risk of a shortfall in customer funds by ensuring that the trustee would fulfill the Commission's regulations that require an FCM to put certain funds into segregation on behalf of customers. This would result in such funds being included in the pool of customer property, rather than going to some other creditor. It would, to the same extent, operate to the detriment of general creditors.
- Third, proposed § 190.09(a)(1)(ii)(K) is also new, and would provide that any cash, securities, or other property that is payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property constitutes customer property. This provision would benefit customers (and, again, the policy of protecting customer collateral), since any insurance payment as described in this proposed section would enlarge the pool of customer property, rather than going to some other creditor.[229] It could result in administrative costs, however, as the trustee would need to spend time and resources in order to determine whether any such insurance payments exist, and in prosecuting such insurance claims.
- Fourth, the second sentence of proposed § 190.09(a)(1)(ii)(L) is new, and would provide customer property for purposes of these regulations includes any ''customer property,'' as that term is defined in SIPA, that remains after satisfaction of the provisions in SIPA regarding allocation of customer property constitutes customer property. This provision would benefit commodity customers (and act to the detriment of general creditors) because any securities customer property remaining after full allocation to securities customers would enlarge the pool of commodity customer property. It could result in administrative costs, however, since the trustee could need to spend time and resources determining the extent to which such property is left over after allocation to customers in a SIPA proceeding.[230]

Proposed § 190.09(a)(2) sets forth the categories of property that are not included in customer property. The Commission has proposed certain substantive changes to the categories listed in proposed § 190.09(a)(2), as discussed below:

- First, in proposed § 190.09(a)(2)(iii), the Commission would add explicit language to state that only those forward contracts that are not cleared by a clearing organization are excluded from the pool of customer property. This revision would benefit customers (and act to the detriment of general creditors), since the pool of customer property would increase by explicitly including any cleared forward contracts.
- Second, proposed § 190.09(a)(2)(v) would provide that any property deposited by a customer with a commodity broker after the entry of an order for relief that is not necessary to meet the margin requirements of such customer is not customer property. The deletion of the word ''maintenance'' before ''margin'' would eliminate any distinction between initial and variation margin; this deletion would benefit the estate by ensuring that any amount deposited by a customer after the entry of an order for relief that is necessary to meet that customer's margin

[228] The costs and benefits of the underlying policy decision to take steps to ensure that customers posting letters of credit are treated (with respect to pro rata allocation of losses) in a manner consistent with the manner in which customers posting other forms of collateral are treated are discussed in connection with proposed § 190.04(d)(3) in section IV.E.2 above.

[229] It would, again, to the same extent, act to the detriment of general creditors.

[230] The Commission further notes that the first sentence of proposed § 190.09(a)(1)(ii)(L), which would provide that customer property would include any cash, securities, or other property in the debtor's estate, but only to the extent that the customer property under the other definitional elements is insufficient to satisfy in full all claims of the debtor's public customers, would impose no costs and benefits because such provision already appears in current § 190.08, and the only changes to the provision would be non-substantive updates to cross-references.

requirements would be included in the pool of customer property. It also would benefit customers who post excess margin, who could be assured that any such excess margin they deposit after the entry of an order for relief will remain their property and will not be included in the pool of customer property. This provision would correspondingly act to the detriment of general creditors.

- Third, proposed § 190.09(a)(2)(viii), which is new, would provide that any money, securities, or other property held in a securities account to fulfill delivery, under a commodity contract that is a security futures product, from or for the account of a customer, is excluded from customer property. This provision avoids conflict with the resolution, under SIPA, of claims for securities and related collateral.

Proposed § 190.09(a)(3), which is new, would give the trustee the authority to assert claims against any person to recover the shortfall of customer property enumerated in certain paragraphs elsewhere in proposed § 190.09(a). This provision could impose administrative costs, since the trustee could have to expend time and resources to assert and prosecute such claims to make up for any shortfall in customer property. The provision would, however, benefit customers, since it would ensure that the trustee would be in a position to recover any such shortfalls and would give the trustee authority to take action to do so. Moreover, since this provision would make explicit what is implicit in current part 190, an additional benefit of this provision would be reduced litigation costs over a trustee's authority to engage in attempts to recover shortfalls in customer property.[231]

Proposed § 190.09(b) would add the phrase ''or attributable to'' when describing how to treat property segregated on behalf of or attributable to non-public customers (''house accounts''); the addition of this phrase, as described above, would clarify that proposed § 190.09(b)(1) would apply both to property that is in the debtor's estate at the time of the bankruptcy filing, as well as property that is later recovered by the trustee and becomes part of the debtor's estate at the time of recovery. This additional phrase would benefit public customers and the statutory policy in favor of them (and correspondingly act to the detriment of non-public customers), since it could increase the amount of property that is treated as part of the public customer estate. It could impose administrative costs because it could take time and resources to properly allocate any property that is recovered after the time the bankruptcy is filed.[232]

Proposed § 190.09(c)(1)(ii) is a new provision that would instruct the trustee, in the event there is property remaining allocated to a particular account class after payment in full of all allowed customer claims in that account class, to allocate the excess in accordance with proposed § 190.09(c)(2), which in turn would set forth the order of allocation for any customer property that could not be traced to a specific customer account class. These provisions would benefit public customers who would otherwise face shortfalls (and then, non-public customers who would otherwise face shortfalls). Since these provisions would make explicit what is implicit in current part 190, an additional benefit of these provisions would result from the increased clarity over what to do with any excess customer property. However, the provisions would act to the detriment of general creditors who, under the current regime, could have been more likely to receive any excess customer property in the absence of an explicit provision providing what to do with any such excess customer property.

Proposed § 190.09(d) would govern the distribution of customer property. The only substantive change in proposed § 190.09(d) from its analog in current § 190.08(d) would be in proposed § 190.09(d)(1)(i) and (ii), which would import the concept of ''substitute customer property.'' Whereas current § 190.08(d)(1)(i) and (ii) require customers to deposit cash in order to obtain the return of specifically identifiable property, proposed § 190.09(d)(1)(i) and (ii) would allow the posting of ''substitute customer property.'' This term, which would be defined in proposed § 190.01, would mean cash or cash equivalents. This revision would benefit customers because it would make it easier for customers to redeem their specifically identifiable property by no longer limiting customers to only using cash to do so. It could, however, impose administrative costs in the form of time and resources of the trustee, who, in the event a customer chooses to post cash equivalents to redeem their specifically identifiable property, would be required to value (and potentially to liquidate) such cash equivalents.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.09. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

8. Regulation § 190.10: Provisions Applicable to Futures Commission Merchants During Business as Usual

a. Consideration of Costs and Benefits

Proposed § 190.10 addresses provisions applicable to FCMs during business as usual.

In § 190.10(a), the Commission would note that an FCM is required to maintain current records related to its customer accounts, consistent with current Commission regulations, and in a manner that would permit them to be provided to another FCM in connection with the transfer of open customer contracts and other customer property. The proposed regulation would not impose new obligations, but rather would inform the trustee regarding their duties by incorporating references to the Commission's existing regulations.

Proposed § 190.10(b) would incorporate concepts in current §§ 190.04(e), 190.06(d), and the current Bankruptcy appendix form 3 instructions. Under this new provision, an FCM would be permitted to rely solely upon written record of the customer's representation of hedging intent regarding the designation of a hedging account, thus mitigating administrative costs.

Proposed § 190.10(b)(1) would require an FCM to provide a customer an opportunity to designate an account as a hedging account when the customer first opens the account, allowing for clearing instruction to FCMs at the outset of the relationship. This provision is new, with regards to the timing of the opportunity. Clear instruction at the outset would facilitate the ability properly to account for customer property. There would be

[231] While the persons against whom such claims are successfully asserted may perceive a subjective cost, the Commission does not find these costs relevant to the analysis, as those persons would simply be forced to pay what they rightfully owe the debtor FCM's estate.

[232] Proposed § 190.09(c)(1) would have a similar change in the addition of the phrase ''or recovered by the trustee on behalf of or for the benefit of an account class,'' which is meant to clarify that any property recovered by the trustee on behalf of or for the benefit of a particular account class after the bankruptcy filing must be allocated to the customer estate of that account class. This revision would present similar costs and benefits to those discussed above.

some disclosure and accounting costs associated with this provision. The proposed regulation would require FCMs to give customers the opportunity to provide instructions as to whether an account is a hedging account at opening, including those who will never enter into hedging accounts. For those customers that do engage in hedging, it would be more cost effective to designate the account at opening, when both customer and FCM are focused on the specifics of the relationship between them, than to monitor the transactions for the first qualifying transaction to provide the opportunity to make the designation, as applicable under the current regulation. Thus, the proposed regulation would reduce the probability that the opportunity to designate the account as a hedging account will be missed.

Proposed § 190.10(b)(2) would set forth the conditions for treating an account as a hedging account. The current § 190.06(d) requires written hedging instructions for such treatment to be given. By contrast, proposed § 190.10(b)(2) would permit such treatment upon the customer's written representation that their trading would constitute hedging as defined under any relevant Commission rule or the rule of a DCO, DCM, SEF, or FBOT. This provision is new and would follow from the designation of the accounts. There would be accounting burdens for FCMs and customers associated with the provision.

In proposed § 190.10(b)(3), the Commission would provide that the requirements in § 190.10(b)(1)–(2) would not apply to commodity contract accounts opened prior to the effective date of the revisions to part 190 and that an FCM could continue to designate existing accounts as hedging accounts based on written hedging instructions obtained under current regulations. This provision would mitigate the impact of the changes to current requirements in proposed § 190.10(b)(1)–(2) by not applying those provisions to already opened hedging accounts and would give FCMs the ability to continue to designated already-open hedging accounts based upon the information collected and maintained during the current regulatory framework.

Proposed § 190.10(b)(4) would permit an FCM to designate an existing customer account as a hedging account for purposes of bankruptcy treatment, provided that the FCM obtains the necessary customer representation. This provision would give FCMs and customers flexibility to apply the proposed regulations to existing accounts where the impact would not be overly burdensome.

In proposed § 190.10(c), the Commission would address the establishment of delivery accounts during business as usual. The Commission would recognize that when an FCM facilitates delivery under a customer's physical delivery contract and such delivery is effected outside of a futures account, foreign futures account, or cleared swaps account, it must be effected through (and the associated property held in) a delivery account.[233] Delivery accounts are of particular importance during bankruptcy although there are costs associated with the opening and maintenance of such accounts. The use of such accounts is considered to be cost effective in facilitating delivery.[234] The benefit of using such accounts would be twofold: To protect customer assets during the delivery process, and to foster the integrity of the delivery process itself.

Proposed § 190.10(d) is new. It would address letters of credit and would prohibit and FCM from accepting a letter of credit during business as usual unless certain conditions are met at the time of acceptance and remain true through the date of expiration. First, the trustee would be required to be able to draw upon the letter of credit in full or in part in the event of a bankruptcy proceeding, the entry of a protective decree under SIPA, or the appointment of FDIC as receiver pursuant to Title II of the Dodd-Frank Act. Second, if the letter of credit would be permitted to be and would in fact be passed through to a clearing organization, the trustee for such clearing organization (or the FDIC) would be required to be able to draw upon the letter of credit in full or in part in the event of a bankruptcy proceeding (or where the FDIC is appointed as receiver). In addition, proposed § 190.00(c)(5) would clarify that the trustee is required to treat letters of credit in a manner consistent with pro rata distribution and is permitted to draw upon the full amount of unexpired letters of credit or any portion thereof or treat the letter of credit as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer.

Proposed § 190.10(d) would ensure that an FCM's treatment and acceptance of letters of credit during business as usual is consistent with and does not preclude the trustee's treatment of letters of credit in accordance with proposed §§ 190.00(c)(5) and 190.04(d)(3). Letters of credit are currently widely used in the industry. The Commission understands that under industry practice, most existing letter of credit arrangements are consistent with the Joint Audit Committee Forms of Irrevocable Standby Letter of Credit, both Pass-Through and Non Pass-Through,[235] and that these forms are consistent with the proposed new requirements. Nevertheless, FCMs would need to review the existing letters of credit for consistency with the regulation, and it is plausible that some could need to be re-negotiated to be consistent therewith. The Commission has considered the extent of the use of letters of credit in the industry and is proposing that upon the effective date of the regulation, proposed § 190.10(d) would apply only to new letters of credit and customer agreements. The Commission further is proposing to include a transition period of one year from the effective date until proposed § 190.10(d) would apply to existing letters of credit and customer agreements. The transition period would give FCMs an opportunity to conduct the necessary review of existing letters of credit and customer agreements, and to make any necessary changes.

It is possible that some letters of credit could become more expensive if the proposed regulation is adopted as there would be an increased likelihood that the letter of credit will be drawn upon. (As discussed above, this would appear to not apply to the majority of existing arrangements). As noted in the discussion of proposed § 190.04(d)(3), the benefit of the proposed regulation would be ensuring consistent economic treatment of letters of credit with other types of collateral to ensure that all forms of collateral are treated similarly, thus promoting the goal of pro rata distribution.

Proposed § 190.10(e) would largely aligns with the provisions in current part 190 from which it was derived. The statement concerning publication of notice in a newspaper of general circulation would be deleted to correspond to changes discussed in connection with proposed § 190.03(c)(1); there would be no additional cost or benefit implications.

[233] As noted above in the discussion of proposed § 190.10(c) in section II.B.8, if the commodity that is subject to delivery is a security, the FCM may instead effect delivery through (and the property may be held in) a securities account.

[234] The Commission further understands that it is already industry practice to use such accounts, therefore, as a practical matter, the cost associated with mandating the use of such accounts would be mitigated.

[235] *See* section II.B.8 above.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.10. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

9. Section 15(a) Factors—Subpart B

a. Protection of Market Participants and the Public

Subpart B of the proposed rules would increase the protection of market participants and the public by clearly setting forth how the bankruptcy trustee is expected to treat the property of customers of FCMs in the event of an FCM insolvency, thereby promoting ex ante transparency for such customers.

b. Efficiency, Competitiveness, and Financial Integrity

Subpart B of the proposed rules would promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of FCMs and the financial integrity of derivatives transactions carried by FCMs by setting forth clear instructions for a bankruptcy trustee to follow in the event of an FCM insolvency, and by updating these instructions to account for current market practices. Moreover, subpart B would provide the bankruptcy trustee with discretion, in certain circumstances, to react flexibly to the particulars of the insolvency proceeding, thereby promoting efficiency of the administration of the proceeding. These effects would, in turn, enhance the competitiveness of U.S. FCMs, by enhancing market confidence in the protection of customer funds and positions entrusted to U.S. FCMs, even in the case of insolvency.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. To the extent that the proposed regulations would mitigate the need for liquidations in conditions of distress, they would avoid negative impacts on price discovery.

d. Sound Risk Management Practices

Subpart B of the proposed rules would promote sound risk management practices by encouraging the bankruptcy trustee effectively to manage the risk of the debtor FCM. Subpart B would accomplish this by revising the bankruptcy rules for an FCM insolvency that reflect current market practices and effectively protect customer property in the event of such an insolvency.

e. Other Public Interest Considerations

Subpart B of the proposed rules supports the implementation of statutory policy such as promoting protection of public customers and ensuring pro rata distribution of customer funds. Moreover, some of the FCMs that might enter bankruptcy are very large financial institutions, and some are (or are part of larger groups that are) considered to be systematically important. An effective bankruptcy process that efficiently facilitates the proceedings is likely to benefit the financial system (and thus the public interest), as that process would help to attenuate the detrimental effects of the bankruptcy on the financial system and reduce the likelihood that uncertainty as to the outcome of the insolvency could cause disruption to financial markets.

*F. Subpart C—Clearing Organization as Debtor*

Proposed subpart C to part 190 is intended to create a tailored set of regulations to govern a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization. While the Commission, in promulgating part 190 in the 1980s, determined to ''take a case-by-case approach with respect to [the bankruptcy of] clearing organizations,'' [236] the Commission is now proposing to provide a more detailed set of instructions.

The overarching benefits of this approach include the following: (1) Uncertainty would be reduced both during business-as-usual (thus enhancing the ability of both clearing members and their customers better to understand their exposures to the possible insolvency of a clearing organization) and in the unlikely event of the actual bankruptcy (or resolution) of a clearing organization (thus enhancing the cost effectiveness of either process). (2) The resolution regime established under Title II of Dodd-Frank provides that the maximum liability of FDIC as receiver of a covered financial company to a claimant is the amount the claimant would have received if the FDIC had not been appointed receiver and the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code. By establishing a clearer counterfactual, proposed subpart C would (a) enhance the ability of FDIC to plan for and to execute its responsibilities as receiver, (b) enhance the ability of market participants to predict in advance their exposures in the unlikely event of the resolution as a DCO, and (c) mitigate the cost of litigation over the value of such claims. The Commission notes that there could, to a certain extent, be costs imposed by proposed subpart C, in that there could be a corresponding reduction in flexibility with the addition of rules specifically tailored to address a DCO bankruptcy, but the Commission has attempted to draft these proposed rules with the intent of maintaining significant flexibility, where warranted.

1. Regulation § 190.11: Scope and Purpose of Subpart C

a. Consideration of Costs and Benefits

Proposed § 190.11 simply would state that the new subpart C of part 190 would apply to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization. Therefore, the costs and benefits of proposed § 190.11 would be the overarching costs and benefits stated above.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.11. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

2. Regulation § 190.12: Required Reports and Records

a. Consideration of Costs and Benefits

Proposed § 190.12(a)(1) would be analogous to proposed § 190.03(a), in that it would provide instructions regarding how to give notice to the Commission and to a clearing organization's members, where such notice would be required under subpart C. For a discussion of the costs and benefits of this paragraph, please refer to the discussion of the cost and benefit implications of proposed § 190.03(a).

Proposed § 190.12(a)(2) would revise the time in which a debtor clearing organization must notify the

[236] 46 FR at 57545.

Commission of a bankruptcy filing. In particular: (1) In the event of a voluntary bankruptcy filing, the debtor would be required to notify the Commission at or before the time of filing, and (2) in the event of an involuntary bankruptcy filing, the debtor must notify the Commission as soon as possible, but in any event no later than three hours after the receipt of the notice of such filing. These revisions would codify expectations that (1) in a voluntary bankruptcy proceeding, the debtor clearing organization will provide advance notice to the Commission ahead of the filing to the extent practicable, and (2) in an involuntary bankruptcy proceeding, the debtor clearing organization will notify the Commission immediately upon the filing, or within at the most three hours thereafter. With respect to a voluntary bankruptcy filing, the Commission expects that the DCO would have made it aware of its financial distress in the lead-up to a bankruptcy filing in accordance with the mandatory reporting requirements in part 39; the revision in proposed § 190.12(a) merely would codify the expectation that the clearing organization would notify the Commission of an intent to file for bankruptcy protection as soon as practicable before, and in no event later than, the time of the filing. In addition, proposed § 190.12(a) also would allow a debtor clearing organization to provide the relevant docket number of the bankruptcy proceeding to the Commission ''as soon as available,'' while not waiting on notifying the Commission of the filing itself, to account for the potential time lag between the filing of a proceeding and the assignment by the relevant court of a docket number. These revisions would enhance the ability of the Commission to perform its responsibilities to support the interests of clearing members, customers of clearing members, markets, and the broader financial system, by providing the Commission with prompt notice of any DCO bankruptcy proceeding.

Proposed § 190.12(b) and(c) would involve the provision of certain reports and records to the trustee and/or the Commission by the debtor clearing organization. In particular: Proposed § 190.12(b) would set forth the reports and records that the clearing organization would be required to provide to the Commission and to the trustee within three hours following the later of the commencement of the proceeding or the appointment of the trustee, and proposed § 190.12(c) would set forth the records to be provided to the Commission and to the trustee no later than the next business day following commencement of a bankruptcy proceeding. These provisions would impose administrative costs on the debtor clearing organization and/or the trustee, which would be obligated to spend time and resources transmitting copies of the required reports and records to the trustee and/or Commission. However, these provisions would both benefit the estate, and enhance the Commission's ability to fulfil its responsibilities, by providing them with the most current information about the clearing organization, and by allowing the trustee to begin to understand the business of the clearing organization as soon as possible following a bankruptcy filing, which is critically necessary to the administration of the debtor clearing organization's estate. This would in turn promote confidence in the clearing system in particular, and financial markets more broadly.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.12. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

3. Regulation § 190.13: Prohibitions on Avoidance of Transfers

a. Consideration of Costs and Benefits

Proposed § 190.13 would implement section 764(b) of the Bankruptcy Code with respect to DCOs, and prohibits the avoidance of certain transfers made either before or after entry of the order for relief. This provision is derived from current § 190.06(g), with certain changes. While the prohibition of avoidance of pre- and post-relief transfers in current § 190.06(g) would apply so long as the transfer is not disapproved by Commission, the same prohibition on avoidance of pre- and post-relief transfers in proposed § 190.13(a) and (b) would require the affirmative approval of the Commission (though such approval can be given either before or after the transfer is made). This change would impose administrative costs on the clearing organization or the trustee, who would have to expend time and resources to seek affirmative approval from the Commission for such a transfer in the context of administering a DCO, respectively, either before or after bankruptcy. As noted above,[237] a clearing organization must maintain a ''balanced book,'' and thus must transfer all of its customer positions (or at least all positions in a given product set). Any such transfer would have significant effects on the markets cleared, and possibly on the broader financial system. There thus would seem to be important benefits from requiring the Commission's approval of such a significant transaction, and thus permitting the exercise of discretion by the administrative agency responsible for oversight of the derivatives markets.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.13. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

4. Regulation § 190.14: Operation of the Estate of the Debtor Subsequent to the Filing Date

a. Consideration of Costs and Benefits

Proposed § 190.14(a) would provide that the trustee may, in their discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee. Allowing the bankruptcy trustee to use their discretion in tailoring the proof of claim form to the specific facts and circumstances of the case would benefit both the trustee and customers by limiting the information requested to only that which is necessary for purposes of administering the debtor's estate and thereby increasing cost effectiveness, particularly given the bespoke nature of a clearing organization bankruptcy. Thus, the Commission has not proposed a prescribed proof of claim form. There could, however, be corresponding administrative costs to both the estate and the customers if the set of information requested by the trustee in the exercise of their discretion turns out in retrospect to be overly narrow or broad.

Proposed § 190.14(b) would provide that a debtor clearing organization will

[237] See section II.C.3 above.

cease making calls for variation or initial margin, except in the limited case where the debtor clearing organization continues operation for a limited time. Specifically, under proposed § 190.14(b)(2), the trustee could request permission of the Commission to continue to operate the clearing organization for up to six calendar days after the order for the relief if the trustee believes that continued operation would (1) facilitate either prompt transfer of the clearing operations of the clearing organization to another DCO or resolution of the DCO under Title II of Dodd-Frank, and (2) be practicable, in the sense that the rules of the DCO do not compel termination of all outstanding contracts under the circumstances then prevailing and all or substantially all of the DCO's members would be able to, and would, make variation margin payments as owed during the period of continued operations. Under current regulations, it would not be possible to continue the operations of a debtor clearing organization for any amount of time after entry of the order for relief, as there is no clear and coherent mechanism to do so. Providing such a mechanism to enable the trustee to continue the operations of the debtor clearing organization for a set amount of time could, in certain circumstances, benefit clearing members and their customers as well as markets and the broader financial system by allowing time to accomplish an impending transfer of the debtor's clearing operations to another clearing organization, or to allow for the possibility of resolving the debtor clearing organization under Title II. Continuing operations of the debtor clearing organization could, however, impose administrative costs, as the trustee would have to essentially operate the clearing organization according to its rules and procedures, using the estate's already limited resources. Moreover, the attempt to continue operations could fail, despite the predictions of the trustee and of the Commission, and such failure could damage the interests of clearing members and their customers as well as markets and the broader financial system.

The Commission notes that it considered alternatives to proposed § 190.14(b)(2). Specifically, the Commission could have left out the possibility of the debtor clearing organization continuing operations for any period of time after entry of the order for relief. As another alternative, the Commission could have allowed for continued operations with fewer requirements than those in proposed § 190.14(b)(2). The Commission decided that the framework set out in proposed § 190.14(b) for continuing operations of a debtor clearing organization would strike the proper balance between allowing for continuing operations where it is appropriate to do so while only allowing for continuing operations where such continued operations would be expected to be both useful and practical.

Proposed § 190.14(c)(1) would provide that the trustee shall liquidate all open commodity contracts that have not been terminated, liquidated or transferred no later than seven calendar days after the entry of the order for relief, unless the Commission determines that liquidation would be inconsistent with the avoidance of systemic risk or would not be in the best interests of the debtor's estate. This provision would impose administrative costs in that the trustee would have a hard deadline for terminating, liquidating or transferring any open commodity contracts within a certain timeframe, whereas under current part 190 there was no specified timeframe for such termination, liquidation or transfer. It could, however, benefit clearing members and customers, who would have certainty that their open commodity contracts would be liquidated within a particular timeframe rather than being held open for an undetermined amount of time. A deadline for liquidation or transfer of open contracts could benefit the broader financial markets by mitigating uncertainty.

Proposed § 190.14(c)(2), which is derived from current § 190.08(d)(3), would provide that the trustee may, at their discretion, make distributions in the form of securities that are equivalent to the securities originally delivered to the debtor by a clearing member or such clearing member's customer, rather than liquidating the securities and making distributions in cash. Unlike current § 190.08(d)(3), proposed § 190.14(c)(2) would not allow the customer to request that the trustee purchase like-kind securities and distribute those instead of cash, instead would leave it up to the discretion of the trustee whether to do so. This change could impose costs on customers who would prefer to have a distribution of equivalent securities rather than cash since it would take away their right to request such a distribution. However, it could benefit the estate by allowing the trustee to use their discretion as to whether to purchase and distribute equivalent securities, rather than being obligated to do so at the request of a customer.

Proposed § 190.14(d) would require the trustee to use reasonable efforts to compute the funded balance of each customer account immediately prior to the distribution of any property in the account, ''which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.'' Setting forth an explicit requirement on the bankruptcy trustee to calculate the funded balance of customer accounts in certain circumstances would impose administrative costs due to the time and effort involved in making such calculations. However, this calculation would be necessary to achieve the goal of making distributions that would be consistent with each customer's proportionate share.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.14. Are there additional costs or benefits that the Commission should consider? Is it plausible that there would be circumstances under which allowing the trustee to continue DCO operations for a limited period of time would be the best approach to resolving the DCO? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

5. Regulation § 190.15: Recovery and Wind-down Plans; Default Rules and Procedures

a. Consideration of Costs and Benefits

Proposed § 190.15, which is not derived from any provision in current part 190, would provide that (1) the trustee shall not avoid or prohibit any action taken by a debtor that was within the scope of and was provided for in the debtor's recovery and wind-down plans; (2) in administering a DCO bankruptcy, the trustee shall, subject to the reasonable discretion of the trustee and to the extent practicable, implement the default rules and procedures maintained by the debtor; and (3) in administering a DCO bankruptcy, the trustee shall, to the extent reasonable and practicable, take actions in accordance with the debtor's recovery and wind-down plans.

The Commission considered two alternatives to directing the trustee to implement the debtor's own default rules and procedures and recovery and wind-down plans: First, continuing to allow a bankruptcy trustee to develop,

in the moment, a plan for liquidating the debtor clearing organization, and second, prescribing an across-the-board method for liquidating a debtor clearing organization. With respect to the first alternative, the Commission is of the view that, given the complexity of the operations of a DCO, and the need for extremely prompt action, having the trustee develop an entire plan in the moment would be likely to turn out to be impracticable. This would be in contrast to the trustee's power under the proposed rule to act differently to a limited extent, in cases where aspects of the plan would be impracticable. As for the second alternative, given the differences between DCOs, a one-size-fits-all approach likely would be less effective.

The Commission is accordingly of the view that, relative to these alternatives, directing a trustee to implement the DCO's own default rules and procedures, and recovery and wind-down plans, would benefit the estate by providing the trustee with purpose-built rules, procedures and plans to liquidate a DCO, which rules, procedures and plans the DCO has developed subject to the requirements of the Commission's regulations and supervision of the Commission. However, adding concepts of reasonability and practicability would give the trustee the discretion to modify those rules, procedures, and plans where and to the extent necessary. Hence, the Commission believes that an approach whereby the trustee would follow the DCO's own purpose-built default rules and procedures and recovery and wind-down plans would be the most cost effective.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.15. Are there additional costs or benefits that the Commission should consider? Are there any other alternatives that could provide preferable costs or benefits to the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

6. Regulation § 190.16: Delivery

a. Consideration of Costs and Benefits

Proposed § 190.16 would address delivery in the context of a clearing organization bankruptcy. Current part 190 does not contain any regulations specific to delivery in the context of a clearing organization bankruptcy.

Proposed § 190.16(a) would provide that a bankruptcy trustee is be required to use ''reasonable efforts'' to facilitate and cooperate with the completion of the delivery on behalf of the clearing organization's clearing member or the clearing member's customer. This would have the benefits of mitigating disruption to the cash market for the commodity and mitigating adverse consequences to parties that could be relying on delivery taking place in connection with their business operations. While the exertion of such reasonable efforts would necessarily involve administrative costs (predominantly, time of the trustee or their agents), the Commission is of the view that this approach would have important benefits relative to the two alternatives. Given the importance of reliable delivery to physical markets, it would be inappropriate to relieve the trustee of the obligation to endeavor to facilitate and cooperate with the members' or members' customers' efforts to accomplish delivery. On the other hand, mandating that the trustee go beyond reasonable efforts would risk compelling the trustee to expend unwarranted amounts of resources in this endeavor.

Proposed § 190.16(b) would clarify which property would be part of the physical delivery account class and which would be part of the cash delivery account class. It is analogous to proposed § 190.06(b) in the FCM context, and would carry forward the concepts in that section but would be modified for the context of a DCO bankruptcy. Clearly delineating between the physical delivery account class and the cash delivery account class would benefit customers because it would increase transparency in terms of which account class their property belongs in. Proposed § 190.16(b) could, however, impose administrative costs, since accounting separately for physical delivery property and cash delivery property would take the trustee's time and resources. As noted above,[238] the sub-division of the delivery account class into the physical and cash delivery account classes would recognize that cash is more vulnerable to loss, and more difficult to trace, as compared to physical delivery property. Therefore, such sub-division would be likely to benefit those with physical delivery claims. Since cash is more vulnerable to loss and more difficult to trace, then under the proposal, clearing members and customers in the cash delivery sub-class would be more likely to get a pro rata distribution that would be less than that in the physical delivery property sub-class.[239]

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.16. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

7. Regulation § 190.17: Calculation of Net Equity

a. Consideration of Costs and Benefits

Proposed § 190.17(a) would clarify that a member of a debtor clearing organization may have claims against the clearing organization in separate capacities: On behalf of its public customers (customer accounts) and on behalf of its non-public customers (house accounts). It further would state that net equity shall be calculated separately for each customer capacity in which the clearing member has a claim against the debtor. In the Commission's view, the provisions in proposed § 190.17(a) would be mere clarifications and would not impose any costs or benefits on any parties.

Proposed § 190.17(b) would provide that the calculation of a clearing member's net equity claim in the bankruptcy of a clearing organization shall include the full application of the debtor's loss allocation rules and procedures, as well as full application of any recoveries made by the estate of the debtor in accordance with the debtor's rules and procedures. These provisions would benefit the estate, as the trustee would (a) have a clear roadmap in calculating net equity in the bankruptcy of a clearing organization and would not be obligated to come up with an ad hoc methodology of doing so, and (b) face reduced likelihood and expected amount of litigation costs arising from challenges to the trustee's choice of methodology. They would also benefit clearing members (and, therefore, their customers) by providing transparency as to how their net equity will be calculated. And in certain cases, where the debtor recovers any funds,

[238] *See* discussion of § 190.06(b) in section II.B.4 above.

[239] Costs and benefits of the separation of the delivery account class into physical delivery and cash delivery subclasses were also addressed in respect to the costs and benefits section addressing the definition of ''account class'' in proposed § 190.01, section II.A.2 above.

application of the debtor's ''reverse waterfall'' rules would benefit clearing members (and, in certain cases, their customers) by increasing the net equity claims of the entitled clearing members. These provisions could, however, impose costs on clearing members whose net equity claims may have been greater absent the application of the clearing organization's loss allocation rules and procedures.

Proposed § 190.17(c) would adopt by reference the net equity calculations set forth in proposed § 190.08, to the extent applicable.[240]

Proposed § 190.17(d) would set forth a definition of the term ''funded balance,'' which is taken directly from Bankruptcy Code provisions. Clarifying the meaning of the term ''funded balance'' in the context of a clearing organization bankruptcy would benefit clearing members, in that they would know ex ante what is and is not included in their funded balance and how such amount is calculated. In addition, proposed § 190.17(d) would adopt by reference the methodology for calculating funded balance that would be set forth in proposed § 190.08(c).[241]

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.17. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

8. Regulation § 190.18: Treatment of Property

a. Consideration of Costs and Benefits

Proposed § 190.18(a) is analogous to proposed § 190.17(a), in that it would provide that property of the debtor clearing organization's estate would be allocated between member property and customer property other than member property in order to satisfy the proprietary and customer claims of clearing members. In the Commission's view, the provisions in proposed § 190.18(a) would be mere clarifications and do not impose any costs or benefits on any parties.

Proposed § 190.18(b)(1)(i) and (ii) would set out the scope of customer property for a clearing organization, and would be largely based on proposed § 190.09(a).[242]

Proposed § 190.18(b)(1)(iii) would provide that customer property would include any guaranty fund deposit, assessment or similar payment or deposit made by a clearing member or recovered by a trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member. This provision would support the goal of making customers whole. Specifically, it would benefit clearing members of the debtor, since it clarifies that any property described in this paragraph will be included in the scope of customer property, rather than ultimately going to some other creditor of the debtor. It would result in corresponding costs to non-customer creditors, and could result in administrative costs, however, since the trustee could need to spend time and resources in order to determine whether any such property exists in order to properly allocate such property to customers.

Proposed § 190.18(b)(2) would adopt by reference proposed § 190.09(a)(2), as if the term debtor used therein would refer to a clearing organization as debtor and to the extent relevant to a clearing organization.[243]

Proposed § 190.18(c) would set forth the allocation of customer property among customer classes (*i.e.,* allocation between (1) customer property other than member property, and (2) member property). This provision, in general, would set forth the principle, consistent with the statutory preference for public customers over non-public customers embodied in Bankruptcy Code section 766(h), that allocation to customer property other than member property is favored over allocation to member property, so long as the funded balance in any account class for members' public customers is less than one hundred percent of net equity claims. This provision would benefit the public customers of the debtor's clearing members, since it would make clear that allocation to such customers would be preferred over allocation to the clearing members' house accounts. It could impose corresponding costs on the debtor's clearing members and affiliates to the extent that, under the current regime, there would be a possibility that more customer property would be allocated to their house accounts. Overall, this provision would provide the benefit of ex ante transparency to the estate, the debtor's clearing members, and their customers, who would know during business as usual how customer property would be allocated in the event of a bankruptcy.

Proposed § 190.18(d) would set forth the allocation of customer property among account classes. This provision would be similar in concept to proposed § 190.09(c) (and current § 190.08(c)). The Commission is proposing to take an additional step that applies specifically in the context of a clearing organization bankruptcy. Specifically, the Commission is proposing to include a provision that would set forth the allocation of customer property among account classes. This provision would benefit clearing members and their customers, who would have increased transparency, ex ante, into how customer property would be allocated. Prescribing such allocation would, however, impose administrative costs, because the trustee would lose some amount of flexibility in terms of how to allocate customer property between account classes.

Proposed § 190.18(e) would provide that, where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property would be considered to be in a single account class. This provision would benefit the estate, because the trustee would not be put to the considerable task of separating in bankruptcy that which was treated as a single account during business-as-usual. The proposed section would also benefit debtor's clearing members, who would have increased transparency as to how their member property would be treated.

Proposed § 190.18(f), which would be the analog to proposed § 190.03(a)(3), would give the trustee the authority to assert claims against any person to recover the shortfall of customer property enumerated in certain paragraphs elsewhere in proposed § 190.18. This provision could impose administrative costs, since the trustee could expend time and resources to assert claims to make up for any shortfall in customer property. The provision would, however, benefit customers, since it would support the trustee's efforts to recover any such shortfalls and by giving the trustee authority to take action to do so.

[240] For a discussion of the cost and benefit considerations for proposed § 190.08, please see section IV.E.6 above.

[241] For a discussion of the cost and benefit considerations for proposed § 190.08(c), please see section IV.E.6 above.

[242] For a discussion of the cost and benefit considerations for proposed § 190.09(a), please see section IV.E.7 above.

[243] For a discussion of the cost and benefit considerations for proposed § 190.09(a)(2), please see section IV.E.7 above.

Moreover, since this provision would make explicit what is implicit in current part 190, an additional benefit of this provision would be reduced litigation costs over a trustee's attempts to recover shortfalls in customer property.[244]

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.18. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

9. Regulation § 190.19: Support of Daily Settlement

a. Consideration of Costs and Benefits

Proposed § 190.19, which is new, would deal with the treatment of variation settlement in a clearing organization bankruptcy, and would set forth what to do when there is a shortfall in variation settlement owed to a debtor clearing organization's clearing members and customers. Specifically, proposed § 190.19(a) would provide that any variation settlement payments received by the clearing organization after entry of an order for relief shall be included in customer property, and shall promptly be distributed to the member and customer accounts entitled to such payments. Proposed § 190.19(b) would deal with a situation where there is a shortfall in variation settlement received by the clearing organization, and provides that such funds shall be supplemented in accordance with the clearing organization's default rules and procedures and any recovery and wind-down plans maintained by the clearing organization.

Proposed § 190.19 would benefit clearing members and their customers because it would ensure that any variation settlement received by the clearing organization would be sent to those member and customer accounts that would be entitled to payment of variation settlement, and that the trustee would be able to supplement any shortfall in variation settlement amounts with the property listed in proposed § 190.19(b). There could be corresponding costs to general creditors of the clearing organization since, under current part 190, it would be conceivable that variation settlement received by the clearing organization could be diverted to the pool of general creditors rather than becoming customer property (even though such diversion would be contrary to the expectations of both the Commission and the industry). In clarifying how variation settlement received by the clearing organization is to be treated by the bankruptcy trustee, proposed § 190.19 would also benefit clearing members and their customers by providing enhanced transparency. There could be administrative costs, however, to the extent the trustee would lose some amount of flexibility in terms of how to treat variation settlement received by the clearing organization, and in terms of the time and resources they could need to spend to determine how to make up a shortfall in such settlement funds.

b. Request for Comment

The Commission requests comment on all aspects of its cost and benefit considerations with respect to proposed § 190.19. Are there additional costs or benefits that the Commission should consider? Are there any alternatives that could provide preferable costs or benefits than the costs and benefits related to the proposed amendments discussed above? Commenters are encouraged to include both qualitative and quantitative assessments of any costs and benefits.

10. Section 15(a) Factors—Subpart C

a. Protection of Market Participants and the Public

Subpart C of the proposed rules would increase the protection of market participants and the public by clearly setting forth how the bankruptcy trustee is expected to treat the property of DCO clearing members and their customers in the event of a DCO insolvency, thereby promoting ex ante transparency for such clearing members and customers. Moreover, the addition in part 190 of bespoke bankruptcy rules for a DCO bankruptcy would provide better protections to market participants by accounting for the unique position of clearing members (and the customers of such clearing member) of a DCO that is going through an insolvency proceeding.

b. Efficiency, Competitiveness, and Financial Integrity

Subpart C of the proposed rules would promote efficiency (in the sense of both cost effectiveness and timeliness) in the administration of insolvency proceedings of DCOs, and the financial integrity of transactions cleared by DCOs by setting forth clear instructions for a bankruptcy trustee to follow in the event of a DCO insolvency. Moreover, subpart C would provide the bankruptcy trustee with discretion, in certain circumstances, to react flexibly to the particulars of the insolvency proceeding, thereby promoting efficiency of the administration of the proceeding. These effects would, in turn, enhance the competitiveness of U.S. DCOs and their FCM clearing members, by enhancing market confidence in the protection of customer funds and positions entrusted to U.S. DCOs through their clearing members, even in the case of insolvency.

c. Price Discovery

Price discovery is the process of determining the price level for an asset through the interaction of buyers and sellers and based on supply and demand conditions. To the extent that the proposed regulations would mitigate the need for liquidations in conditions of distress, they would avoid the resultant negative impacts on price discovery.

d. Sound Risk Management Practices

Subpart C of the proposed rules would promote sound risk management practices by encouraging the bankruptcy trustee to effectively manage the risk of the debtor DCO. Subpart C would accomplish this by adding bankruptcy rules to part 190 for a DCO insolvency that reflect current market practices and effectively would protect customer property in the event of such an insolvency. Moreover, subpart C would promote sound risk management practices by instructing a bankruptcy trustee to implement the debtor DCO's default rules and procedures and to take actions in accordance with the debtor DCO's recovery and wind-down plans, which rules, procedures and plans are developed and overseen by the Commission.

e. Other Public Interest Considerations

By favoring the implementation of the clearing organization's default rules, recovery plans, and procedures established *ex ante* under the supervision of the Commission, and by supporting daily settlement, the proposed rules would support financial stability. Moreover, some of the DCOs that might enter bankruptcy are very large financial institutions, and some are considered to be systematically important. An effective bankruptcy process that efficiently facilitates the proceedings is likely to benefit the financial system (and thus the public

[244] As discussed above in section IV.E.7, while the persons against whom claims are successfully asserted may perceive a subjective cost, the Commission does not find these costs relevant to the analysis.

interest), as that process would help to attenuate the detrimental effects of the bankruptcy on the financial network.

*G. Technical Corrections to Parts 1, 4, and 41*

The Commission is proposing technical corrections to parts 1, 4, and 41 to update cross-references. These corrections and clarifying and do not have any impact on the substantive obligations related to these sections. Thus, there are no costs associated with these minor technical updates.

*H. Antitrust Considerations*

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA in issuing any order or adopting any Commission rule or regulation.[245]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requests comment on whether the proposed rulemaking implicates any other specific public interest to be protected by the antitrust laws. The Commission has considered the proposed rulemaking to determine whether it might have anticompetitive effects. The Commission has not identified any effect on competition of the proposed rulemaking, which would apply only in the rare instance of an FCM or DCO bankruptcy. Accordingly, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

**V. Related Matters**

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[246] The regulations proposed by the Commission would affect clearing organizations, FCMs, bankruptcy trustees, and customers. The Commission has previously established certain definitions of ''small entities'' to be used in evaluating the impact of its regulations in accordance with the RFA.[247]

The Commission has previously determined that clearing organizations and FCMs are not small entities for purposes of the RFA.[248] In the event of a bankruptcy, a trustee is appointed as receiver to manage the estate of the insolvent FCM or clearing organization. Accordingly, since the trustee is representing the estate of either an FCM or clearing organization, the trustee is not a small entity for purposes of the RFA. The Commission recognizes that many customers of an FCM or DCO in bankruptcy could be considered to be small entities for purposes of the RFA. The Commission believes, however, that the amendments to part 190 are designed so that they can be implemented without imposing a significant economic burden on a substantial number of small entities. The proposed regulations take into account existing trading practices and the logistical considerations of implementing the regulations.

Accordingly, the Commission Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b), that the proposed amendments would not have a significant economic impact on a substantial number of small entities. The Commission invites public comments on this determination.

*B. Paperwork Reduction Act*

The Paperwork Reduction Act (''PRA'') provides that Federal agencies, including the Commission, may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Office of Management and Budget (''OMB'').[249] This proposed rulemaking contains reporting requirements that are collections of information within the meaning of the PRA and for which the Commission has previously received a control number from OMB: OMB Control Number 3038–0021 (Regulations Governing Bankruptcies of Commodity Brokers).

Information Collection 3038–0021[250] contains the reporting, recordkeeping and third-party disclosure requirements in the Commission's bankruptcy regulations for commodity broker liquidations (17 CFR part 190). These regulations apply to liquidations under chapter 7, subchapter IV of the Bankruptcy Code.[251] The Commission promulgated part 190 pursuant to the authority of 7 U.S.C. 24. The Commission is proposing to amend Information Collection 3038–0021 to (1) accommodate new information collection requirements for FCMs and DCOs as a result of this proposal, and (2) revise the existing information collection requirements for FCMs and DCOs as a result of this proposal.

The Commission therefore is submitting this proposal to the OMB for its review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the FOIA and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.[252] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[253]

The information collection requirements of proposed part 190 are necessary and will be used to facilitate the effective, efficient and fair conduct of liquidation proceedings for FCMs and DCOs and to protect the interests of customers in these proceedings both directly and by facilitating the participation of the Commission in such proceedings. The estimates below reflect estimated burden hours per information collection requirement; the Commission has not identified any start-up, operational or maintenance costs

[245] Section 15(b) of the CEA, 7 U.S.C. 19(b).

[246] 5 U.S.C. 601 *et seq.*

[247] 47 FR 18618 (Apr. 30, 1982).

[248] *See* 66 FR 45604, 45609 (Aug. 29, 2001); 67 FR 53146, 53171 (Aug. 14, 2002).

[249] 44 U.S.C. 3501 *et seq.*

[250] There are two information collections associated with OMB Control No. 3038–0021. The first includes the reporting, recordkeeping, and third-party disclosure requirements applicable to a single respondent in a commodity broker liquidation (*e.g.,* a single FCM, DCO, or trustee) within the relevant time period. This includes both (1) proposed requirements on a single FCM or a single trustee in an FCM bankruptcy which correspond to current requirements on a single FCM or a single trustee in an FCM bankruptcy, as provided for in proposed §§ 190.03(b)(1) and (2) and (c)(1), (2), and (4), 190.05(b) and (d), and 190.07(b)(5); and (2) new requirements on a single DCO or a single trustee in a DCO bankruptcy as provided for in proposed §§ 190.12(a)(2), (b)(1) and (2), and (c)(1) and (2) and 190.14(a) and (d). The second information collection includes the third-party disclosure requirements that are applicable during business as usual to multiple respondents (*e.g.,* multiple FCMs), as provided for in proposed §§ 190.10(b) and 190.10(e) (which are analogs to current §§ 190.06(d) and 190.10(c)), as well as new a third-party disclosure requirement provided for in proposed § 190.10(d) (regarding letters of credit).

[251] 11 U.S.C. 761 *et seq.*

[252] 7 U.S.C. 12(a)(1).

[253] 5 U.S.C. 552a.

associated with the information collection requirements set forth below. The Commission requests comment on all aspects of its PRA analysis.

1. Reporting Requirements in an FCM Bankruptcy

Proposed § 190.03(b)(1) would require FCMs that file a petition in bankruptcy to notify the Commission and the relevant DSRO, as soon as practicable before and in any event no later than the time of such filing, of the anticipated or actual filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. It would further require an FCM against which an involuntary bankruptcy petition or application for a protective decree under SIPA is filed to notify the Commission and the relevant DSRO immediately upon the filing of such petition or application.

Proposed § 190.03(b)(2) would require the trustee, the relevant DSRO, or an applicable clearing organization to notify the Commission if such person intends to transfer or apply to transfer open commodity contracts or customer property on behalf of the public customers of the debtor.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[254] The Commission has estimated the burden hours for the reporting requirements in an FCM bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 1.[255]

*Estimated total annual number of responses for all respondents:* 1.

*Estimated annual number of burden hours per respondent:* 1.[256]

*Estimated total annual burden hours for all respondents:* 1.

2. Recordkeeping Requirements in an FCM Bankruptcy

Proposed § 190.05(b) would require the trustee to use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and other property in such account has been transferred or liquidated.

Proposed § 190.05(d) would require the trustee to use reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[257] The Commission has estimated the burden hours for the recordkeeping requirements in an FCM bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 26,666.67.[258]

*Estimated total annual number of responses for all respondents:* 26,666.67.

*Estimated annual number of burden hours per respondent:* 266.67.[259]

*Estimated total annual burden hours for all respondents:* 266.67.

3. Third-Party Disclosure Requirements Applicable to a Single Respondent in an FCM Bankruptcy

Proposed § 190.03(c)(1) would require the trustee to use all reasonable efforts to promptly notify any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, and that such specifically identifiable property may be liquidated on and after the seventh day after the order for relief if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of customer property contained in proposed part 190.

Proposed § 190.03(c)(2) would allow the trustee to treat open commodity contracts of public customers identified on the books and records of the debtor has held in an account designated as a hedging account as specifically identifiable property of such customer.[260]

Proposed § 190.03(c)(4) would require the trustee to promptly notify each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in proposed § 190.03(e).

Proposed § 190.07(b)(5) would, in the event that specifically identifiable property has been or will be transferred, require the trustee to transmit any customer instructions previously received by the trustee with respect to such specifically identifiable property to the transferee of such property.

Based on its experience, the Commission anticipates that an FCM bankruptcy would occur once every three years.[261] The Commission has estimated the burden hours for the third-party disclosure requirements applicable to a single respondent in an FCM bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 10,003.32.[262]

*Estimated total annual number of responses for all respondents:* 10,003.32.

*Estimated annual number of burden hours per respondent:* 1,336.67.[263]

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[254] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[255] The Commission estimates that (1) under proposed § 190.03(b)(1), an FCM would make two notifications per bankruptcy (one to the Commission and one to its DSRO), and (2) under proposed § 190.03(b)(2), an FCM would make one notification per bankruptcy. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 0.67 notifications annually pursuant to proposed § 190.03(b)(1), and 0.33 notifications annually pursuant to proposed § 190.03(b)(2), for a total of one notification annually per respondent.

[256] The Commission estimates that (1) the notifications required under proposed § 190.03(b)(1) would take 0.5 hours to make, and (2) the notification required under proposed § 190.03(b)(2) would take 2 hours to make. In terms of burden hours, this amounts to (0.5*0.67 under proposed § 190.03(b)(1)) plus (2*0.33 under proposed § 190.03(b)(2)), or a total of one burden hour annually per respondent.

[257] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[258] The Commission estimates that (1) under proposed § 190.05(b), a trustee would compute a funded balance for customer accounts 40,000 times; and (2) under proposed § 190.05(d), a trustee would issue 40,000 account statements for customer accounts. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 13,333.33 records annually pursuant to proposed § 190.05(b), and 13,333.33 records annually pursuant to proposed § 190.05(d), for a total of 26,666.67 records annually per respondent.

[259] The Commission estimates that the each record required under proposed § 190.05(b) and (d) would take 0.01 hours to prepare. In terms of burden hours, this amounts to (0.01*13,333.33 under proposed § 190.05(b)) plus (0.01*13,333.33 under proposed § 190.05(d)), or a total of 266.67 burden hours annually per respondent.

[260] The Commission no longer assigns burden hours to the discretionary notice that a trustee may provide to customers in an involuntary FCM bankruptcy proceeding pursuant to proposed § 190.03(c)(3). There have been no involuntary FCM liquidations and none are anticipated. Accordingly, continuing to assign burden hours to this voluntary requirement would inappropriately inflate the burden hours of this information collection.

[261] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the three-year period.

[262] The Commission estimates that a trustee would make the required disclosures under each of proposed § 190.03(c)(1), (2) and (4) 10,000 times per bankruptcy. Dividing those numbers by three (since the Commission anticipates an FCM bankruptcy occurring once every three years) results in 3,333.33 disclosures annually pursuant to each of proposed § 190.03(c)(1), (2), and (4). The Commission further estimates that a trustee would make the required disclosure under proposed § 190.07(b)(5) 10 times per bankruptcy. Dividing this number by three results in 3.33 disclosures annually pursuant to proposed § 190.07(b)(5). This amounts to a total of 10,003.32 disclosures annually per respondent.

[263] The Commission estimates that (1) each disclosure required under proposed §§ 190.03(c)(1)

Continued

*Estimated total annual burden hours for all respondents:* 1,336.67.

4. Reporting Requirements in a DCO Bankruptcy

Proposed § 190.12(a)(2) would require a clearing organization that files a petition in bankruptcy to notify the Commission, at or before the time of such filing, of the filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. It further would require clearing organization against which an involuntary bankruptcy petition is filed to similarly notify the Commission within three hours after the receipt of notice of such filing.

Proposed § 190.12(b)(1) would require the debtor clearing organization to provide to the trustee, no later than three hours following the later of the commencement of a bankruptcy proceeding or the appointment of the trustee, copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c).

Proposed § 190.12(b)(2) would require the debtor clearing organization to provide to the trustee and the Commission, no later than three hours following the commencement of a bankruptcy proceeding, copies of (1) the most recent recovery or wind-down plans of the debtor maintained pursuant to § 39.39(b) and (2) the most recent version of the debtor's default management plan and default rules and procedures maintained pursuant to § 39.16 and, as applicable, § 39.35.

Proposed § 190.12(c)(1) and (2) would require the debtor clearing organization to make available to the trustee and the Commission, no later than the next business day following commencement of a bankruptcy proceeding, copies of (1) all records maintained by the debtor pursuant to § 39.20(a), and (2) any opinions of counsel or other legal memoranda provided to the debtor in the five years preceding the bankruptcy proceeding relating to the enforceability of the rules and procedures of the debtor in the event of an insolvency proceeding involving the debtor.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[264] The Commission has estimated the burden hours for the reporting requirements in a DCO bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 2.98.[265]

*Estimated total annual number of responses for all respondents:* 2.98.

*Estimated annual number of burden hours per respondent:* 0.61.[266]

*Estimated total annual burden hours for all respondents:* 0.61.

5. Recordkeeping Requirements in a DCO Bankruptcy

Proposed § 190.14(d) would require the trustee to use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief on which liquidation of property within the account has been completed or immediately prior to any distribution of property within the account.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[267] The Commission has estimated the burden hours for the recordkeeping requirements in a DCO bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 9.[268]

*Estimated total annual number of responses for all respondents:* 9.

*Estimated annual number of burden hours per respondent:* 0.9.[269]

*Estimated total annual burden hours for all respondents:* 0.9.

6. Third-Party Disclosure Requirements Applicable to a Single Respondent in a DCO Bankruptcy

Proposed § 190.14(a) would allow the trustee, in their discretion based upon the facts and circumstances of the case, to instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim.

Based on its experience, the Commission anticipates that a clearing organization bankruptcy would occur once every fifty years.[270] The Commission has estimated the burden hours for the third-party disclosure requirements applicable to a single respondent in a DCO bankruptcy as follows:

*Estimated number of respondents:* 1.

*Estimated annual number of responses per respondent:* 0.9.[271]

and 190.03(c)(2) (b) would take 0.1 hours to prepare; (2) each disclosure required under proposed § 190.03(c)(4) would take 0.2 hours to prepare; and (3) each disclosure required under proposed § 190.07(b)(5) would take 1 hour to prepare. In terms of burden hours, this amounts to (0.1*3,333.33 under proposed § 190.03(c)(1)) plus (0.1*3,333.33 under proposed § 190.03(c)(2)) plus (0.2*3,333.33 under proposed § 190.03(c)(4)) plus (1*3.33 under proposed § 190.07(b)(5)), or a total of 1336.67 burden hours annually per respondent.

[264] No U.S. clearing organization has ever been the subject of a bankruptcy proceeding, and none has come anywhere near insolvency. While there have been less than a handful of central counterparties worldwide that became functionally insolvent during the twentieth century, none of those were subject to modern resiliency requirements. Accordingly, the Commission believes that an estimate of one DCO bankruptcy every fifty years is an appropriate estimate. These burden estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[265] The Commission estimates that (1) under proposed § 190.12(a)(2), a clearing organization would make two notifications per bankruptcy; (2) under proposed § 190.12(b)(1), a clearing organization would provide 40 reports to the trustee; (3) under proposed § 190.12(b)(2), a clearing organization would provide 5 reports to the trustee and the Commission; (4) under proposed § 190.12(c)(1), a clearing organization would provide 100 records to the trustee and the Commission; and (5) under proposed § 190.12(c)(2), a clearing organization would provide 2 records to the trustee and the Commission. Dividing those numbers by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in (1) 0.04 reports annually pursuant to proposed § 190.12(a)(2); (2) 0.8 reports annually pursuant to proposed § 190.12(b)(1); (3) 0.1 reports annually pursuant to proposed § 190.12(b)(2); (4) 2 reports annually pursuant to proposed § 190.12(c)(1); and (5) 0.04 reports annually pursuant to proposed § 190.12(c)(2). This amounts to a total of 2.98 reports annually per respondent.

[266] The Commission estimates that (1) each notification required under proposed § 190.12(a)(2) would take 0.5 hours to make; (2) gathering the reports required under proposed § 190.12(b)(1) would take 0.2 hours; (3) gathering the reports required under proposed § 190.12(b)(2) would take 0.2 hours; (4) gathering the reports required under proposed § 190.12(c)(1) would take 0.2 hours; and (5) gathering the reports required under proposed § 190.12(c)(2) would take 0.2 hours. In terms of burden hours, this amounts to (0.5*0.04 under proposed § 190.12(a)(2)) plus (0.2*0.8 under proposed § 190.12(b)(1)) plus (0.2*0.1 under proposed § 190.12(b)(2)) plus (0.2*2 under proposed § 190.12(c)(1)) plus (0.2*0.04 under proposed § 190.12(c)(2)), or a total of 0.61 burden hours annually per respondent.

[267] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[268] The Commission estimates that, under proposed § 190.14(d), a clearing organization would compute a funded balance for customer accounts 450 times during a bankruptcy. This number is based on an average of 45 clearing members, each with two accounts (house and customer). Dividing that number by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in 9 records annually per respondent.

[269] The Commission estimates that computing the funded balance of customer accounts pursuant to proposed § 190.14(d) would take 0.1 hours per computation. In terms of burden hours, this amounts to (0.1*9), or 0.9 burden hours annually per respondent.

[270] These estimates express the burdens in terms of those that would be imposed on *one* respondent during the fifty-year period.

[271] The Commission estimates that, under proposed § 190.14(a), a trustee would make the disclosure 45 times during a bankruptcy. This number is based on an average of 45 clearing

*Estimated total annual number of responses for all respondents:* 0.9.

*Estimated annual number of burden hours per respondent:* 0.18.[272]

*Estimated total annual burden hours for all respondents:* 0.18.

7. Third-Party Disclosure Requirements Applicable to Multiple Respondents During Business as Usual

Proposed § 190.10(b) would require an FCM to provide an opportunity to each of its customers, upon first opening a futures account or cleared swaps account with such FCM, to designate such account as a hedging account.

Proposed § 190.10(d) would prohibit an FCM from accepting a letter of credit as collateral unless such letter of credit may be exercised under certain conditions specified in the proposed regulation.

Proposed § 190.10(e) would require an FCM to provide any customer with the disclosure statement set forth in proposed § 190.10(e) prior to accepting property other than cash from or for the account of a customer to margin, guarantee, or secure a commodity contract.

The requirements described above are applicable on a regular basis (*i.e.,* during business as usual) to multiple respondents. The Commission has estimated the burden hours for the third-party disclosure requirements applicable to multiple respondents during business as usual as follows:

*Estimated number of respondents:* 125.

*Estimated annual number of responses per respondent:* 3,000.[273]

*Estimated total annual number of responses for all respondents:* 375,000.

*Estimated annual number of burden hours per respondent:* 60.[274]

*Estimated total annual burden hours for all respondents:* 7,500.

members. Dividing that number by 50 (since the Commission anticipates a clearing organization bankruptcy occurring once every 50 years) results in 0.9 records annually per respondent.

[272] The Commission estimates that instructing customers to file a proof of claim pursuant to proposed § 190.14(a) would take 0.2 hours. In terms of burden hours, this amounts to (0.2*0.9), or 0.18 burden hours annually per respondent.

[273] The Commission estimates that under proposed § 190.10(b), (d), and (e), an FCM would make the required disclosures 1,000 times per year. This amounts to a total of 3,000 responses annually per respondent.

[274] The Commission estimates that each disclosure required under § 190.10(b), (d), and (e) would take 0.02 hours to make. In terms of burden hours, this amounts to (0.02*1,000 under proposed § 190.10(b)) plus (0.02*1,000 under proposed § 190.10(d)) plus (0.02*1,000 under proposed § 190.10(e)), or a60 burden hours annually per respondent.

8. Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on this proposed collection of information regarding:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;
- enhancing the quality, utility, and clarity of the information proposed to be collected; and
- reducing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418–5160 or from *http://RegInfo.gov*. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer for the Commodity Futures Trading Commission;
- (202) 395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

**List of Subjects**

*17 CFR Part 1*

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

*17 CFR Part 4*

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

*17 CFR Part 41*

Brokers, Reporting and recordkeeping requirements, Securities.

*17 CFR Part 190*

Bankruptcy, Brokers, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

■ 2. In § 1.25, revise paragraph (a)(2)(ii)(B) to read as follows:

**§ 1.25 Investment of customer funds.**

(a) * * *

(2) * * *

(ii) * * *

(B) Securities subject to such repurchase agreements must not be ''specifically identifiable property'' as defined in § 190.01 of this chapter.

* * * * *

■ 3. In § 1.55, revise paragraphs (d) and (f) to read as follows:

**§ 1.55 Public disclosures by futures commission merchants.**

* * * * *

(d) Any futures commission merchant, or (in the case of an introduced account) any introducing broker, may open a commodity futures account for a customer without obtaining the separate acknowledgments of disclosure and elections required by this section and by § 1.33(g) and § 33.7 of this chapter, provided that:

(1) Prior to the opening of such account, the futures commission merchant or introducing broker obtains an acknowledgement from the customer, which may consist of a single signature at the end of the futures commission merchant's or introducing broker's customer account agreement, or on a separate page, of the disclosure statements, consents and elections specified in this section and § 1.33(g), and in §§ 33.7, 155.3(b)(2), and 155.4(b)(2) of this chapter, and which may include authorization for the transfer of funds from a segregated customer account to another account of such customer, as listed directly above the signature line, provided the customer has acknowledged by check or other indication next to a description of each specified disclosure statement, consent or election that the customer

has received and understood such disclosure statement or made such consent or election; and

(2) The acknowledgment referred to in paragraph (d)(1) of this section is accompanied by and executed contemporaneously with delivery of the disclosures and elective provisions required by this section and § 1.33(g), and by § 33.7 of this chapter.

* * * * *

(f) A futures commission merchant or, in the case of an introduced account, an introducing broker, may open a commodity futures account for an ''institutional customer'' as defined in § 1.3 without furnishing such institutional customer the disclosure statements or obtaining the acknowledgments required under paragraph (a) of this section, or §§ 1.33(g) and 1.65(a)(3), and §§ 30.6(a), 33.7(a), 155.3(b)(2), 155.4(b)(2), and 190.10(e) of this chapter.

* * * * *

■ 4. In § 1.65, revise paragraphs (a)(3) introductory text and (a)(3)(iii) to read as follows:

**§ 1.65 Notice of bulk transfers and disclosure obligations to customers.**

(a) * * *

(3) Where customer accounts are transferred to a futures commission merchant or introducing broker, other than at the customer's request, the transferee introducing broker or futures commission merchant must provide each customer whose account is transferred with the risk disclosure statements and acknowledgments required by § 1.55 (domestic futures and foreign futures and options trading) and §§ 33.7 (domestic exchange-traded commodity options) and 190.10(e) (non-cash margin—to be furnished by futures commission merchants only) of this chapter and receive the required acknowledgments within sixty days of the transfer of accounts. The requirement in this paragraph (a)(3) shall not apply:

* * * * *

(iii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of § 1.10(j) and such futures commission merchant maintains the relevant acknowledgments required by § 1.55(a)(1)(ii) and § 33.7(a)(1)(ii) of this chapter and can establish compliance with § 190.10(e) of this chapter.

* * * * *

## PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

**Authority:** 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

■ 6. In § 4.5, revise paragraph (c)(2)(iii)(A) to read as follows:

**§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term ''commodity pool operator.''**

* * * * *

(c) * * *

(2) * * *

(iii) * * *

(A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of the definition of bona fide hedging transactions and positions for excluded commodities in §§ 1.3 and 151.5 of this chapter; Provided however, That, in addition, with respect to positions in commodity futures or commodity options contracts, or swaps which do not come within the meaning and intent of the definition of bona fide hedging transactions and positions for excluded commodities in §§ 1.3 and 151.5 of this chapter, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, Provided further, That in the case of an option that is in-the-money at the time of the purchase, the in-the-money amount as defined in § 190.01 of this chapter may be excluded in computing such five percent; or

* * * * *

■ 7. In § 4.12, revise the section heading and paragraph (b)(1)(i)(C) to read as follows:

**§ 4.12 Exemption from provisions of this part.**

* * * * *

(b) * * *

(1) * * *

(i) * * *

(C) Will not enter into commodity interest transactions for which the aggregate initial margin and premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) exceed 10 percent of the fair market value of the pool's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; *Provided, however,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01 of this chapter may be excluded in computing such 10 percent; and

* * * * *

■ 8. In § 4.13, revise paragraph (a)(3)(ii)(A) to read as follows:

**§ 4.13 Exemption from registration as a commodity pool operator.**

* * * * *

(a) * * *

(3) * * *

(ii) * * *

(A) The aggregate initial margin, premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) required to establish such positions, determined at the time the most recent position was established, will not exceed 5 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01 of this chapter may be excluded in computing such 5 percent; or

* * * * *

## PART 41—SECURITY FUTURES PRODUCTS

■ 9. The authority citation for part 41 continues to read as follows:

**Authority:** Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

■ 10. In § 41.41, revise paragraph (d) to read as follows:

**§ 41.41 Security futures products accounts.**

* * * * *

(d) *Recordkeeping requirements.* The Commission's recordkeeping rules set forth in §§ 1.31, 1.32, 1.35, 1.36, 1.37, 4.23, 4.33, and 18.05 of this chapter shall apply to security futures product transactions and positions in a futures account (as that term is defined in § 1.3 of this chapter). These rules shall not apply to security futures product transactions and positions in a securities account (as that term is defined in § 1.3 of this chapter); provided, that the SEC's recordkeeping rules apply to those transactions and positions.

* * * * *

■ 11. Revise part 190 to read as follows:

## PART 190—BANKRUPTCY RULES

### Subpart A—General Provisions



### Subpart B—Futures Commission Merchant as Debtor



### Subpart C—Clearing Organization as Debtor



**Authority:** 7 U.S.C. 1a, 2, 6c, 6d, 6g, 7a–1, 12, 12a, 19, and 24; 11 U.S.C. 362, 546, 548, 556, and 761–767, unless otherwise noted.

## Subpart A—General Provisions

### § 190.00 Statutory authority, organization, core concepts, scope, and construction.

(a) *Statutory authority.* The Commission has adopted the regulations in this part pursuant to its authority under sections 8a(5) and 20 of the Commodity Exchange Act (the Act). Section 8a(5) provides general rulemaking authority to effectuate the provisions and accomplish the purposes of the Act. Section 20 provides that the Commission may, notwithstanding title 11 of the United States Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code. Specifically, the Commission is authorized to adopt rules or regulations specifying—

(1) That certain cash, securities or other property, or commodity contracts, are to be included in or excluded from customer property or member property;

(2) That certain cash, securities or other property, or commodity contracts, are to be specifically identifiable to a particular customer in a particular capacity;

(3) The method by which the business of the commodity broker is to be conducted or liquidated after the date of the filing of the petition under chapter 7 of the Bankruptcy Code, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation;

(4) Any persons to which customer property and commodity contracts may be transferred under section 766 of the Bankruptcy Code; and

(5) How a customer's net equity is to be determined.

(b) *Organization.* This part is organized into three subparts. Subpart A contains general provisions applicable in all cases. Subpart B contains provisions that apply when the debtor is a futures commission merchant (as that term is defined in the Act or Commission regulations). This includes acting as a foreign futures commission merchant, as defined in section 761(12) of the Bankruptcy Code, but excludes a person that is ''notice-registered'' as a futures commission merchant pursuant to section 4f(a)(2) of the Act. Subpart C contains provisions that apply when the debtor is registered as a derivatives clearing organization under the Act.

(c) *Core concepts.* The regulations in this part reflect several core concepts. The following descriptions of core concepts in this paragraph (c) are subject to the further specific requirements set forth in this part, and the specific requirements in this part should be interpreted and applied consistently with these core concepts.

(1) *Commodity brokers.* Subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a commodity broker, against which a customer holds a ''net equity'' claim relating to a commodity contract. This part is limited to a commodity broker that is—

(i) A futures commission merchant; or

(ii) A derivatives clearing organization registered under the Act and § 39.3 of this chapter.

(2) *Account classes.* The Act and Commission regulations in parts 1, 22, and 30 of this chapter provide differing treatment and protections for different types of cleared commodity contracts. This part establishes three account classes that correspond to the different types of accounts that futures commission merchants and clearing organizations are required to maintain under the regulations in the preceding sentence, specifically, the futures account class (including options on futures), the foreign futures account class (including options on foreign futures) and the cleared swaps account class (including cleared options other than options on futures or foreign futures). This part also establishes a fourth account class, the delivery account class (which may be further subdivided as provided in this part), for property held in an account designated within the books and records of the debtor as a delivery account, for effecting delivery under commodity contracts whose terms require settlement via delivery when the commodity contract is held to expiration or, in the case of a cleared option, is exercised.

(3) *Public customers and non-public customers; Commission segregation requirements; member property*—(i) *Public customers and non-public customers.* This part prescribes separate treatment of ''public customers'' and ''non-public customers'' (as these terms are defined in § 190.01) within each account class in the event of a proceeding under this part in which the debtor is a futures commission merchant. Public customers of a debtor futures commission merchant are entitled to a priority in the distribution of cash, securities or other customer property over non-public customers, and both have priority over all other claimants (except for claims relating to the administration of customer property) pursuant to section 766(h) of the Bankruptcy Code.

(A) The cash, securities or other property held on behalf of the public customers of a futures commission merchant in the futures, foreign futures or cleared swaps account classes are subject to special segregation requirements imposed under parts 1, 22, and 30 of this chapter for each account class. Although such segregation requirements generally are not applicable to cash, securities or other property received from or reflected in the futures, foreign futures or cleared swaps accounts of non-public customers of a futures commission merchant, such transactions and property are customer property within the scope of this part.

(B) While parts 1, 22, and 30 of this chapter do not impose special segregation requirements with respect to treatment of cash, securities or other property of public customers carried in a delivery account, such property does constitute customer property. Thus, the

distinction between public and non-public customers is, given the priority for public customers in section 766(h) of the Bankruptcy Code, relevant for the purpose of making distributions to delivery account class customers pursuant to this part.

(ii) *Clearing organization bankruptcies: Member property and customer property other than member property.* In the event of a proceeding under this part in which the debtor is a clearing organization, the classification of customers as public customers or non-public customers also is relevant, in that each member of the clearing organization will have separate claims against the clearing organization (by account class) with respect to—

(A) Commodity contract transactions cleared for its own account or on behalf of any of its non-public customers (which are cleared in a ''house account'' at the clearing organization); and

(B) Commodity contract transactions cleared on behalf of any public customers of the clearing member (which are cleared in accounts at the clearing organization that is separate and distinct from house accounts). Thus, for a clearing organization, ''customer property'' is divided into ''member property'' and ''customer property other than member property.'' The term member property is used to identify the cash, securities or property available to pay the net equity claims of clearing members based on their house account at the clearing organization.

(iii) *Preferential assignment among customer classes and account classes for clearing organization bankruptcies.* Section 190.18 is designed to support the interests of public customers of members of a debtor that is a clearing organization.

(A) Certain customer property is preferentially assigned to ''customer property other than member property'' instead of ''member property'' to the extent that there is a shortfall in funded balances for members' public customer claims. Moreover, to the extent that there are excess funded balances for members' claims in any customer class/account class combination, that excess is also preferentially assigned to ''customer property other than member property'' to the extent of any shortfall in funded balances for members' public customer claims.

(B) Where property is assigned to a particular customer class with more than one account class, it is assigned to the account class for which the funded balance percentage is the lowest until there are two account classes with equal funded balance percentages, then to both such account classes, keeping the funded balance percentage the same, and so forth following the analogous approach if the debtor has more than two account classes within the relevant customer class.

(4) *Porting of public customer commodity contract positions.* In a proceeding in which the debtor is a futures commission merchant, this part sets out a policy preference for transferring to another futures commission merchant, or ''porting,'' open commodity contract positions of the debtor's public customers along with all or a portion of such customers' account equity. Porting mitigates risks to both the customers of the debtor futures commission merchant and to the markets. To facilitate porting, this part addresses the manner in which the debtor's business is to be conducted on and after the filing date, with specific provisions addressing the collection and payment of margin for open commodity contract positions prior to porting.

(5) *Pro rata distribution.* (i) The commodity broker provisions of the Bankruptcy Code, subchapter IV of Chapter 7, in particular section 766(h), have long revolved around the principle of pro rata distribution. If there is a shortfall in the cash, securities or other property in a particular account class needed to satisfy the net equity claims of public customers in that account class, the customer property in that account class will be distributed pro rata to those public customers (subject to appendix B of this part). Any customer property not attributable to a specific account class, or that exceeds the amount needed to pay allowed customer net equity claims in a particular account class, will be distributed to public customers in other account classes so long as there is a shortfall in those other classes. Non-public customers will not receive any distribution of customer property so long as there is any shortfall, in any account class, of customer property needed to satisfy public customer net equity claims.

(ii) The pro rata distribution principle means that, if there is a shortfall of customer property in an account class, all customers within that account class will suffer the same proportional loss relative to their allowed net equity claims. The principle in this paragraph (c)(5)(ii) applies to all customers, including those who post as collateral specifically identifiable property or letters of credit. The pro rata distribution principle is subject to the special distribution provisions set forth in Framework 1 of appendix B to this part for cross-margin accounts and Framework 2 of appendix B to this part for funds held outside of the U.S. or held in non-U.S. currency.

(6) *Deliveries.* (i) Commodity contracts may have terms that require a customer owning the contract—

(A) To make or take delivery of the underlying commodity if the customer holds the contract to a delivery position; or,

(B) In the case of an option on a commodity—

(*1*) To make delivery upon exercise (as the buyer of a put option or seller of a call option); or

(*2*) To take delivery upon exercise (as seller of a put option or buyer of a call option). Depending upon the circumstances and relevant market, delivery may be effected via a delivery account, a futures account, a foreign futures account or a cleared swaps account, or, when the commodity subject to delivery is a security, in a securities account (in which case property associated with the delivery held in a securities account is not part of any customer account class for purposes of this part).

(ii) Although commodity contracts with delivery obligations are typically offset before reaching the delivery stage (*i.e.,* prior to triggering bilateral delivery obligations), when delivery obligations do arise, a delivery default could have a disruptive effect on the cash market for the commodity and adversely impact the parties to the transaction. This part therefore sets out special provisions to address open commodity contracts that are settled by delivery, when those positions are nearing or have entered into a delivery position at the time of or after the filing date. The delivery provisions in this part are intended to allow deliveries to be completed in accordance with the rules and established practices for the relevant commodity contract market or clearing organization, as applicable and to the extent permitted under this part.

(iii) In a proceeding in which the debtor is a futures commission merchant, the delivery provisions in this part reflect policy preferences to—

(A) Liquidate commodity contracts that settle via delivery before they move into a delivery position; and

(B) When such contracts are in a delivery position, to allow delivery to occur, where practicable, outside administration of the debtor's estate.

(iv) The delivery provisions in this part apply to any commodity that is subject to delivery under a commodity contract, as the term commodity is defined in section 1a(9) of the Act, whether the commodity itself is tangible or intangible, including agricultural commodities as defined in § 1.3 of this

chapter, other non-financial commodities (such as metals or energy commodities) covered by the definition of exempt commodity in section 1a(20) of the Act, and commodities that are financial in nature (such as foreign currencies) covered by the definition of excluded commodity in section 1a(19) of the Act. The delivery provisions also apply to virtual currencies that are subject to delivery under a commodity contract.

(d) *Scope*—(1) *Proceedings*—(i) *Certain commodity broker proceedings under subchapter IV of chapter 7 of the Bankruptcy Code.* (A) Section 101(6) of the Bankruptcy Code recognizes ''futures commission merchants'' and ''foreign futures commission merchants,'' as those terms are defined in section 761(12) of the Bankruptcy Code, as separate categories of commodity broker. The definition of commodity broker in § 190.01, as it applies to a commodity broker that is a futures commission merchant under the Act, also covers foreign futures commission merchants because a foreign futures commission merchant is required to register as a futures commission merchant under the Act.

(B) Section 101(6) of the Bankruptcy Code recognizes ''commodity options dealers,'' and ''leverage transaction merchants'' as defined in sections 761(6) and (13) of the Bankruptcy Code, as separate categories of commodity brokers. There are no commodity options dealers or leverage transaction merchants as of [date final rule is signed by the Secretary of the Commission].[1]

(ii) *Futures commission merchants subject to a SIPA proceeding.* Pursuant to section 7(b) of SIPA, 15 U.S.C. 78fff–1(b), the trustee in a SIPA proceeding, where the debtor also is a commodity broker, has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with the provisions of SIPA or as otherwise ordered by the court. This part therefore also applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under section 15 of the Securities Exchange Act of 1934 when the debtor also is a futures commission merchant.

(iii) *Commodity brokers subject to an FDIC proceeding.* Section 5390(m)(1)(B) of title 12 of the United States Code provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property in connection with the liquidation of a covered financial company or a bridge financial company (as those terms are defined in section 5381(a) of title 12) that is a commodity broker as if such person were a debtor for purposes of subchapter IV, except as specifically provided in section 5390 of title 12. This part therefore shall serve as guidance as to such distribution of property in a proceeding in which the FDIC is acting as a receiver pursuant to title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act with respect to a covered financial company or bridge financial company that is a commodity broker whose liquidation otherwise would be administered by a trustee under subchapter IV of chapter 7 of the Bankruptcy Code.

(2) *Account class and implied trust limitations.* (i) The trustee may not recognize any account class that is not one of the account classes enumerated in § 190.01.

(ii) No property that would otherwise be included in customer property, as defined in § 190.01, shall be excluded from customer property because such property is considered to be held in a constructive, resulting, or other trust that is implied in equity.

(3) *Commodity contract exclusions.* For purposes of this part, the following are excluded from the term ''commodity contract'':

(i) Options on commodities (including swaps subject to regulation under part 32 of this chapter) that are not centrally cleared by a clearing organization or foreign clearing organization.

(ii) Transactions, contracts, or agreements that are classified as ''forward contracts'' under the Act pursuant to the exclusion from the term ''future delivery'' set out in section 1a(27) of the Act or the exclusion from the definition of a ''swap'' under section 1a(47)(B)(ii) of the Act, in each case that are not centrally cleared by a clearing organization or foreign clearing organization.

(iii) Security futures products as defined in section 1a(45) of the Act when such products are held in a securities account.

(iv) Any off-exchange retail foreign currency transaction, contract, or agreement described in sections 2(c)(2)(B) or (C) of the Act.

(v) Any security-based swap or other security (as defined in section 3 of the Exchange Act), but a security futures product that is carried in an account for which there is a corresponding account class under this part is not so excluded.

(vi) Any off-exchange retail commodity transaction, contract, or agreement described in section 2(c)(2)(D) of the Act, unless such transaction, contract, or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade as, or as if, such transaction, contract or agreement is a futures contract.

(e) *Construction.* (1) A reference in this part to a specific section of a Federal statute refers to such section as the same may be amended, superseded, or renumbered.

(2) Where they differ, the definitions set forth in § 190.01 shall be used instead of defined terms set forth in section 761 of the Bankruptcy Code. In many cases, these definitions are based on definitions in parts 1, 22, and 30 of this chapter. Notwithstanding the use of different defined terms, the regulations in this part are intended to be consistent with the provisions and objectives of subchapter IV of chapter 7 of the Bankruptcy Code.

(3) In the context of portfolio margining and cross margining programs, commodity contracts and associated collateral will be treated as part of the account class in which, consistent with part 1, 22, 30, or 39 of this chapter, or Commission Order, they are held.

(i) Thus, as noted in paragraph (2) of the definition of account class in § 190.01, where open commodity contracts (and associated collateral) that would be attributable to one account class are, instead, commingled with the commodity contracts (and associated collateral) in a second account class (the ''home field''), then the trustee must treat all such commodity contracts and collateral as part of, and consistent with the regulations applicable to, the second account class.

(ii) The concept in paragraph (e)(3)(i) of this section, that the rules of the ''home field'' will apply, also pertains to securities positions that are, pursuant to an approved cross margining program, held in a commodities account class (in which case the rules of that commodities account class will apply) and to commodities positions that are, pursuant to an approved cross-margining program, held in a securities account (in which case, the rules of the securities account will apply, consistent with section 16(2)(b)(ii) of SIPA, 15 U.S.C. 78lll(2)(b)(ii)).

**§ 190.01 Definitions.**

For purposes of this part:

*Account class,* for purposes of this part:

[1] The Commission intends to adopt rules with respect to commodity options dealers or leverage transaction merchants, respectively, at such time as an entity registers as such.

(1) Means one or more of each of the following types of accounts maintained by a futures commission merchant or clearing organization (as applicable), each type of which must be recognized as a separate account class by the trustee:

(i) *Futures account* has the same definition as set forth in § 1.3 of this chapter.

(ii) *Foreign futures account* means:

(A) A 30.7 account, as such term is defined in § 30.1(g) of this chapter; and

(B) An account maintained on the books and records of a clearing organization for the purpose of accounting for transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade, cleared or settled by the clearing organization for a member that is a futures commission merchant (and related cash, securities or other property), on behalf of that member's 30.7 customers (as that latter term is defined in § 30.1(f) of this chapter).

(iii) *Cleared swaps account* means a cleared swaps customer account, as such term is defined in § 22.1 of this chapter.

(iv)(A) *Delivery account* means:

(*1*) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, and which is designated as a delivery account on the books and records of the futures commission merchant; and

(*2*) An account maintained on the books and records of a clearing organization for a clearing member (or a customer of a clearing member) for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, as well as any account in which the clearing organization holds physical delivery property represented by electronic title documents or otherwise existing in an electronic (dematerialized) form in its capacity as a central depository, in each case where the account is designated as a delivery account on the books and the records of the clearing organization.

(B) The delivery account class is further divided into a ''physical delivery account class'' and a ''cash delivery account class,'' as provided in § 190.06(b), each of which shall be recognized as a separate class of account by the trustee.

(2)(i) If open commodity contracts that would otherwise be attributable to one account class (and any property margining, guaranteeing, securing or accruing in respect of such commodity contracts) are, pursuant to a Commission rule, regulation, or order, or a clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter, held separately from other commodity contracts and property in that account class and are commingled with the commodity contracts and property of another account class, then the trustee must treat the former commodity contracts (and any property margining, guaranteeing, securing or accruing in respect of such commodity contracts), for purposes of this part, as being held in an account of the latter account class.

(ii) The principle in paragraph (2)(i) of this definition will be applied to securities positions and associated collateral held in a commodity account class pursuant to a cross margining program approved by the Commission (and thus treated as part of that commodity account class) and to commodity positions and associated collateral held in a securities account pursuant to a cross margining program approved by the Commission (and thus treated as part of the securities account).

(3) For the purpose of this definition, a commodity broker is considered to maintain an account for another person by establishing internal books and records in which it records the person's commodity contracts and cash, securities or other property received from or on behalf of such person or accruing to the credit of such person's account, and related activity (such as liquidation of commodity contract positions or adjustments to reflect mark-to-market gains or losses on commodity contract positions), regardless whether the commodity broker has kept such books and records current or accurate.

*Act* means the Commodity Exchange Act.

*Allowed net equity* means, for purposes of subpart B of this part, the amount calculated as allowed net equity in accordance with § 190.08(a), and for purposes of subpart C of this part, the amount calculated as allowed net equity in accordance with § 190.17(c).

*Bankruptcy Code* means, except as the context of the regulations in this part otherwise requires, those provisions of title 11 of the United States Code relating to ordinary bankruptcies (chapters 1 through 5) and liquidations (chapter 7 with the exception of subchapters III and V, together with the Federal rules of bankruptcy procedure relating thereto.

*Business day* means weekdays, not including Federal holidays as established annually by 5 U.S.C. 6103. A business day begins at 8:00 a.m. in Washington, DC, and ends at 7:59:59 a.m. on the next day that is a business day.

*Calendar day* means the time from midnight to midnight in Washington, DC.

*Cash delivery account class* has the meaning set forth under *account class* in this section.

*Cash delivery property* means any cash or cash equivalents recorded in a delivery account that is, as of the filing date:

(1) Credited to such account to pay for receipt of delivery of a commodity under a commodity contract;

(2) Credited to such account to collateralize or guarantee an obligation to make or take delivery of a commodity under a commodity contract; or

(3) Has been credited to such account as payment received in exchange for making delivery of a commodity under a commodity contract. It also includes property in the form of commodities that have been delivered after the filing date in exchange for cash or cash equivalents held in a delivery account as of the filing date. The cash or cash equivalents must be identified on the books and the records of the debtor as having been received, from or for the account of a particular customer, on or after three calendar days before the relevant—

(i) First notice date in the case of a futures contract; or

(ii) Exercise date in the case of a (cleared) option.

*Cash equivalents* means assets, other than United States dollar cash, that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value.

*Cleared swaps account* has the meaning set forth under *account class* in this section.

*Clearing organization* means a derivatives clearing organization that is registered with the Commission as such under the Act.

*Commodity broker* means any person that is—

(1) A futures commission merchant under the Act, but excludes a person that is ''notice-registered'' as a futures commission merchant under section 4f(a)(2) of the Act; or

(2) A clearing organization, in each case with respect to which there is a ''customer'' as that term is defined in this section.

*Commodity contract* means—

(1) A futures or options on futures contract executed on or subject to the rules of a designated contract market;

(2) A futures or option on futures contract executed on or subject to the rules of a foreign board of trade;

(3) A swap as defined in section 1a(47) of the Act and § 1.3 of this chapter, that is directly or indirectly submitted to and cleared by a clearing organization and which is thus a cleared swap as that term is defined in section 1a(7) of the Act and § 22.1 of this chapter; or

(4) Any other contract that is a swap for purposes of this part under the definition in this section and is submitted to and cleared by a clearing organization. Notwithstanding the preceding sentence, a security futures product as defined in section 1a(45) of the Act is not a commodity contract for purposes of this part when such contract is held in a securities account. Moreover, a contract, agreement, or transaction described in § 190.00(d)(3) as excluded from the term ''commodity contract'' is excluded from this definition.

*Commodity contract account* means—

(1) A futures account, foreign futures account, cleared swaps account, or delivery account; or

(2) If the debtor is a futures commission merchant, for purposes of identifying customer property for the foreign futures account class (subject to § 190.09(a)(1)), an account maintained for the debtor by a foreign clearing organization or a foreign futures intermediary reflecting futures or options on futures executed on or subject to the rules of a foreign board of trade, including any account maintained on behalf of the debtor's public customers.

*Court* means the court having jurisdiction over the debtor's estate.

*Cover* has the meaning set forth in § 1.17(j) of this chapter.

*Customer* means:

(1)(i) With respect to a futures commission merchant as debtor (including a foreign futures commission merchant as that term is defined in section 761(12) of the Bankruptcy Code), the meaning set forth in sections 761(9)(A) and (B) of the Bankruptcy Code.

(ii) With respect to a clearing organization as debtor, the meaning set forth in section 761(9)(D) of the Bankruptcy Code.

(2) The term customer includes the owner of a portfolio cross-margining account covering commodity contracts and related positions in securities (as defined in section 3 of the Exchange Act) that is carried as a futures account or cleared swaps customer account pursuant to an appropriate rule, regulation, or order of the Commission.

*Customer claim of record* means a customer claim that is determinable solely by reference to the records of the debtor.

*Customer class* means each of the following two classes of customers, which must be recognized as separate classes by the trustee: Public customers and non-public customers; provided, however, that when the debtor is a clearing organization the references to public customers and non-public customers are based on the classification of customers of, and in relation to, the members of the clearing organization.

*Customer property* and *customer estate* are used interchangeably to mean the property subject to pro rata distribution in a commodity broker bankruptcy in the priority set forth in sections 766(h) or (i), as applicable, of the Bankruptcy Code, and includes cash, securities, and other property as set forth in § 190.09(a).

*Debtor* means a person with respect to which a proceeding is commenced under subchapter IV of chapter 7 of the Bankruptcy Code or under SIPA, or for which the Federal Deposit Insurance Corporation is appointed as a receiver pursuant to 12 U.S.C. 5382, provided, however, that this part applies only to such a proceeding if the debtor is a commodity broker as defined in this section.

*Delivery account* has the meaning set forth under *account class* in this section.

*Distribution* of property to a customer includes transfer of property on the customer's behalf, return of property to a customer, as well as distributions to a customer of valuable property that is different than the property posted by that customer.

*Equity* means the amount calculated as equity in accordance with § 190.08(b)(1).

*Exchange Act* means the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*

*FDIC* means the Federal Deposit Insurance Corporation.

*Filing date* means the date a petition under the Bankruptcy Code or application under SIPA commencing a proceeding is filed or on which the FDIC is appointed as a receiver pursuant to 12 U.S.C. 5382(a).

*Final net equity determination date* means the latest of:

(1) The day immediately following the day on which all commodity contracts held by or for the account of customers of the debtor have been transferred, liquidated, or satisfied by exercise or delivery;

(2) The day immediately following the day on which all property other than commodity contracts held for the account of customers has been transferred, returned, or liquidated;

(3) The bar date for filing customer proofs of claim as determined by rule 3002(c) of the Federal Rules of Bankruptcy Procedure, the expiration of the six-month period imposed pursuant to section 8(a)(3) of SIPA, or such other date (whether earlier or later) set by the court (or, in the case of the FDIC acting as a receiver pursuant to 12 U.S.C. 5382(a), the deadline set by the FDIC pursuant to 12 U.S.C. 5390(a)(2)(B)); or

(4) The day following the allowance (by the trustee or by the bankruptcy court) or disallowance (by the bankruptcy court) of all disputed customer net equity claims.

*Foreign board of trade* has the same meaning as set forth in § 1.3 of this chapter.

*Foreign clearing organization* means a clearing house, clearing association, clearing corporation, or similar entity, facility, or organization clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade.

*Foreign future* shall have the same meaning as that set forth in section 761(11) of the Bankruptcy Code.

*Foreign futures account* has the meaning set forth under *account class* in this section.

*Foreign futures commission merchant* shall have the same meaning as that set forth in section 761(12) of the Bankruptcy Code.

*Foreign futures intermediary* refers to a foreign futures and options broker, as such term is defined in § 30.1(e) of this chapter, acting as an intermediary for foreign futures contracts between a foreign futures commission merchant and a foreign clearing organization.

*Funded balance* means the amount calculated as funded balance in accordance with § 190.08(c) and, as applicable, § 190.17(d).

*Futures* and *futures contract* are used interchangeably to mean any contract for the purchase or sale of a commodity (as defined in section 1a(9) of the Act) for future delivery that is executed on or subject to the rules of a designated contract market or on or subject to the rules of a foreign board of trade. The term also covers, for purposes of this part:

(1) Any transaction, contract or agreement described in section 2(c)(2)(D) of the Act and traded on or subject to the rules of a designated contract market or foreign board of trade, to the extent not covered by the foregoing definition; and

(2) Any transaction, contract or agreement that is classified as a ''forward contract'' under the Act pursuant to the exclusion from the term ''future delivery'' set out in section 1a(27) of the Act or the exclusion from the definition of a ''swap'' under section 1a(47)(B)(ii) of the Act, provided that such transaction, contract, or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade and is cleared by, respectively, a clearing organization or foreign clearing organization the same as if it were a futures contract.

*Futures account* has the meaning set forth under *account class* in this section.

*House account* means:

(1) In the case of a futures commission merchant, any proprietary account, as defined in § 1.3 of this chapter, with respect to futures contracts or swaps;

(2) In the case of a foreign futures commission merchant, any proprietary account, as defined in § 1.3 of this chapter, with respect to foreign futures contracts; and

(3) In the case of a clearing organization, any commodity contract account of a member at such clearing organization maintained to reflect trades for the member's own account or for any non-public customer of such member.

*In-the-money* means:

(1) With respect to a call option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the option exceeds the strike price of the option; and

(2) With respect to a put option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the option is exceeded by the strike price of the option.

*Joint account* means any commodity contract account held by more than one person.

*Member property* means, in connection with a clearing organization bankruptcy, the property which may be used to pay that portion of the net equity claim of a member which is based on the member's house account at the clearing organization, including any claims on behalf of non-public customers of the member.

*Net equity* means, for purposes of subpart B of this part, the amount calculated as net equity in accordance with § 190.08(b), and for purposes of subpart C of this part, the amount calculated as net equity in accordance with § 190.17(b).

*Non-public customer* means:

(1) With respect to a futures commission merchant, any customer that is not a public customer; and

(2) With respect to a clearing organization, any person whose account carried on the books and records of—

(i) A member of the clearing organization that is a futures commission merchant, is classified as a proprietary account under § 1.3 of this chapter (in the case of the futures or foreign futures account class) or as a cleared swaps proprietary account under § 22.1 of this chapter (in the case of the cleared swaps account class); or

(ii) A member of the clearing organization that is a foreign broker, is classified or treated as proprietary under and for purposes of—

(A) The rules of the clearing organization; or

(B) The jurisdiction of incorporation of such member.

*Open commodity contract* means a commodity contract which has been established in fact and which has not expired, been redeemed, been fulfilled by delivery or exercise, or been offset (*i.e.,* liquidated) by another commodity contract.

*Order for relief* has the same meaning set forth in section 301 of the Bankruptcy Code, in the case of the filing of a voluntary bankruptcy petition, and means the entry of an order granting relief under section 303 of the Bankruptcy Code in an involuntary case. It also means, where applicable, the issuance of a protective decree under section 5(b)(1) of SIPA or the appointment of the FDIC as receiver pursuant to 12 U.S.C. 5382(a)(1)(A).

*Person* means any individual, association, partnership, corporation, trust, or other form of legal entity.

*Physical delivery account class* has the meaning set forth under *account class* in this section.

*Physical delivery property* means a commodity, whether tangible or intangible, held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract that settles via delivery if held to a delivery position (as described in § 190.06(a)(1)), including warehouse receipts, shipping certificates or other documents of title (including electronic title documents) for the commodity, or the commodity itself:

(1) That the debtor holds for the account of a customer for the purpose of making delivery of such commodity on the customer's behalf, which as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer. Cash or cash equivalents received after the filing date in exchange for delivery of such physical delivery property shall also constitute physical delivery property;

(2) That the debtor holds for the account of a customer and that the customer received or acquired by taking delivery under an expired or exercised commodity contract and which, as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer, regardless how long such property has been held in such account; and

(3) Where property that the debtor holds in a futures account, foreign futures account or cleared swaps account, or, if the commodity is a security, in a securities account, would meet the criteria listed in paragraph (1) or (2) of this definition, but for the fact of being held in such account rather than a delivery account, such property will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06.

(4) Commodities or documents of title that are not held by the debtor and are delivered or received by a customer in accordance with § 190.06(a)(2) (or in accordance with § 190.06(a)(2) in conjunction with § 190.16(a) if the debtor is a clearing organization) to fulfill a customer's delivery obligation under a commodity contract will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06. As this property is held outside of the debtor's estate, it is not subject to pro rata distribution.

*Primary liquidation date* means the first business day immediately following the day on which all commodity contracts (including any commodity contracts that are specifically identifiable property) have been liquidated or transferred.

*Public customer* means:

(1) With respect to a futures commission merchant and in relation to:

(i) The futures account class, a futures customer as defined in § 1.3 of this chapter whose futures account is subject to the segregation requirements of section 4d(a) of the Act and the regulations in this chapter that implement section 4d(a), including as applicable §§ 1.20 through 1.30 of this chapter;

(ii) The foreign futures account class, a § 30.7 customer as defined in § 30.1 of this chapter whose foreign futures accounts is subject to the segregation requirements of § 30.7 of this chapter;

(iii) The cleared swaps account class, a Cleared Swaps Customer as defined in § 22.1 of this chapter whose cleared swaps account is subject to the segregation requirements of part 22 of this chapter; and

(iv) The delivery account class, a customer that is or would be classified as a public customer if the property reflected in the customer's delivery account had been held in an account described in paragraph (1)(i), (ii), or (iii) of this definition.

(2) With respect to a clearing organization, any customer of that clearing organization that is not a non-public customer.

*Securities account* means, in relation to a futures commission merchant that is registered as a broker or dealer under the Exchange Act, an account maintained by such futures commission merchant in accordance with the requirements of section 15(c)(3) of the Exchange Act and § 240.15c3–3 of this title.

*Security* has the meaning set forth in section 101(49) of the Bankruptcy Code.

*SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C 78aaa *et seq.*

*Specifically identifiable property* means:

(1)(i) The following property received, acquired, or held by or for the account of the debtor from or for the futures account, foreign futures account or cleared swaps account of a customer:

(A) Any security which as of the filing date is:

(*1*)(*i*) Held for the account of a customer;

(*ii*) Registered in such customer's name;

(*iii*) Not transferable by delivery; and

(*iv*) Has a duration or maturity date of more than 180 days; or

(*2*)(*i*) Fully paid;

(*ii*) Non-exempt; and

(*iii*) Identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity; and

(B) Any warehouse receipt, bill of lading, or other document of title which as of the filing date:

(*1*) Can be identified on the books and records of the debtor as held for the account of a particular customer; and

(*2*) Is not in bearer form and is not otherwise transferable by delivery;

(ii) Any open commodity contracts treated as specifically identifiable property in accordance with § 190.03(c)(2); and

(iii) Any physical delivery property described in paragraphs (1) through (3) of the definition of physical delivery property in this section.

(2) Notwithstanding any other provision of this definition of specifically identifiable property, security futures products, and any money, securities, or property held to margin, guarantee, or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of subchapter IV of the Bankruptcy Code or this part, if held in a securities account.

(3) No property that is not explicitly included in this definition may be treated as specifically identifiable property.

*Strike price* means the price per unit multiplied by the total number of units at which a person may purchase or sell a futures contract or a commodity or other interest underlying an option that is a commodity contract.

*Substitute customer property* means cash or cash equivalents delivered to the trustee by or on behalf of a customer in connection with—

(1) The return of specifically identifiable property by the trustee; or

(2) The return of, or an agreement not to draw upon, a letter of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract.

*Swap* has the meaning set forth in section 1a(47) of the Act and § 1.3 of this chapter, and, in addition, also means any other contract, agreement, or transaction that is carried in a cleared swaps account pursuant to a rule, regulation, or order of the Commission, provided, in each case, that it is cleared by a clearing organization as, or the same as if it were, a swap.

*Trustee* means, as appropriate, the trustee in bankruptcy or in a SIPA proceeding, appointed to administer the debtor's estate and any interim or successor trustee, or the FDIC, where it has been appointed as a receiver pursuant to 12 U.S.C. 5382.

*Undermargined* means, with respect to a futures account, foreign futures account or cleared swaps account carried by the debtor, the funded balance for such account is below the minimum amount that the debtor is required to collect and maintain for the open commodity contracts in such account under the rules of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade. If any such rules establish both an initial margin requirement and a lower maintenance margin requirement applicable to any commodity contracts (or to the entire portfolio of commodity contracts or any subset thereof) in a particular commodity contract account of the customer, the trustee will use the lower maintenance margin level to determine the customer's minimum margin requirement for such account.

*Variation settlement* means variation margin as defined in § 1.3 of this chapter plus all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.

**§ 190.02 General.**

(a) *Request for exemption.* (1) The trustee (or, in the case of an involuntary petition pursuant to section 303 of the Bankruptcy Code, any other person charged with the management of a commodity broker) may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in this part, including an extension of any time limit prescribed by this part or an exemption subject to conditions, provided that the Commission shall not grant an extension for any time period established by the Bankruptcy Code.

(2) A request pursuant to paragraph (a)(1) of this section:

(i) May be made ex parte and by any means of communication, written or oral, provided that the trustee must confirm an oral request in writing within one business day and such confirmation must contain all the information required by paragraph (b)(3) of this section. The request or confirmation of an oral request must be given to the Commission as provided in paragraph (a) of this section.

(ii) Must state the particular provision of this part with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and this part.

(3) The Director of the Division of Clearing and Risk, or members of the Commission staff designated by the Director, shall grant, deny, or otherwise respond to a request, on the basis of the information provided in any such request and after consultation with the Director of the Division of Swap Dealer and Intermediary Oversight or members of the Commission staff designated by the Director, unless exigent circumstances require immediate action precluding such prior consultation, and shall communicate that determination

by the most appropriate means to the person making the request.

(b) *Delegation of authority to the Director of the Division of Clearing and Risk.* (1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Risk, and to such members of the Commission's staff acting under the Director's direction as they may designate, after consultation with the Director of the Division of Swap Dealer and Intermediary Oversight, or such member of the Commission's staff under the Director's direction as they may designate, unless exigent circumstances require immediate action, all the functions of the Commission set forth in this part, except the authority to disapprove a pre-relief transfer of a public customer commodity contract account or customer property pursuant to § 190.07(e)(1).

(2) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated to the Director pursuant to paragraph (b)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Risk under paragraph (b)(1) of this section.

(c) *Forward contracts.* For purposes of this part, an entity for or with whom the debtor deals who holds a claim against the debtor solely on account of a forward contract, that is not cleared by a clearing organization, will not be deemed to be a customer.

(d) *Other.* The Bankruptcy Code will not be construed by the Commission to prohibit a commodity broker from doing business as any combination of the following: Futures commission merchant, commodity options dealer, foreign futures commission merchant, or leverage transaction merchant, nor will the Commission construe the Bankruptcy Code to permit any operation, trade or business, or any combination of the foregoing, otherwise prohibited by the Act or by any of the Commission's regulations in this chapter, or by any order of the Commission.

(e) *Rule of construction.* Contracts in security futures products held in a securities account shall not be considered to be ''from or for the commodity futures account'' or ''from or for the commodity options account'' of such customers, as such terms are used in section 761(9) of the Bankruptcy Code.

(f) *Receivers.* In the event that a receiver for a futures commission merchant (FCM) is appointed due to the violation or imminent violation of the customer property protection requirements of section 4d of the Act, or of the regulations in part 1, 22, or 30 of this chapter that implement sections 4d or 4(b)(2) of the Act, or of the FCM's minimum capital requirements in § 1.17 of this chapter, such receiver may, in an appropriate case, file a petition for bankruptcy of such FCM pursuant to section 301 of the Bankruptcy Code.

## Subpart B—Futures Commission Merchant as Debtor

### § 190.03 Notices and proofs of claims.

(a) *Notices—means of providing*—(1) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*. For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(2) *To customers.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to customers under this subpart and for receiving claims or other notices from customers. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to customers' electronic addresses that are available in the debtor's books and records.

(b) *Notices to the Commission and designated self-regulatory organizations*—(1) *Of commencement of a proceeding.* Each commodity broker that is a futures commission merchant and files a petition in bankruptcy shall as soon as practicable before, and in any event no later than, the time of such filing, notify the Commission and such commodity broker's designated self-regulatory organization of the anticipated or actual filing date, the court in which the proceeding will be or has been filed, and, as soon as known, the docket number assigned to that proceeding. Each commodity broker that is a futures commission merchant and against which a bankruptcy petition is filed or with respect to which an application for a protective decree under SIPA is filed shall immediately upon the filing of such petition or application notify the Commission and such commodity broker's designated self-regulatory organization of the filing date, the court in which the proceeding has been filed, and, as soon as known, the docket number assigned to that proceeding.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, the trustee of a commodity broker that is a futures commissions merchant, the relevant designated self-regulatory organization, or the applicable clearing organization must notify the Commission, and in the case of a futures commission merchant, the trustee shall also notify its designated self-regulatory organization and clearing organization(s), if such person intends to transfer or to apply to transfer open commodity contracts or customer property on behalf of the public customers of the debtor in accordance with section 764(b) of the Bankruptcy Code and § 190.07(c) or (d).

(c) *Notices to customers*—(1) *Specifically identifiable property other than open commodity contracts.* In any case in which an order for relief has been entered, the trustee must use all reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, other than open commodity contracts, which has not been liquidated, that such specifically identifiable property may be liquidated commencing on and after the seventh day after the order for relief (or such other date as is specified by the trustee in the notice with the approval of the Commission or court) if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of specifically identifiable property contained in § 190.09(d)(1). Such notice must describe the specifically identifiable property and specify the terms upon which that property may be returned, including if applicable and to the extent practicable any substitute customer property that must be provided by the customer.

(2) *Open commodity contracts carried in hedging accounts.* To the extent reasonably practicable under the circumstances of the case, and following consultation with the Commission, the trustee may treat open commodity contracts of public customers identified on the books and records of the debtor as held in a futures account, foreign futures account or cleared swaps account designated as a hedging account in the debtor's records, as specifically identifiable property of such customer. If the trustee does not exercise such authority, such open commodity contracts do not constitute specifically

identifiable property. If the trustee exercises such authority, the trustee shall use reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, each relevant public customer of such determination and request the customer to provide written instructions whether to transfer or liquidate such open commodity contracts. Such notice must specify the manner for providing such instructions and the deadline by which the customer must provide instructions. Such notice must also inform the customer that—

(i) If the customer does not provide instructions in the prescribed manner and by the prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property under this part;

(ii) Any transfer of the open commodity contracts is subject to the terms for distribution contained in § 190.09(d)(2);

(iii) Absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts; and

(iv) Providing instructions may not prevent the open commodity contracts from being liquidated.

(3) *Involuntary cases.* Prior to entry of an order for relief, and upon leave of the court, a trustee appointed in an involuntary proceeding pursuant to section 303 of the Bankruptcy Code may notify customers, in accordance with paragraph (a)(2) of this section, of the commencement of such proceeding and may request customer instructions with respect to the return, liquidation, or transfer of specifically identifiable property.

(4) *Notice of bankruptcy and request for proof of customer claim.* The trustee shall promptly notify, in accordance with paragraph (a)(2) of this section, each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in paragraph (e) of this section. Such notice may be given separately from any notice provided in accordance with paragraph (c) of this section. The trustee shall cause the proof of customer claim form referred to in paragraph (e) of this section to set forth the bar date for its filing.

(d) *Notice of court filings.* The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court filings shall be directed to the Commission addressed as provided in paragraph (a)(1) of this section.

(e) *Proof of customer claim.* The trustee shall request that customers provide, to the extent reasonably practicable, information sufficient to determine a customer's claim in accordance with the regulations contained in this part, including in the discretion of the trustee:

(1) The class of commodity contract account upon which each claim is based (*i.e.,* futures account, foreign futures account, cleared swaps account, or delivery account (and, in the case of a delivery account, how much is based on cash delivery property and how much is based on the value of physical delivery property);

(2) Whether the claimant is a public customer or a non-public customer;

(3) The number of commodity contract accounts held by each claimant, and, for each such account:

(i) The account number;

(ii) The name in which the account is held;

(iii) The balance as of the last account statement for the account, and information regarding any activity in the account from the date of the last account statement up to and including the filing date that affected the balance of the account;

(iv) The capacity in which the account is held;

(v) Whether the account is a joint account and, if so, the amount of the claimant's percentage interest in that account and whether participants in the joint account are claiming jointly or separately;

(vi) Whether the account is a discretionary account;

(vii) Whether the account is an individual retirement account for which there is a custodian; and

(viii) Whether the account is a cross-margining account for futures and securities;

(4) A description of any accounts held by the claimant with the debtor that are not commodity contract accounts;

(5) A description of all claims against the debtor not based upon a commodity contract account of the claimant or an account listed in response to paragraph (e)(4) of this section;

(6) A description of all claims of the debtor against the claimant not included in the balance of a commodity contract account of the claimant;

(7) A description of and the value of any open positions, unliquidated securities, or other unliquidated property held by the debtor on behalf of the claimant, indicating the portion of such property, if any, which was included in the information provided in paragraph (e)(3) of this section, and identifying any such property which would be specifically identifiable property as defined in § 190.01;

(8) Whether the claimant holds positions in security futures products, and, if so, whether those positions are held in a futures account, a foreign futures account, or a securities account;

(9) Whether the claimant wishes to receive payment in kind, to the extent practicable, for any claim for unliquidated securities or other unliquidated property; and

(10) Copies of any documents which support the information contained in the proof of customer claim, including without limitation, customer confirmations, account statements, and statements of purchase or sale.

(f) *Proof of claim form.* A template customer proof of claim form which may (but is not required to) be used by the trustee is set forth in appendix A to this part.

(1) If there are no open commodity contracts that are being treated as specifically identifiable property (*e.g.,* if the customer proof of claim form was distributed after the primary liquidation date), the trustee should modify the customer proof of claim form to delete references to open commodity contracts as specifically identifiable property.

(2) In the event the trustee determines that the debtor's books and records reflecting customer transactions are not reasonably reliable, or account statements are not available from which account balances as of the date of transfer or liquidation of customer property may be determined, the proof of claim form used by the trustee should be modified to take into account the particular facts and circumstances of the case.

**§ 190.04 Operation of the debtor's estate—customer property.**

(a) *Transfers*—(1) *All cases.* The trustee for a commodity broker shall promptly use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) no later than the seventh calendar day after the order for relief of the open commodity contracts and property held by the commodity broker for or on behalf of its public customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, shall use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) of all open commodity contracts and property held by the commodity broker for or on behalf of its public customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing

date, and immediately cease doing business; provided, however, that if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(b) *Treatment of open commodity contracts*—(1) *Payments by the trustee.* Prior to the primary liquidation date, the trustee may make payments of initial margin and variation settlement to a clearing organization, commodity broker, foreign clearing organization, or foreign futures intermediary, carrying the account of the debtor, pending the transfer or liquidation of any open commodity contracts, whether or not such contracts are specifically identifiable property of a particular customer, provided, that:

(i) To the extent within the trustee's control, the trustee shall not make any payments on behalf of any commodity contract account on the books and records of the debtor that is in deficit; provided, however, that the provision in this paragraph (b)(1) shall not be construed to prevent a clearing organization, foreign clearing organization, futures commission merchant, or foreign futures intermediary carrying an account of the debtor from exercising its rights to the extent permitted under applicable law;

(ii) Any margin payments made by the trustee with respect to a specific customer account shall not exceed the funded balance for that account;

(iii) The trustee shall not make any payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers;

(iv) If the trustee receives payments from a customer in response to a margin call, then to the extent within the trustee's control, the trustee must use such payments to make margin payments for the open commodity contract positions of such customer;

(v) The trustee may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer; and

(vi) If funds segregated for the benefit of public customers in a particular account class exceed the aggregate net equity claims for all public customers in such account class, the trustee may use such excess funds to meet the margin obligations for any public customer in such account class whose account is undermargined (as described in paragraph (b)(4) of this section) but not in deficit, provided that the trustee issues a margin call to such customer and provided further that the trustee shall liquidate such customer's open commodity contracts if the customer fails to make the margin payment within a reasonable time as provided in paragraph (b)(4) of this section.

(2) *Margin calls.* The trustee (or, prior to appointment of the trustee, the debtor against which an involuntary petition was filed) may issue a margin call to any public customer whose commodity contract account contains open commodity contracts if such account is under-margined.

(3) *Margin payments by the customer.* The full amount of any margin payment by a customer in response to a margin call under paragraph (b)(2) of this section must be credited to the funded balance of the particular account for which it was made.

(4) *Trustee obligation to liquidate certain open commodity contracts.* The trustee shall, as soon as practicable under the circumstances, liquidate all open commodity contracts in any commodity contract account that is in deficit, or for which any mark-to-market calculation would result in a deficit, or for which the customer fails to meet a margin call made by the trustee within a reasonable time. Except as otherwise provided in this part, absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion.

(5) *Partial liquidation of open commodity contracts by others.* In the event that a clearing organization, foreign clearing organization, futures commission merchant, foreign futures intermediary, or other person carrying a commodity customer account for the debtor in the nature of an omnibus account has liquidated only a portion of open commodity contracts in such account, the trustee will exercise reasonable business judgment in assigning the liquidating transactions to the underlying commodity customer accounts carried by the debtor. Specifically, the trustee should endeavor to assign the contracts as follows: First, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are in deficit; second, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are undermargined; third, to liquidate open commodity contracts in a risk-reducing manner in any other accounts, and finally to liquidate any remaining open commodity contracts in any accounts. If more than one commodity contract account reflects open commodity contracts in a particular account class for which liquidating transactions have been executed, the trustee shall to the extent practicable allocate the liquidating transactions to such commodity contract accounts pro rata based on the number of open commodity contracts of such commodity contract accounts. For purposes of this section, the term ''a risk-reducing manner'' is measured by margin requirements set using the margin methodology and parameters followed by the derivatives clearing organization at which such contracts are cleared.

(c) *Contracts moving to into delivery position.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, the trustee shall use its best efforts to liquidate any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity:

(1) If such contract is a futures contract or a cleared swaps contract, before the earlier of the last trading day or the first day on which notice of intent to deliver may be tendered with respect thereto, or otherwise before the debtor or its customer incurs an obligation to make or take delivery of the commodity under such contract;

(2) If such contract is a long option on a commodity and has value, before the first date on which the contract could be automatically exercised or the last date on which the contract could be exercised if not subject to automatic exercise; or

(3) If such contract is a short option on a commodity that is in-the-money in favor of the long position holder, before the first date on which the long option position could be exercised.

(d) *Liquidation or offset.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, and except as otherwise set forth in this paragraph (d), the following commodity contracts and other property held by or for the account of a debtor must be liquidated in the market in accordance with paragraph (e)(1) of this section or liquidated via book entry in accordance with paragraph (e)(2) of this section by

the trustee promptly and in an orderly manner:

(1) *Open commodity contracts.* All open commodity contracts, except for—

(i) Commodity contracts that are specifically identifiable property (if applicable) and are subject to customer instructions to transfer (in lieu of liquidating) as provided in § 190.03(c)(2), provided that the customer is in compliance with the terms of § 190.09(d)(2); and

(ii) Open commodity contract positions that are in a delivery position, which shall be treated in accordance with the provisions of § 190.06.

(2) *Specifically identifiable property, other than open commodity contracts, or physical delivery property.* Specifically identifiable property, other than open commodity contracts or physical delivery property, to the extent that:

(i) The fair market value of such property is less than 75% of its fair market value on the date of entry of the order for relief;

(ii) Failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account; or

(iii) The trustee has not received instructions to return pursuant to § 190.03(c)(1), or has not returned such property upon the terms contained in § 190.09(d)(1).

(3) *Letters of credit.* The trustee may request that a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract, whether the letter of credit is held by the trustee on behalf of the debtor's estate or a derivatives clearing organization or a foreign intermediary or foreign clearing organization on a pass-through or other basis, including in cases where the letter of credit has expired since the date of the order for relief. The amount of the request may equal the full face amount of the letter of the credit or any portion thereof, to the extent required or may be required in the trustee's discretion to ensure pro rata treatment among customer claims within each account class, consistent with §§ 190.08 and 190.09.

(i) If a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may, if the letter of credit has not expired, draw upon the full amount of the letter of credit or any portion thereof.

(ii) For any letter of credit referred to in this paragraph (d)(3), the trustee shall treat any portion that is not drawn upon (less the value of any substitute customer property delivered by the customer) as having been distributed to the customer for purposes of calculating entitlements to distribution or transfer. The expiration of the letter of credit on or at any time after the date of the order for relief shall not affect such calculation.

(iii) Any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by a customer, shall be considered customer property in the account class applicable to the original letter of credit.

(4) *All other property.* All other property, other than physical delivery property held for delivery in accordance with the provisions of § 190.06, which is not required to be transferred or returned pursuant to customer instructions and which has not been liquidated in accordance with paragraphs (d)(1) through (3) of this section.

(e) *Liquidation of open commodity contracts*—(1) *By the trustee or a clearing organization in the market*—(i) *Debtor as a clearing member.* For open commodity contracts cleared by the debtor as a member of a clearing organization, the trustee or clearing organization, as applicable, shall liquidate such open commodity contracts pursuant to the rules of the clearing organization, a designated contract market, or a swap execution facility, if and as applicable. Any such rules providing for liquidation other than on the open market shall be designed to achieve, to the extent feasible under market conditions at the time of liquidation, a process for liquidating open commodity contracts that results in competitive pricing. For open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, the trustee shall liquidate such open commodity contracts pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of such rules, in the manner the trustee determines appropriate.

(ii) *Debtor not a clearing member.* For open commodity contracts submitted by the debtor for clearing through one or more accounts established with a futures commission merchant (as defined in § 1.3 of this chapter) or foreign futures intermediary, the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade governing the liquidation of open commodity contracts.

(2) *By the trustee or a clearing organization via book entry offset.* Upon application by the trustee or clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization in accordance with its rules. Such rules shall be designed to establish, to the extent feasible under market conditions at the time of liquidation, such settlement prices in a competitive manner.

(3) *By a futures commission merchant or foreign futures intermediary.* For open commodity contracts cleared by the debtor through one or more accounts established with a futures commission merchant or a foreign futures intermediary, such futures commission merchant or foreign futures intermediary may exercise any enforceable contractual rights it has to liquidate such commodity contracts, provided, that it shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade governing its liquidation of such open commodity contracts. If a futures commission merchant or foreign futures intermediary fails to use commercially reasonable efforts to liquidate open commodity contracts to achieve competitive pricing in accordance with this paragraph (e)(3), the trustee may seek damages reflecting the difference between the price (or prices) at which the relevant commodity contracts would have been liquidated using commercially reasonable efforts to achieve competitive pricing and the price (or prices) at which the commodity contracts were liquidated, which shall be the sole remedy available to the trustee. In no event shall any such liquidation be voided.

(4) *Liquidation only.* (i) Nothing in this part shall be interpreted to permit the trustee to purchase or sell new

commodity contracts for the debtor or its customers except to offset open commodity contracts or to transfer any transferable notice received by the debtor or the trustee under any commodity contract; provided, however, that the trustee may, in its discretion and with approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of price limits or other market conditions, or may take an offsetting position in a new month or at a strike price for which limits have not been reached.

(ii) Notwithstanding paragraph (e)(4)(i) of this section, the trustee may, with the written permission of the Commission, operate the business of the debtor in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor under appropriate circumstances, as determined by the Commission.

(f) *Long option contracts.* Subject to paragraphs (d) and (e) of this section, the trustee shall use its best efforts to assure that a commodity contract that is a long option contract with value does not expire worthless.

**§ 190.05 Operation of the debtor's estate—general.**

(a) *Compliance with the Act and regulations in this chapter.* Except as specifically provided otherwise in this part, the trustee shall use reasonable efforts to comply with all of the provisions of the Act and of the regulations in this chapter as if it were the debtor.

(b) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and other property in such account have been transferred or liquidated, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

(c) *Records*—(1) *Maintenance.* Except as otherwise ordered by the court or as permitted by the Commission, records required under this chapter to be maintained by the debtor, including records of the computations required by this part, shall be maintained by the trustee until such time as the debtor's case is closed.

(2) *Accessibility.* The records required to be maintained by paragraph (c)(1) of this section shall be available during business hours to the Commission and the U.S. Department of Justice. The trustee shall give the Commission and the U.S. Department of Justice access to all records of the debtor, including records required to be retained in accordance with § 1.31 of this chapter and all other records of the commodity broker, whether or not the Act or this chapter would require such records to be maintained by the commodity broker.

(d) *Customer statements.* The trustee shall use all reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred. With respect to such accounts, the trustee must also issue an account statement reflecting any liquidation or transfer of open commodity contracts or other property promptly after such liquidation or transfer.

(e) *Other matters*—(1) *Disbursements.* With the exception of transfers of customer property made in accordance with § 190.07, the trustee shall make no disbursements to customers except with approval of the court.

(2) *Investment.* The trustee shall promptly invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and may invest any other customer property, in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States, provided that such obligations are maintained in a depository located in the United States, its territories or possessions.

(f) *Residual interest.* The trustee shall apply the residual interest provisions of § 1.11 of this chapter in a manner appropriate to the context of their responsibilities as a bankruptcy trustee pursuant subchapter IV of chapter 7 of the Bankruptcy Code and this part, and in light of the existence of a surplus or deficit in customer property available to pay customer claims.

**§ 190.06 Making and taking delivery under commodity contracts.**

(a) *Deliveries*—(1) *General.* The provisions of this paragraph (a) apply to commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property, if such commodity contracts are in a delivery position on the filing date, or the trustee is unable to liquidate such commodity contracts in accordance with § 190.04(c) to prevent them from moving into a delivery position, *i.e.,* before the debtor or its customer incurs bilateral contractual obligations to make or take delivery under such commodity contracts.

(2) *Delivery made or taken on behalf of a customer outside of the administration of the debtor's estate.* (i) The trustee shall use reasonable efforts to allow a customer to deliver physical delivery property that is held directly by the customer and not by the debtor (and thus not recorded in any commodity contract account of the customer) in settlement of a commodity contract, and to allow payment in exchange for such delivery, to occur outside the administration of the debtor's estate, when the rules of the exchange or other market listing the commodity contract, or the clearing organization or the foreign clearing organization clearing the commodity contract, as applicable, prescribe a process for delivery that allows the delivery to be fulfilled—

(A) In the normal course directly by the customer;

(B) By substitution of the customer for the commodity broker; or

(C) Through agreement of the buyer and seller to alternative delivery procedures.

(ii) Where a customer delivers physical delivery property in settlement of a commodity contract outside of the administration of the debtors' estate in accordance with paragraph (a)(2)(i) of this section, any property of such customer held at the debtor in connection with such contract must nonetheless be included in the net equity claim of that customer, and, as such, can only be distributed pro rata at the time of, and as part of, any distributions to customers made by the trustee.

(3) *Delivery as part of administration of the debtor's estate.* When the trustee determines that it is not practicable to effect delivery as provided in paragraph (a)(2) of this section:

(i) To facilitate the making or taking of delivery directly by a customer, the trustee may, as it determines reasonable under the circumstances of the case and consistent with the pro rata distribution of customer property by account class:

(A) When a customer is obligated to make delivery, return any physical delivery property to the customer that is held by the debtor for or on behalf of the customer under the terms set forth in § 190.09(d)(1)(ii), to allow the customer to deliver such property to fulfill its delivery obligation under the commodity contract; or

(B) When a customer is obligated to take delivery:

(*1*) Return any cash delivery property to the customer that is reflected in the customer's delivery account, provided that cash delivery property returned

under this paragraph (a)(3)(i)(B)(*1*) shall not exceed the lesser of—

(*i*) The amount the customer is required to pay for delivery of the commodity; or

(*ii*) The customer's net funded balance for all of the customer's commodity contract accounts; and

(*2*) Return cash, securities, or other property held in the customer's non-delivery commodity contract accounts, provided that property returned under this section shall not exceed the lesser of—

(*i*) The amount the customer is required to pay for delivery of the commodity; or

(*ii*) The net funded balance for all of the customer's commodity contract accounts reduced by any amount returned to the customer pursuant to paragraph (a)(3)(i)(B)(*1*) of this section, and provided further, however, that the trustee may distribute such property only to the extent that the customer's funded balance for each such account exceeds the minimum margin obligations for such account (as described in § 190.04(b)(2)); and

(C) Impose such conditions on the customer as it considers appropriate to assure that property returned to the customer is used to fulfill the customer's delivery obligations.

(ii) If the trustee does not return physical delivery property, cash delivery property, or other property in the form of cash or cash equivalents to the customer as provided in paragraph (a)(3)(i) of this section, subject to paragraph (a)(4) of this section:

(A) To the extent practical, the trustee shall make or take delivery of physical delivery property in the same manner as if no bankruptcy had occurred, and when making delivery, the party to which delivery is made must pay the full price required for taking such delivery; or

(B) When taking delivery of physical delivery property:

(*1*) The trustee shall pay for the delivery first using the customer's cash delivery property or other property, limited to the amounts set forth in paragraph (a)(3)(i)(B) of this section, along with any cash transferred by the customer to the trustee on or after the filing date for the purpose of paying for delivery.

(*2*) If the value of the cash or cash equivalents that may be used to pay for deliveries as described in paragraph (a)(3)(i)(B) of this section is less than the amount required to be paid for taking delivery, the trustee shall issue a payment call to the customer. The full amount of any payment made by the customer in response to a payment call must be credited to the funded balance of the particular account for which such payment is made.

(*3*) If the customer fails to meet a call for payment under paragraph (a)(3)(ii)(B)(*2*) of this section before payment is made for delivery, the trustee must convert any physical delivery property received on behalf of the customer to cash as promptly as possible.

(4) *Deliveries in a securities account.* If an open commodity contract held in a futures account, foreign futures account, or cleared swaps account requires delivery of a security upon expiration or exercise of such commodity contract, and delivery is not completed pursuant to paragraph (a)(2) or (a)(3)(i) of this section, the trustee may make or take delivery in a securities account in a manner consistent with paragraph (a)(3)(ii) of this section, provided, however, that the trustee may transfer property from the customer's commodity contract accounts to the securities account to fulfill the delivery obligation only to the extent that the customer's funded balance for such commodity contract account exceeds the customer's minimum margin obligations for such accounts (as described in § 190.04(b)(2)) and provided further that the customer is not undermargined or does not have a deficit balance in any other commodity contract accounts.

(5) *Delivery made or taken on behalf of house account.* If delivery of physical delivery property is to be made or taken on behalf of a house account of the debtor, the trustee shall make or take delivery, as the case may be, on behalf of the debtor's estate, provided that if the trustee takes delivery of physical delivery property it must convert such property to cash as promptly as possible.

(b) *Special account class provisions for delivery accounts.* (1) Within the delivery account class, the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property subsequently received, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a customer in accordance with paragraph (a)(3) of this section, as part of a separate cash delivery account class.

(2)(i) If the debtor holds any cash or cash equivalents in an account maintained at a bank, clearing organization, foreign clearing organization, or other person, under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking delivery, or receiving payment for making delivery, of a commodity under commodity contracts, such property shall (subject to § 190.09) be considered customer property—

(A) In the cash delivery account class if held for making payment for taking delivery; and

(B) In the physical delivery account class, if held as a result of receiving such payment for a making delivery after the filing date.

(ii) Any other property (excluding property segregated for the benefit of customer in the futures, foreign futures or cleared swaps account class) that is traceable as having been held or received for the purpose of making delivery, or as having been held or received as a result of taking delivery, of a commodity under commodity contracts, shall (subject to § 190.09) be considered customer property—

(A) In the cash delivery account class if received after the filing date in exchange for taking delivery; and

(B) Otherwise shall be considered customer property in the physical delivery account class.

**§ 190.07 Transfers.**

(a) *Transfer rules.* No clearing organization or self-regulatory organization may adopt, maintain in effect, or enforce rules that:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from futures commission merchants that are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; or

(3) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from a futures commission merchant that is a debtor as defined in § 190.01, if such transfers have been approved by the Commission, *provided, however,* that this paragraph (a)(3) shall not—

(i) Limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts; or

(ii) Be interpreted to limit a clearing organization's ability adequately to manage risk.

(b) *Requirements for transferees.* (1) It is the duty of each transferee to assure

that it will not accept a transfer that would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.

(2) Any transferee that accepts a transfer of open commodity contracts from the estate of the debtor:

(i) Accepts the transfer subject to any loss that may arise in the event the transferee cannot recover from the customer any deficit balance that may arise related to the transferred open commodity contracts.

(ii) If the commodity contracts were held for the account of a customer:

(A) Must keep such commodity contracts open at least one business day after their receipt, unless the customer for whom the transfer is made fails to respond within a reasonable time to a margin call for the difference between the margin transferred with such commodity contracts and the margin which such transferee would require with respect to a similar set of commodity contracts held for the account of a customer in the ordinary course of business; and

(B) May not collect commissions with respect to the transfer of such commodity contracts.

(3) A transferee may accept open commodity contracts and property, and open accounts on its records, for customers whose commodity contracts and property are transferred pursuant to this part prior to completing customer diligence, provided that account opening diligence as required by law is performed, and records and information required by law are obtained, as soon as practicable, but in any event within six months of the transfer, unless this time is extended for a particular account, transferee, or debtor by the Commission.

(4) Any account agreements governing a transferred account (including an account that has been partially transferred) shall be deemed assigned to the transferee by operation of law and shall govern the transferee and customer's relationship until such time as the transferee and customer enter into a new agreement; provided, however, that any breach of such agreement by the debtor existing at or before the time of the transfer (including but not limited to any failure to segregate sufficient customer property) shall not constitute a default or breach of the agreement on the part of the transferee, or constitute a defense to the enforcement of the agreement by the transferee.

(5) If open commodity contracts or any specifically identifiable property has been, or is to be, transferred in accordance with section 764(b) of the Bankruptcy Code and this section, customer instructions previously received by the trustee with respect to open commodity contracts or with respect to specifically identifiable property, shall be transmitted to the transferee of property, which shall comply therewith to the extent practicable.

(c) *Eligibility for transfer under section 764(b) of the Bankruptcy Code—accounts eligible for transfer.* All commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer after the order for relief pursuant to section 764(b) of the Bankruptcy Code, except:

(1) House accounts or the accounts of general partners of the debtor if the debtor is a partnership; and

(2) Accounts that are in deficit.

(d) *Special rules for transfers under section 764(b) of the Bankruptcy Code*—(1) *Effecting transfer.* The trustee for a commodity broker shall use its best efforts to effect a transfer to one or more other commodity brokers of all eligible commodity contract accounts, open commodity contracts, and property held by the debtor for or on behalf of its customers, based on customer claims or record, no later than the seventh calendar day after the order for relief.

(2) *Partial transfers; multiple transferees*—(i) *Of the customer estate.* If all eligible commodity contract accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer. Commodity contract accounts may be transferred to one or more transferees, and, subject to paragraph (d)(4) of this section, may be transferred to different transferees by account class.

(ii) *Of a customer's commodity contract account.* If all of a customer's open commodity contracts and property cannot be transferred under this section, a partial transfer of contracts and property may be made so long as such transfer would not result in an increase in the amount of any customer's net equity claim. One, but not the only, means to effectuate a partial transfer is by liquidating a portion of the open commodity contracts held by a customer such that sufficient value is realized, or margin requirements are reduced to an extent sufficient, to permit the transfer of some or all of the remaining open commodity contracts and property. If any open commodity contract to be transferred in a partial transfer is part of a spread or straddle, to the extent practicable under the circumstances, each side of such spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred.

(3) *Letters of credit.* A letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract may be transferred with an eligible commodity contract account if it is held by a derivatives clearing organization on a pass-through or other basis or is transferable by its terms, so long as the transfer will not result in a recovery which exceeds the amount to which the customer would be entitled under §§ 190.08 and 190.09. If the letter of credit cannot be transferred as provided for in the foregoing sentence, and the customer does not deliver substitute customer property to the trustee in accordance with § 190.04(d)(3), the trustee may draw upon a portion or all of the letter of credit, the proceeds of which shall be treated as customer property in the applicable account class.

(4) *Physical delivery property.* The trustee shall use reasonable efforts to prevent physical delivery property held for the purpose of making delivery on a commodity contract from being transferred separate and apart from the related commodity contract, or to a different transferee.

(5) *No prejudice to other customers.* No transfer shall be made under this part by the trustee if, after taking into account all customer property available for distribution to customers in the applicable account class at the time of the transfer, such transfer would result in insufficient remaining customer property to make an equivalent percentage distribution (including all previous transfers and distributions) to all customers in the applicable account class, based on—

(i) Customer claims of record; and

(ii) Estimates of other customer claims made in the trustee's reasonable discretion based on available information, in each case as of the calendar day immediately preceding transfer.

(e) *Prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code*—(1) *Pre-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under section 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of commodity contract accounts or customer property prior to the entry of the order for relief in compliance with § 1.17(a)(4) of this chapter unless such transfer is disapproved by the Commission;

(ii) The transfer, withdrawal, or settlement, prior to the order for relief

at the request of a public customer, including a transfer, withdrawal, or settlement at the request of a public customer that is a commodity broker, of commodity contract accounts or customer property held from or for the account of such customer by or on behalf of the debtor unless:

(A) The customer acted in collusion with the debtor or its principals to obtain a greater share of customer property or the bankruptcy estate than that to which it would be entitled under this part; or

(B) The transfer is disapproved by the Commission; or

(iii) The transfer prior to the order for relief by a clearing organization, or by a receiver that has been appointed for the FCM that is now a debtor, of one or more accounts held for or on behalf of customers of the debtor, or of commodity contracts and other customer property held for or on behalf of customers of the debtor, provided that the transfer is not disapproved by the Commission.

(2) *Post-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under section 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of a commodity contract account or customer property eligible to be transferred under paragraphs (c) and (d) of this section made by the trustee or by any clearing organization on or before the seventh calendar day after the entry of the order for relief, as to which the Commission has not disapproved the transfer; or

(ii) The transfer of a commodity contract account or customer property at the direction of the Commission on or before the seventh calendar day after the order for relief, upon such terms and conditions as the Commission may deem appropriate and in the public interest.

(f) *Commission action.* Notwithstanding any other provision of this section (other than paragraphs (d)(2)(ii) and (d)(5) of this section), in appropriate cases and to protect the public interest, the Commission may:

(1) Prohibit the transfer of a particular set or sets of commodity contract accounts and customer property; or

(2) Permit transfers of a particular set or sets of commodity contract accounts and customer property that do not comply with the requirements of this section.

**§ 190.08 Calculation of allowed net equity.**

For purposes of this subpart, allowed net equity shall be computed as follows:

(a) *Allowed claim.* The allowed net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer's net equity claim for each account class.

(b) *Net equity.* Net equity means a customer's total customer claim of record against the estate of the debtor based on the customer property, including any commodity contracts, held by the debtor for or on behalf of such customer less any indebtedness of the customer to the debtor. Net equity shall be calculated as follows:

(1) *Step 1—Equity determination.* (i) Determine the equity balance of each commodity contract account of a customer by computing, with respect to such account, the sum of:

(A) The ledger balance;

(B) The open trade balance; and

(C) The realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the debtor from or for such account, plus accrued interest, if any.

(ii) For the purposes of this paragraph (b)(1), the ledger balance of a customer account shall be calculated by:

(A) Adding:

(*1*) Cash deposited to purchase, margin, guarantee, secure, or settle a commodity contract;

(*2*) Cash proceeds of liquidations of any securities or other property referred to in paragraph (b)(1)(i)(C) of this section;

(*3*) Gains realized on trades; and

(*4*) The face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract; and

(B) Subtracting from the result:

(*1*) Losses realized on trades;

(*2*) Disbursements to or on behalf of the customer (including, for these purposes, transfers made pursuant to §§ 190.04(a) and 190.07); and

(*3*) The normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance and other costs and charges lawfully incurred in connection with the purchase, sale, exercise, or liquidation of any commodity contract in such account.

(iii) For purposes of this paragraph (b)(1), the open trade balance of a customer's account shall be computed by subtracting the unrealized loss in value of the open commodity contracts held by or for such account from the unrealized gain in value of the open commodity contracts held by or for such account.

(iv) For purposes of this paragraph (b)(1), in calculating the ledger balance or open trade balance of any customer, exclude any security futures products, any gains or losses realized on trades in such products, any property received to margin, guarantee, or secure such products (including interest thereon or the proceeds thereof), to the extent any of the foregoing are held in a securities account, and any disbursements to or on behalf of such customer in connection with such products or such property held in a securities account.

(2) *Step 2—Customer determination (aggregation).* Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Paragraphs (b)(2)(i) through (xii) of this section prescribe which accounts must be treated as being held in the same capacity and which accounts must be treated as being held in a separate capacity.

(i) Except as otherwise provided in this paragraph (b)(2), all accounts that are maintained with a debtor in a person's name and that, under this paragraph (b)(2), are deemed to be held by that person in its individual capacity shall be deemed to be held in the same capacity.

(ii) An account maintained with a debtor by a guardian, custodian, or conservator for the benefit of a ward, or for the benefit of a minor under the Uniform Gift to Minors Act, shall be deemed to be held in a separate capacity from accounts held by such guardian, custodian or conservator in its individual capacity.

(iii) An account maintained with a debtor in the name of an executor or administrator of an estate in its capacity as such shall be deemed to be held in a separate capacity from accounts held by such executor or administrator in its individual capacity.

(iv) An account maintained with a debtor in the name of a decedent, in the name of the decedent's estate, or in the name of the executor or administrator of such estate in its capacity as such shall be deemed to be accounts held in the same capacity.

(v) An account maintained with a debtor by a trustee shall be deemed to be held in the individual capacity of the grantor of the trust unless the trust is created by a valid written instrument for a purpose other than avoidance of an offset under the regulations contained in this part. A trust account which is not deemed to be held in the individual capacity of its grantor under this paragraph (b)(2)(v) shall be deemed to be held in a separate capacity from accounts held in an individual capacity by the trustee, by the grantor or any successor in interest of the grantor, or by any trust beneficiary, and from accounts held by any other trust.

(vi) An account maintained with a debtor by a corporation, partnership, or unincorporated association shall be deemed to be held in a separate capacity from accounts held by the shareholders, partners, or members of such corporation, partnership, or unincorporated association, if such entity was created for purposes other than avoidance of an offset under the regulations contained in this part.

(vii) A hedging account of a person shall be deemed to be held in the same capacity as a speculative account of such person.

(viii) Subject to paragraphs (b)(2)(ix) and (xiv) of this section, the futures accounts, foreign futures accounts, delivery accounts, and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: *provided, however,* that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) An omnibus customer account of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such futures commission merchant.

(x) A joint account maintained with the debtor shall be deemed to be held in a separate capacity from any account held in an individual capacity by the participants in such account, from any account held in an individual capacity by a commodity pool operator or commodity trading advisor for such account, and from any other joint account; provided, however, that if such account is not transferred in accordance with §§ 190.04(a) and 190.07, it shall be deemed to be held in the same capacity as any other joint account held by identical participants and a participant's percentage interest therein shall be deemed to be held in the same capacity as any account held in an individual capacity by such participant.

(xi) An account maintained with a debtor in the name of a plan that is subject to the terms of the Employee Retirement Income Security Act of 1974 and the regulations in 29 CFR chapter XXV, or similar state, Federal, or foreign laws or regulations applicable to retirement or pension plans, shall be deemed to be held in a separate capacity from an account held in an individual capacity by the plan administrator, any employer, employee, participant, or beneficiary with respect to such plan.

(xii) Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

(xiii) With respect to the cleared swaps account class, each individual cleared swaps customer account within each cleared swap omnibus customer account referred to in paragraph (b)(2)(viii) of this section shall be deemed to be held in a separate capacity from each other such individual cleared swaps customer account, subject to the provisions of paragraphs (b)(2)(i) through (xi) of this section.

(xiv) Accounts held by a customer in separate capacities shall be deemed to be accounts of different customers. The burden of proving that an account is held in a separate capacity shall be upon the customer.

(3) *Step 3—Setoffs.* (i) The net equity of one customer account may not be offset against the net equity of any other customer account.

(ii) Any (x), which is the obligation to the debtor owed by a customer which is not required to be included in computing the equity of that customer under paragraph (b)(1) of this section, must be deducted from (y), which is any obligation to the customer owed by the debtor which is not required to be included in computing the equity of that customer. If the former amount (x) exceeds the latter (y), the excess (x − y) must be deducted from the equity balance of the customer obtained after performing the preceding calculations required by paragraph (b) of this section, provided, that if the customer owns more than one class of accounts with a positive equity balance, the excess (again, x − y) must be allocated and offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances of accounts of different classes held by such customer.

(iii) A negative equity balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity, provided, that if a customer owns more than one class of accounts with a positive equity balance, such negative equity balance must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances in accounts of different classes held by such customer.

(iv) To the extent any indebtedness of the debtor to the customer which is not required to be included in computing the equity of such customer under paragraph (b)(1) of this section exceeds such indebtedness of the customer to the debtor, the customer claim therefor will constitute a general creditor claim rather than a customer property claim, and the net equity therefor shall be separately calculated.

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section shall only be applied subsequent to the entry of an order for relief; prior to that date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations in part 1, 22, or 30 of this chapter that implement sections 4d(a)(2) and 4d(f)) shall govern what setoffs are permitted.

(4) *Step 4—Correction for distributions.* The value on the date of transfer or distribution of any property transferred or distributed subsequent to the filing date and prior to the primary liquidation date with respect to each class of account held by a customer must be added to the equity obtained for that customer for accounts of that class after performing the steps contained in paragraphs (b)(1) through (3) of this section: *Provided, however,* that if all accounts for which there are customer claims of record and 100% of the equity pertaining thereto is transferred in accordance with § 190.07 and section 764(b) of the Bankruptcy Code, net equity shall be computed based solely upon those allowed customer claims, if any, filed subsequent to the order for relief which are not claims of record on the filing date.

(5) *Step 5—Correction for ongoing events.* Compute any adjustments to the steps in paragraphs (b)(1) through (4) of this section required to correct misestimates or errors including, without limitation, corrections for ongoing events such as the liquidation of unliquidated claims or specifically identifiable property at a value different from the estimated value previously used in computing net equity.

(c) *Calculation of funded balance. Funded balance* means a customer's pro rata share of the customer estate with respect to each account class available for distribution to customers of the same customer class.

(1) *Funded balance computation.* The funded balance of any customer claim shall be computed (separately by account class and customer class) by:

(i) Multiplying the ratio of (x), which is the amount of the net equity claim of such customer, less (y), which is the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class divided, by (p), which is the sum of the net equity claims of all customers for accounts of that class, less (q), which is the amounts referred to in paragraph (c)(1)(ii) of this

section of all customers for accounts of that class, (thus, ((x − y)/(p − q)) by the sum of:

(A) The value of letters of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract relating to all customer accounts of the same class;

(B) The value of the money, securities, or other property segregated on behalf of all customer accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(C) The value of any money, securities, or other property which must be allocated under § 190.09 to all customer accounts of the same class; and

(D) The amount of any add-back required under paragraph (b)(4) of this section; and

(ii) Then adding 100% of any margin payment made between the entry of the order for relief (or, in an involuntary case, the date on which the petition for bankruptcy is filed) and the primary liquidation date; *provided, however,* that if margin is posted to substitute for a letter of credit, such margin does not increase the funded balance.

(2) *Corrections to funded balance.* The funded balance must be adjusted to correct for ongoing events including, without limitation:

(i) Added claimants;

(ii) Disallowed claims;

(iii) Liquidation of unliquidated claims at a value other than their estimated value; and

(iv) Recovery of property.

(d) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (d).

(1) *Commodity contracts*—(i) *Open contracts.* Unless otherwise specified in this paragraph (d), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules; provided, however, that *if an open* commodity contract is transferred *to another commodity broker,* its value *on the debtor's books and records* shall be determined as of the end of the *last settlement cycle on the day preceding such transfer.*

(ii) *Liquidated contracts. Except as* specified *in paragraphs (d)(1)(ii)(A) and (B) of this section, the* value of a commodity contract liquidated on the open market shall equal the actual value realized on liquidation of the commodity contract.

(A) *Weighted average.* If identical commodity contracts are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of commodity contracts, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such commodity contracts.

(B) *Bulk liquidation.* The value of a commodity contract liquidated as part of a bulk auction, taken into inventory or under *management* by a clearing organization, or *similarly* liquidated outside of the open market shall be equal to the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the *commodity contract was liquidated.*

(2) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated, the value of such security shall be equal to the actual value realized on liquidation of the security; provided, however, that if identical securities are liquidated *within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of securities,* but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such securities. Securities which are not publicly traded shall be valued by the trustee pursuant to paragraph (d)(5) of this section.

(3) *Commodities held in inventory.* Commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. If such fair market value is not readily ascertainable based upon public sources of prices, the trustee shall value such commodities pursuant to paragraph (d)(5) of this section.

(4) *Letters of credit.* The value of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract shall be its face amount, less the amount, if any, drawn and outstanding, provided that, if the trustee makes a determination in good faith that a draw on a letter of credit is unlikely to be honored on either temporary or permanent basis, the trustee shall value the letter of credit pursuant to paragraph (d)(5) of this section.

(5) *All other property.* Subject to the other provisions of this paragraph (d), all other property shall be valued by the trustee using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances; provided, however, that if such property is sold, its value for purposes of the calculations required by this part shall be equal to the actual value realized on the sale of such property; and, provided further, that the sale shall be made in compliance with all applicable statutes, rules, and orders of any court or governmental entity with jurisdiction there over.

**§ 190.09 Allocation of property and allowance of claims.**

The property of the debtor's estate must be allocated among account classes and between customer classes as provided in this section. (Property connected with certain cross-margining arrangements is subject to the provisions of framework 1 in appendix B to this part.) The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(a) *Scope of customer property.* (1) Customer property includes the following:

(i) All cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer, including a non-public customer, which is:

(A) Property received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) in the definition of that term in § 190.01;

(D) Cash delivery property, or other cash, securities or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer;

(E) Profits or contractual rights accruing to a customer as the result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by the customer, pursuant to § 190.04(d)(3);

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account; or

(H) Property hypothecated under § 1.30 of this chapter to the extent that the value of such property exceeds the proceeds of any loan of margin made with respect thereto; and

(ii) All cash, securities, or other property which:

(A) Is segregated for customers on the filing date;

(B) Is a security owned by the debtor to the extent there are customer claims for securities of the same class and series of an issuer;

(C) Is specifically identifiable to a customer;

(D) Was property of a type described in paragraph (a)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(E) Represents recovery of any debit balance, margin deficit, or other claim of the debtor against a customer;

(F) Was unlawfully converted but is part of the debtor's estate;

(G) Constitutes current assets of the debtor (as of the date of the order for relief) within the meaning of § 1.17(c)(2) of this chapter, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of—

(*1*) The amount that the debtor is obligated to set aside as its targeted residual interest amount pursuant to § 1.11 of this chapter and the debtor's residual interest policies adopted thereunder, with respect to each of the futures account class, the foreign futures account class, and the cleared swaps account class; or

(*2*) The debtor's obligations to cover debit balances or under-margined amounts as provided in §§ 1.20, 1.22, 22.2 and 30.7 of this chapter;

(H) Is other property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers;

(I) Is property of the debtor's estate recovered by the Commission in any proceeding brought against the principals, agents, or employees of the debtor;

(J) Is proceeds from the investment of customer property by the trustee pending final distribution;

(K) Is a payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property; or

(L) Is cash, securities or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (K) of this section is insufficient to satisfy in full all claims of public customers. Such property includes ''customer property,'' as defined in section 16(4) of SIPA, 15 U.S.C. 78lll(4), that remains after allocation in accordance with section 8(c)(1)(A) through (D) of SIPA, 15 U.S.C. 78fff–2(c)(1)(A) through (D) and that is allocated to the debtor's general estate in accordance with section 8(c)(1) of SIPA, 15 U.S.C. 78fff–2(c)(1).

(2) Customer property will not include:

(i) Claims against the debtor for damages for any wrongdoing of the debtor, including claims for misrepresentation or fraud, or for any violation of the Act or of the regulations in this chapter;

(ii) Other claims for property which are not based upon property received, acquired, or held by or for the account of the debtor, from or for the account of the customer;

(iii) Forward contracts (unless such contracts are cleared by a clearing organization or, in the case of forward contracts treated as foreign futures, a foreign clearing organization);

(iv) Physical delivery property that is not held by the debtor, and is delivered or received by a customer in accordance with § 190.06(a)(2) or § 190.16(a) to fulfill the customer's delivery obligation under a commodity contract;

(v) Property deposited by a customer with a commodity broker after the entry of an order for relief which is not necessary to meet the margin requirements applicable to the accounts of such customer;

(vi) Property hypothecated pursuant to § 1.30 of this chapter to the extent of the loan of margin with respect thereto;

(vii) Money, securities, or property held to margin, guarantee, or secure security futures products, or accruing as a result of such products, if held in a securities account; and

(viii) Money, securities or property held in a securities account to fulfill delivery, under a commodity contract from or for the account of a customer, as described in § 190.06(b)(2).

(3) Nothing contained in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (L) of this section.

(b) *Allocation of customer property between customer classes.* No customer property may be allocated to pay non-public customer claims until all public customer claims have been satisfied in full. Any property segregated on behalf of or attributable to non-public customers must be treated initially as part of the public customer estate and allocated in accordance with paragraph (c)(2) of this section.

(c) *Allocation of customer property among account classes*—(1) *Property identified to an account class*—(i) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, or recovered by the trustee on behalf of or for the benefit of an account class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(ii) *Excess property.* If, after payment in full of all allowed customer claims in a particular account class, any property remains allocated to that account class, such excess shall be allocated in accordance with paragraph (c)(2) of this section.

(2) *All other property.* Money, securities, and property received from or for the account of customers which cannot be allocated in accordance with paragraph (c)(1)(i) of this section, must be allocated in the following order:

(i) To the estate of the account class for which, after the allocation required in paragraph (c)(1) of this section, the percentage of each public customer net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such class equals the percentage of each public customer's net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and

(ii) Then to the estate of the two account classes referred to in paragraph (c)(2)(i) of this section so that the percentage of the net equity claims which are funded for each class remains equal until the percentage of each public customer net equity claim which is funded equals the percentage of each public customer net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until the percentage of each public customer net equity claim which is funded is equal for all classes of accounts; and

(iii) Then among account classes in the same proportion as the public customer net equity claims for each such account class bears to the total of public customer net equity claims of all account classes until the public customer claims of each account class are paid in full; and

(iv) Thereafter to the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) through (iii) of this section for the allocation of the customer estate among account classes.

(d) *Distribution of customer property*—(1) *Return or transfer of specifically identifiable property.* Specifically identifiable property not required to be liquidated under § 190.04(d)(2) may be returned or transferred on behalf of the customer to which it is identified:

(i) If it is margining an open commodity contract, only if substitute customer property is first deposited with the trustee with a value equal to the greater of the full fair market value of such property on the return date or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security; or

(ii) If it is not margining an open commodity contract, at the option of the customer, either pursuant to the terms of paragraph (d)(1)(i) of this section, or pursuant to the following terms: Such customer first deposits substitute customer property with the trustee with a value equal to the amount by which the greater of the value of the specifically identifiable property to be transferred or returned on the date of such transfer or return or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security, together with any other disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; provided, however, that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(2) *Transfers of specifically identifiable commodity contracts under section 766 of the Bankruptcy Code.* Any open commodity contract that is specifically identifiable property and which is not required to be liquidated under § 190.04(d), and which is not otherwise liquidated, may be transferred on behalf of a public customer, provided, however, that such customer must first deposit substitute customer property with the trustee with a value equal to the amount by which the equity to be transferred to margin such contract together with any other transfers or returns of specifically identifiable property or disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; and, provided further, that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(3) *Distribution in kind of specifically identifiable securities.* If any securities of a customer are specifically identifiable property as defined in paragraph *(1)(i)(A)* of the definition of that term in § 190.01, but the customer has no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities (*i.e.,* securities of the same class and series of an issuer), with a fair market value (inclusive of transaction costs) which does not exceed that portion of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

(4) *Proof of customer claim.* No distribution shall be made pursuant to paragraphs (d)(1) and (3) of this section prior to receipt of a completed proof of customer claim as described in § 190.03(e) or (f).

(5) *No differential distributions.* No further disbursements may be made to customers with respect to a particular account class for whom transfers have been made pursuant to § 190.07 and paragraph (d)(2) of this section, until a percentage of each net equity claim equivalent to the percentage distributed to such customers is distributed to all public customers in such account class. Partial distributions, other than the transfers referred to in § 190.07 and paragraph (d)(2) of this section, with respect to a particular account class made prior to the final net equity determination date must be made pursuant to a preliminary plan of distribution approved by the court, upon notice to the parties and to all customers, which plan requires adequate security to the debtor's estate to assure the recovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers in such account class.

**§ 190.10 Provisions applicable to futures commission merchants during business as usual.**

(a) *Current records.* A person that is a futures commission merchant is required to maintain current records relating to its customers' accounts, including copies of all account agreements and related account documentation, and ''know your customer'' materials, pursuant to §§ 1.31, 1.35, 1.36, and 1.37 of this chapter, which may be provided to another futures commission merchant to facilitate the transfer of open commodity contracts or other customer property held by such person for or on behalf of its customers to the other futures commission merchant, in the event an order for relief is entered with respect to such person.

(b) *Designation of hedging accounts.* (1) A futures commission merchant must provide an opportunity to each customer, when it first opens a futures account, foreign futures account or cleared swaps account with such futures commission merchant, to designate such account as a hedging account. The futures commission merchant must indicate prominently in the accounting records in which it maintains open trade balances whether, for each customer account, the account is designated as a hedging account.

(2) A futures commission merchant may permit the customer to open an account as a hedging account only if it obtains the customer's written representation that the customer's trading of futures or options on futures, foreign futures or options on foreign futures, or cleared swaps (as applicable) in the account constitutes hedging as such term may be defined under any relevant Commission regulation or rule of any clearing organization, designated contract market, swap execution facility, or foreign board of trade.

(3) The requirements set forth in paragraphs (b)(1) and (2) of this section do not apply to a futures commission merchant with respect to any commodity contract account that the futures commission merchant opened prior to [EFFECTIVE DATE OF FINAL RULE]. The futures commission merchant may continue to designate as a hedging account any account with respect to which the futures commission merchant received written hedging instructions from the customer in accordance with § 190.06(d) as contained in 17 CFR part 190 revised as of April 1, 2020.

(4) A futures commission merchant may designate an existing futures account, foreign futures account, or cleared swaps account of a particular

customer as a hedging account, provided that it has obtained the representation set out in paragraph (b)(2) of this section from such customer.

(c) *Delivery accounts.* In connection with the making or taking of delivery of a commodity under a commodity contract whose terms require settlement via physical delivery, if a futures commission merchant facilitates or effects the transfer of the physical delivery property and payment therefor on behalf of the customer, and does so outside the futures account, foreign futures account, or cleared swaps account in which the commodity contract was held, the futures commission merchant must do so in a delivery account, provided, however, that when the commodity subject to delivery is a security, a futures commission merchant may, consistent with any applicable regulatory requirements, do so in a securities account.

(d) *Letters of credit.* A futures commission merchant shall not accept a letter of credit as collateral unless such letter of credit may be exercised, through its stated date of expiry, under the following conditions, regardless of whether the customer posting that letter of credit is in default in any obligation:

(1) In the event that an order for relief under chapter 7 of the Bankruptcy Code or a protective decree pursuant to section 5(b)(1) of SIPA is entered with respect to the futures commission merchant, or if the FDIC is appointed as receiver for the futures commission merchant pursuant to 12 U.S.C. 5382(a), the trustee for that futures commission merchant (or, as applicable, FDIC) may draw upon such letter of credit, in full or in part, in accordance with § 190.04(d)(3).

(2) If the letter of credit is passed through to a clearing organization, then in the event that an order for relief under chapter 7 of the Bankruptcy Code is entered with respect to the clearing organization, or if the FDIC is appointed as receiver for the clearing organization pursuant to 12 U.S.C. 5382(a), the trustee for that clearing organization (or, as applicable, FDIC) may draw upon such letter of credit, in full or in part, in accordance with § 190.04(d)(3). A futures commission merchant shall not accept a letter of credit from a customer as collateral if it has any agreement with the customer that is inconsistent with the foregoing.

(e) *Disclosure statement for non-cash margin.* (1) Except as provided in § 1.65 of this chapter, no commodity broker (other than a clearing organization) may accept property other than cash from or for the account of a customer, other than a customer specified in § 1.55(f) of this chapter, to margin, guarantee, or secure a commodity contract unless the commodity broker first furnishes the customer with the disclosure statement set forth in paragraph (e)(2) of this section in boldface print in at least 10 point type which may be provided as either a separate, written document or incorporated into the customer agreement, or with another statement approved under § 1.55(c) of this chapter and set forth in appendix A to § 1.55 which the Commission finds satisfies this requirement.

(2) The disclosure statement required by paragraph (e)(1) of this section

THIS STATEMENT IS FURNISHED TO YOU BECAUSE § 190.10(e) OF THE COMMODITY FUTURES TRADING COMMISSION REQUIRES IT FOR REASONS OF FAIR NOTICE UNRELATED TO THIS COMPANY'S CURRENT FINANCIAL CONDITION.

1. YOU SHOULD KNOW THAT IN THE UNLIKELY EVENT OF THIS COMPANY'S BANKRUPTCY, PROPERTY, INCLUDING PROPERTY SPECIFICALLY TRACEABLE TO YOU, WILL BE RETURNED, TRANSFERRED OR DISTRIBUTED TO YOU, OR ON YOUR BEHALF, ONLY TO THE EXTENT OF YOUR PRO RATA SHARE OF ALL PROPERTY AVAILABLE FOR DISTRIBUTION TO CUSTOMERS.

2. THE COMMISSION'S REGULATIONS CONCERNING BANKRUPTCIES OF COMMODITY BROKERS CAN BE FOUND AT 17 CODE OF FEDERAL REGULATIONS PART 190.

(3) The statement contained in paragraph (e)(2) of this section need be furnished only once to each customer to whom it is required to be furnished by this section.

## Subpart C—Clearing Organization as Debtor

### § 190.11 Scope and purpose of this subpart.

This subpart applies to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization.

### § 190.12 Required reports and records.

(a) *Notices*—(1) *Notices—means of providing*—(i) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*. For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(ii) *To members.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to members under this subpart and for receiving claims or other notices from members. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to members' electronic addresses that are available in the debtor's books and records.

(2) *Of commencement of a proceeding.* A debtor that files a petition in bankruptcy that is subject to this subpart shall, at or before the time of such filing, and a debtor against which such a petition is filed shall, as soon as possible, but in any event no later than three hours after the receipt of notice of such filing, notify the Commission of the filing date, the court in which the proceeding has been or will be filed, and, as soon as available, the docket number assigned to that proceeding by the court.

(b) *Reports and records to be provided to the trustee and the Commission within three hours.* (1) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the later of the commencement of such proceeding or the appointment of the trustee, the debtor shall provide to the trustee copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under § 39.19(c)(2), (3), and (4) of this chapter (including the most up-to-date version of any recovery and wind-down plans of the debtor maintained pursuant to § 39.39(b) of this chapter) that the debtor filed with the Commission during the preceding 12 months.

(2) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the commencement of such proceeding (or, with respect to the trustee, the appointment of the trustee), the debtor shall provide to the trustee and the Commission copies of the most up-to-date versions of the default management plan and default rules and procedures maintained by the debtor pursuant to §§ 39.16 and, as applicable, 39.35 of this chapter.

(c) *Records to be provided to the trustee and the Commission by the next business day.* As soon as practicable following commencement of a proceeding that is subject to this subpart and in any event no later than the next business day, the debtor shall make

available to the trustee and the Commission copies of the following records:

(1) All records maintained by the debtor described in § 39.20(a) of this chapter; and

(2) Any opinions of counsel or other legal memoranda provided to the debtor (whether by external or internal counsel) in the five years preceding the commencement of such proceeding relating to the enforceability of the rules and procedures of the debtor in the event of an insolvency proceeding involving the debtor.

**§ 190.13 Prohibition on avoidance of transfers.**

The following transfers are approved and may not be avoided under section 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(a) *Pre-relief transfers.* Any transfer of open commodity contracts and the property margining or securing such contracts made to another clearing organization that was approved by the Commission, either before or after such transfer, and was made prior to entry of the order for relief; and

(b) *Post-relief transfers.* Any transfers of open commodity contracts and the property margining or securing such contracts made to another clearing organization on or before the seventh calendar day after the entry of the order for relief, that was made with the approval of the Commission, either before or after such transfer.

**§ 190.14 Operation of the estate of the debtor subsequent to the filing date.**

(a) *Proofs of claim.* The trustee may, in its discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim.

(b) *Continued operation of the derivatives clearing organization.* (1) Subsequent to the order for relief, the derivatives clearing organization shall cease making calls for variation or initial margin, except as otherwise explicitly provided in this paragraph (b).

(2) If the trustee believes that continued operation of the derivatives clearing organization on a temporary basis would:

(i) Facilitate either—

(A) Prompt transfer of the clearing operations of the derivatives clearing organization to another derivatives clearing organization; or

(B) Resolution of the derivatives clearing organization pursuant to title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(ii) Be practicable, in the sense that—

(A) The rules of the derivatives clearing organization do not compel the termination of all or substantially all of the outstanding contracts under the circumstances then prevailing (*e.g.,* upon the order for relief); and

(B) All or substantially all of the members of the derivatives clearing organization (other than those who are themselves subject to a bankruptcy proceeding) would be able to, and would in fact, make variation payments as owed during the temporary timeframe, then the trustee may request permission of the Commission to continue to operate the derivatives clearing organization for up to six calendar days after the order for relief to the extent practicable and in accordance with the rules and procedures of the debtor, with respect to open commodity contracts of the debtor.

(3) Upon receiving a request pursuant to paragraph (b)(2) of this section, the Commission shall proceed promptly to consider the request and, if it is persuaded that the trustee's conclusions with respect to paragraphs (b)(2)(i) and (ii) of this section are well grounded, may grant the trustee's request. Such grant may be for fewer calendar days than the trustee has requested, but then may be renewed at the Commission's discretion so long as the calendar days of continued operation total no more than six.

(c) *Liquidation.* (1) The trustee shall liquidate all open commodity contracts that have not been terminated, liquidated, or transferred no later than seven calendar days after entry of the order for relief, unless the Commission determines that liquidation would be inconsistent with the avoidance of systemic risk or would not be in the best interests of the debtor's estate. Such liquidation of open commodity contracts shall be conducted in accordance with the rules and procedures of the debtor, to the extent applicable and practicable.

(2) In lieu of liquidating securities held by the debtor and making distributions in the form of cash, the trustee may, in its reasonable discretion, make distributions in the form of securities that are equivalent (*i.e.,* securities of the same class and series of an issuer) to the securities originally delivered to the debtor by a clearing member or such clearing member's customer.

(d) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account immediately prior to any distribution of property within the account, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

**§ 190.15 Recovery and wind-down plans; default rules and procedures.**

(a) *Prohibition on avoidance of actions taken pursuant to recovery and wind-down plans.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that was reasonably within the scope of and was provided for in any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter.

(b) *Implementation of debtor's default rules and procedures.* In administering a proceeding under this subpart, the trustee shall implement, in consultation with the Commission, the default rules and procedures maintained by the debtor under §§ 39.16 and, as applicable, 39.35 of this chapter and any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the reasonable discretion of the trustee and to the extent that implementation of such default rules and procedures is practicable.

(c) *Implementation of recovery and wind-down plans.* In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable.

**§ 190.16 Delivery.**

(a) *General.* In the event that a commodity contract, cleared by the derivatives clearing organization (DCO), that settles upon expiration or exercise by making or taking delivery of physical delivery property, has moved into delivery position prior to the date and time of the order for relief, the trustee must use reasonable efforts to facilitate and cooperate with the completion of delivery on behalf of the clearing member or the clearing member's customer in a manner consistent with § 190.06(a) and the pro rata distribution principle addressed in § 190.00(c)(5).

(b) *Special provisions for delivery accounts.* (1) Consistent with the separation of the physical delivery property account class and the cash delivery account class set forth in § 190.06(b), the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date, along with the proceeds from any subsequent sale of such physical delivery property in accordance with § 190.06(a)(3) to fulfill a clearing member's or its customer's delivery obligation or any other subsequent sale of such property, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a clearing member or its customer in accordance with § 190.06(a)(3), as part of the separate cash delivery account class.

(2) If the debtor holds any cash or property in the form of cash equivalents in an account with a bank or other person under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking physical delivery, or receiving payment for making physical delivery, of a commodity under any commodity contracts, such property shall (subject to § 190.19) be considered customer property in the cash delivery account class if held for making payment for taking delivery, or in the physical delivery account class, if held for the purpose of receiving such payment.

**§ 190.17 Calculation of net equity.**

(a) *Net equity—separate capacities and calculations.* (1) If a member of the clearing organization clears trades in commodity contracts through a commodity contract account carried by the debtor as a customer account for the benefit of the clearing member's public customers and separately through a house account, the clearing member shall be treated as having customer claims against the debtor in separate capacities with respect to the customer account and house account at the clearing organization, and by account class. A member shall be treated as part of the public customer class with respect to claims based on any commodity customer accounts carried as ''customer accounts'' by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account.

(2) Net equity shall be calculated separately for each separate customer capacity in which the clearing member has a claim against the debtor, *i.e.,* separately by the member's customer account and house account and by account class.

(b) *Net equity—application of debtor's loss allocation rules and procedures.* (1) The calculation of a clearing member's net equity claim shall include the full application of the debtor's loss allocation rules and procedures, including the default rules and procedures referred to in §§ 39.16 and, if applicable, 39.35 of this chapter. This includes, with respect to the clearing member's house account, any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid.

(2) Where the debtor's loss allocation rules and procedures would entitle clearing members to additional payments of cash or other property due to—

(i) Portions of mutualized default resources that are prefunded, or assessed and collected, but in either event not used; or

(ii) To the debtor's recoveries on claims against others (including, but not limited to, recoveries on claims against clearing members who have defaulted on their obligations to the debtor), appropriate adjustments shall be made to the net equity claims of the clearing members that are so entitled.

(c) *Net equity—general.* Subject to paragraph (b) of this section, net equity shall be calculated in the manner provided in § 190.08, to the extent applicable.

(d) *Calculation of funded balance. Funded balance* means a clearing member's pro rata share of customer property other than member property (for accounts for a clearing member's customer accounts) or member property (for a clearing member's house accounts) with respect to each account class available for distribution to customers of the same customer class, calculated in the manner provided in § 190.08(c) to the extent applicable.

**§ 190.18 Treatment of property.**

(a) *General.* The property of the debtor's estate must be allocated between member property and customer property other than member property as provided in this section to satisfy claims of clearing members, as customers of the debtor. The property so allocated will constitute a separate estate of the customer class (*i.e.,* member property, and customer property other than member property) and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(b) *Scope of customer property.* Customer property is the property available for distribution within the relevant account class in respect of claims by clearing members, as customers of the clearing organization, based on customer accounts carried by the debtor for the benefit of such members' public customers or such members' house accounts.

(1) Customer property includes the following:

(i) All cash, securities, or other property, or the proceeds of such cash, securities, or other property, received, acquired, or held by or for the account of the debtor, from or for any commodity contract account of a clearing member carried by the debtor, which is:

(A) Property received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) of the definition of that term in § 190.01;

(D) Cash, securities, or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a clearing member or a customer of a clearing member;

(E) Profits or contractual rights accruing as a result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn upon by the trustee, or substitute customer property posted by a clearing member or a customer of a clearing member, pursuant to § 190.04(d)(3); or

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(ii) All cash, securities, or other property which:

(A) Is segregated by the debtor on the filing date for the benefit of clearing members' house accounts or clearing members' public customer accounts;

(B) Which was of a type described in paragraph (b)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(C) Represents a recovery of any debit balance, margin deficit or other claim of the debtor against any commodity contract account carried for the benefit of a member's house accounts or a member's public customer accounts;

(D) Was unlawfully converted but is part of the debtor's estate; or

(E) Of a type described in paragraphs (a)(1)(ii)(H) through (K) of § 190.09 (as if the term debtor used therein refers to a clearing organization as debtor); and

(iii) Any guaranty fund deposit, assessment, or similar payment or deposit made by a clearing member, or recovered by the trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member.

(2) Customer property will not include property of the type described in § 190.09(a)(2), as if the term debtor used therein refers to a clearing organization and to the extent relevant to a clearing organization.

(c) *Allocation of customer property between customer classes.* (1) Property referred to in paragraph (b)(1)(iii) of this section should be allocated:

(i) To customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any account class.

(ii) Any remaining excess after the application of paragraph (c)(1)(i) of this section should be allocated to member property.

(2) Where the funded balance for members' house accounts is greater than one hundred percent with respect to any account class:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any account class.

(ii) Any remaining excess after the application of paragraph (c)(2)(i) of this section should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any other account class.

(3) Where the funded balance for members' public customers in any account class is greater than one hundred percent:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any other account class.

(ii) Any remaining excess after the application of paragraph (c)(3)(i) should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any account class.

(d) *Allocation of customer property among account classes*—(1) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class within a customer class, or readily traceable on the filing date to customers of such account class within a customer class, or recovered by the trustee on behalf of or for the benefit of an account class within a customer class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(2) *All other property.* Customer property which cannot be allocated in accordance with paragraph (d)(1) of this section, shall be allocated within customer classes, but between account classes, in the following order:

(i) To the estate of the account class for which the percentage of each members' net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such account class equals the percentage of each members' net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and

(ii) Then to the estate of the two account classes so that the percentage of the net equity claims which are funded for each such account class remains equal until the percentage of each net equity claim which is funded equals the percentage of each net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until all account classes within the customer class are fully funded.

(e) *Accounts without separation by account class.* Where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.

(f) *Assertion of claims by trustee.* Nothing in this section, including but not limited to the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (b)(1)(i)(E) and (b)(1)(ii) and (iii) of this section.

**§ 190.19 Support of daily settlement.**

(a) Notwithstanding any other provision of this part, funds received (whether from clearing members' house or customer accounts) by a debtor clearing organization as part of the daily settlement required pursuant to § 39.14 of this chapter shall, upon and after an order for relief, be included as customer property that is reserved for and traceable to, and promptly shall be distributed to, members entitled to payments of such funds with respect to such members' house and customer accounts as part of that same daily settlement. Such funds when received, other than deposits of initial margin described in § 39.14(a)(1)(iii) of this chapter, shall be considered member property and customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively. Deposits of initial margin described in § 39.14(a)(1)(iii) of this chapter shall be considered Member property and Customer property other than member property, to the extent deposited on behalf of, respectively, clearing members' house accounts and customer accounts.

(b) To the extent there is a shortfall in funds received pursuant to paragraph (a) of this section:

(1) Such funds shall be supplemented in accordance with the derivatives clearing organization's default rules and procedures adopted pursuant to §§ 39.16 and, as applicable, 39.35 of this chapter, and any recovery and wind-down plans maintained pursuant to § 39.39 of this chapter and submitted pursuant to § 39.19 of this chapter, including the property in paragraphs (b)(1)(i) and (iv) of this section, as applicable, to the extent necessary to meet the shortfall. Such funds shall be included as member property and customer property other than member property in the proportion described in paragraph (a) of this section, and shall be distributed promptly to members' house accounts and members' customer accounts which accounts are entitled to payment of such funds as part of that daily settlement:

(i) Initial margin held for the account of a member, including initial margin segregated for the customers of such member, that has defaulted on payments required pursuant to a daily settlement, but only to the extent that such margin is permitted to be used pursuant to parts 1, 22, and 30 of this chapter.

(ii) Assets of the debtor, to the extent dedicated to such use as part of the debtor's default rules and procedures, and any recovery and wind-down plans, described in this paragraph (b)(1).

(iii) Prefunded guarantee or default funds maintained pursuant to the debtor's default rules and procedures.

(iv) Payments made by members pursuant to assessment powers

maintained pursuant to the debtor's default rules and procedures.

(2) If the funds that are included as customer property pursuant to paragraph (a) of this section, supplemented as described in paragraph (b)(1) of this section, are insufficient to pay in full members entitled to payment of such funds as part of daily settlement, then such funds shall be distributed pro rata to such members' house accounts and customer accounts in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

## Appendix A to Part 190—Customer Proof of Claim Form

BILLING CODE 6351–01–P

**[CASE CAPTION]**

**CLAIM FORM FOR COMMODITY BROKER CUSTOMERS OF [DEBTOR]**

| | |
|---|---|
| Debtor: [INSERT] | |
| Customer Name:<br><br>**COURT USE ONLY** | |
| Account Number(s):<br><br>Daytime Telephone number:<br><br>Email: | ❒ Check this box if this claim amends a previously filed claim.<br><br>**Court Claim Number:**_____<br>(*If known*)<br><br>Filed on:_____ |
| Name and address where payment should be sent (if different from above):<br><br>Telephone number:<br><br>Email: | ❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars. |

**THIS CLAIM FORM SHOULD BE USED ONLY IF YOU ARE A CUSTOMER HOLDING A CLAIM BASED ON A COMMODITY CONTRACT ACCOUNT (A FUTURES, FOREIGN FUTURES, CLEARED SWAPS OR DELIVERY ACCOUNT) AT THE DEBTOR. A DIFFERENT CLAIM FORM MUST BE USED TO ASSERT OTHER TYPES OF CLAIMS AGAINST THE DEBTOR.**

**THE DEADLINE FOR FILING ALL CUSTOMER CLAIMS BASED ON COMMODITY CONTRACT ACCOUNTS IS [BAR DATE]. NO CUSTOMER CLAIM WILL BE ALLOWED IF IT IS RECEIVED AFTER THIS DATE. CLAIMS MUST BE RECEIVED BY 11:59 P.M. ([TIME ZONE]) ON _____ TO BE CONSIDERED TIMELY.**

[Include case-specific instructions for how to file a claim]

If you require additional space to answer any question, please attach separate pieces of paper and label the answers to the corresponding questions.

## I. CLAIM AMOUNT

For each type of commodity contract account that is applicable, state the amount of your claim against the Debtor.

(1) Futures account claim: $_____[§ 190.03(e)(1)][1]

(2) Foreign futures account claim: $_____[§ 190.03(e)(1)]

(3) Cleared swaps account claim: $_____[§ 190.03(e)(1)]

(4) Delivery account claim: $_____[§ 190.03(e)(1)]

[Of the amount in (4), please note how much is in the form of cash or cash equivalents ($ ) and how much is the value of commodities that have been or were/are to be delivered ($_____)

(5) Total claim: $_____

(6) Date on which your claim is valued (*see instructions*): _____

## II. ACCOUNT INFORMATION

For each commodity contract account with the Debtor, please provide the following information. To the extent you have multiple commodity contract accounts with the Debtor, please provide the following information for each account separately in an attachment.

(1) Account number: _____[§ 190.03(e)(3)(i)]

(2) Name in which the account is held:
_____[§ 190.03(e)(3)(ii)]

(3) Please specify all capacities in which you hold the account (check all that are applicable) [§ 190.03(e)(3)(iv)]:

☐ a. Individual capacity

[1] Bracketed references are to the corresponding provision in § 190.03(e) where the relevant information item is listed.

☐ b. Guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act

☐ c. Executor or administrator of an estate

☐ d. Trustee for a trust beneficiary

☐ e. Corporation, partnership, or unincorporated association

☐ f. Omnibus customer account of a futures commission merchant

☐ g. Part owner of a joint account

☐ h. Individual retirement account

☐ i. Agent or nominee for a principal or beneficial owner (and not described in Items (a)-(h))

☐ j. In any other capacity not described above in Items (a)-(i) (please specify the capacity): _____

*If you selected more* than *one box, please attach an explanation.*

(4) Please specify whether the account is a joint account [§ 190.03(e)(3)(v)]:

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please specify your percentage interest in the account, and whether all participants in the joint account are claiming jointly. In addition, please see the instructions for additional information required for joint accounts.*

a. My percentage interest in the joint account is: _____%

b. Participants in the joint account are claiming:

**Check one:** ☐ SEPARATELY ☐ JOINTLY

(5) Please specify whether the account is a discretionary account (*i.e.*, does another person have trading authority over the account) [§ 190.03(e)(3)(vi)]:

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please see the instructions for additional information required for discretionary accounts.*

(6) Please specify whether the account is an individual retirement account for which there is a custodian [§ 190.03(e)(3)(vii)]:

**Check one:** ☐ YES ☐ NO

*1. If you selected "YES," please see the instructions for additional information required for individual retirement accounts for which there is a custodian.*

(7) Please specify whether the account is a cross-margining account for futures and securities [§ 190.03(e)(3)(viii)]:

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please see the instructions for additional information required for cross-margining accounts for futures and securities.*

## III. ACCOUNT STATEMENT: OPEN POSITIONS, UNLIQUIDATED SECURITIES AND OTHER UNLIQUIDATED PROPERTY

(1) Account balance per most recent account statement:
$_____ [§ 190.03(e)(3)(iii)]

a. Date of the most recent account statement:

_____

***PLEASE ATTACH A* COPY *OF THIS STATEMENT (NOT THE ORIGINAL)***

b. Do you agree with the account balance(s) on your most recent account statement(s), as set forth above?

**Check one:** ☐ YES ☐ NO

*If you selected "NO," please explain in an attachment the reasons why you disagree with the account balance reflected on your most recent statement.*

c. Has there been activity in the account since the date of the last account statement up to and including the filing date that has affected the balance of the account ("subsequent activity")?

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please provide full information regarding any such subsequent activity in an attachment.*

(2) On the date on which your claim is valued, did you have any open positions, unliquidated securities and/or other unliquidated property in or associated with any of your commodity contract accounts? [§ 190.03(e)(7)]

2. **Check one:** ☐ YES ☐ NO

*If you selected "YES," please state below the value of your open positions, unliquidated securities and/or other unliquidated property. In addition, please*

*see the instructions for additional information required regarding open positions, unliquidated securities and other unliquidated property.*

Value of all open positions, unliquidated securities and/or other unliquidated property: $_____

(3) To the extent you are claiming unliquidated securities or other unliquidated property held in your account, do you wish to receive payment in kind, if possible? [§ 190.03(e)(9)]

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please see the instructions for additional required information.*

## IV. CONNECTIONS WITH THE DEBTOR [§ 190.03(e)(2)]

(1) Is the customer making this claim one of the following persons (check all that are applicable):

☐ a. Officer, director, general partner or owner of ten percent or more of the capital stock of the Debtor.

☐ b. An employee, limited partner or special partner of the Debtor whose duties include (1) the management of the business of the Debtor or any part thereof; (2) the handling of the trades or customer funds; (3) the keeping of records pertaining to the trades or funds of customers; or (4) the signing or cosigning of checks or drafts on behalf of Debtor.

☐ c. A spouse or minor dependent living in the same household as any person listed in this section.

☐ d. A business affiliate that directly or indirectly controls the Debtor, or is directly or indirectly controlled by or is under common control with the Debtor.

(2) Is the customer making the claim on behalf of any account that is owned 10% or more by the Debtor or by any of the persons, alone or jointly, identified in IV.(1)?

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please identify such person(s) and the category identified in IV.(1) under which they fit.*

_____

_____

_____

_____

## V. SECURITY FUTURES PRODUCTS [§ 190.03(e)(8)][2]

Is any portion of your claim based on security futures products (i.e. futures whose underlying instrument is either a single security or a narrow-based security index) held in a securities account with the Debtor?

**Check one:** ☐ **YES** ☐ **NO**

*If you selected "YES," you will need to file a separate claim in accordance with the procedures established for claims based on securities accounts at the Debtor.*

## VI. OTHER ACCOUNTS WITH DEBTOR [§ 190.03(e)(4)]

Do you have any accounts with the Debtor that are not commodity contract accounts listed in response to Section III above?

**Check one:** ☐ YES ☐ NO

*If you selected "YES," specify the other account number(s) and the type of each such account.*

| Account Number | Type of Account |
|---|---|
| 1. _____ | _____ |
| 2. _____ | _____ |

*(Attach additional page(s) if necessary)*

## VII. OTHER CLAIMS AGAINST DEBTOR [§ 190.03(e)(5)]

Do you have any other claims against the Debtor not already taken into account in the claim and account information provided in response to Sections I, II, III and VI above?

**Check one:** ☐ YES ☐ NO

*If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.*

[2] This section is for use only in cases where the debtor is jointly registered as a futures commission merchant and securities broker-dealer.

## VIII. AMOUNTS OWED TO DEBTOR [§ 190.03(e)(6)]

Do you owe any amounts to the Debtor not already taken into account in the claim and account balance information provided in response to the questions in sections I and II above?

**Check one:** YES ☐ NO ☐

*If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.*

## IX. VERIFICATION

**CHECK THE APPROPRIATE BOX:**

❒ I am the customer ❒ I am the customer's authorized agent.

❒ I am a guarantor, surety, indorser or other (See Bankruptcy Rule 3005.)

***I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.***

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above):

_____

_____

_____

Telephone number: _____

Email: _____

_____

Signature (Date)

*Penalty for presenting fraudulent claim:* Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

<table>
<tr><th colspan="2">INSTRUCTIONS FOR CUSTOMER PROOF OF CLAIM FORM</th></tr>
<tr><td>Customer's Name and Address:<br>Fill in the name of the person or entity asserting the claim, and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The customer has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).</td><td>Date on Which Claim is Valued:<br>Your claim should be valued as of [the last date on which any contracts or property not liquidated to cash balances remained in your account. Do not include the value of any contracts, funds or other property transferred to another commodity broker] [^, the date established by the Court as the date on which customer accounts should be valued].</td></tr>
<tr><td rowspan="4">• Types of Customer Accounts:<br><br>• A "futures account" is an account opened for the purpose of trading futures or options on futures on a U.S. futures exchange . Your account statement for a "futures account" would typically include the term "SEG" in the title or description of the account.<br><br>• A "foreign futures account" is an account opened for the purpose of trading futures or options on futures on an exchange located outside the U.S. Your account statement for a "foreign futures account" would typically include the term "30.7" in the title or description of the account.<br><br>• A "cleared swaps account" is an account opened for the purpose of holding swaps traded bilaterally or in off-exchange markets that are submitted to a CFTC-registered derivatives clearing organization for settlement and clearing. A "cleared swaps account" also is an account opened for the purpose of trading swaps or options on swaps on a designated contract market or swap execution facility and cleared by a CFTC-registered derivatives clearing organization. Your account statement for a "cleared swaps account" would typically include the term "swap" in the title or description of the account.<br><br>• A "delivery account" is an account denominated as such and through which</td><td>Estimated Claim Amount: If you cannot compute the amount of your claim, you <u>must</u> file an estimated claim. In that case, please be sure to indicate that your claim is an estimated claim.</td></tr>
<tr><td>Joint Accounts: If any commodity contract account for which you are making a claim is a joint account, please include an attachment listing the account number and the name, address and contact information for each joint account holder other than yourself.<br><br>If you are making a claim with respect to multiple joint accounts, and those joint accounts are not owned by the same holders in the same legal capacities and in identical ownership percentages, please complete a separate claim form for each joint account.</td></tr>
<tr><td>Discretionary Accounts: If any commodity contract account for which you are making a claim is a discretionary account, please include an attachment listing the account number and the name, address, and contact information for all persons with trading authority over any of those accounts. If different persons have trading authority over different accounts, please provide this information for each such account, listing applicable account numbers.</td></tr>
<tr><td>Individual Retirement Accounts for which there is a Custodian: If any commodity contract account for which you are making a claim is an individual retirement account for which there is a custodian, please include an attachment listing the account number and the name, address, and contact information for both the custodian and the account owner.</td></tr>
</table>

deliveries of commodities, whether tangible or intangible, occur or have occurred under expiring futures contracts. A delivery account also may hold cash balances, title documents for commodities such as metals warehouse receipts, or other commodities, whether tangible or intangible, that are deliverable under an exchange's futures contract.

- Your account statement may include multiple types of customer accounts in a single account statement.

Other types of derivatives trading accounts that you may have with the debtor, such as accounts holding off-exchange retail forex positions subject to part 5 of the regulations of the CFTC and funds to margin such positions, are not customer accounts entitled to special protection under the Bankruptcy Code.

**Claim in foreign currencies**: If some or all of your claim is based on a currency other than U.S. dollars, please file you claim in U.S. dollars based on the exchange rate in effect as of the petition date ([INSERT]), and identify the exchange rate used in calculating your claim in a separate attachment.

**Cross-Margining Accounts for Futures and Securities:** If any commodity contract account for which you are making a claim is a cross-margining account for futures and securities, please include an attachment listing the account number and whether the securities positions are held in an account with the debtor or in an account with an affiliate of the debtor. If such positions are held in an account with an affiliate of the debtor, please identify and include contact information for such affiliate.

**Open positions, Unliquidated Securities and Other Unliquidated Property**: To the extent you have any open positions, unliquidated securities and/or other unliquidated property in a commodity contract account, please include an attachment (i) describing each such open position, unliquidated security and/or other item of unliquidated property (*e.g.*, for positions, by contract, delivery date, long/short, quantity, and strike price for options; for securities, by CUSIP and quantity); (ii) identifying whether such open position, unliquidated security and/or other unliquidated property is specifically identifiable property; and (iii) identifying whether you would prefer, if practicable, payment in kind for each unliquidated security or other item of unliquidated property or to have it liquidated.

If the position, unliquidated security or other item of unliquidated property is already reflected in the account statement that you attached in response to Section III of this form, and you agree with the quantity and any value set forth therein, please say so. Otherwise, please (i) state the quantity and value you claim with respect to such open position, unliquidated security and/or other unliquidated property, and explain the basis for that quantity and value; and (ii) attach any documentary evidence supporting such value.

- **Documentation**:
- Please attach a copy (not the original) of the most recent account statement for each account on which this claim is based.

- Please enclose copies (not originals) of any documentation or correspondence you believe will be of assistance in processing your claim, including, but not limited to, customer confirmations, account statements, and statements of purchase or sale.

If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the claim that you are asserting in this claim form, please provide copies of the complaint and all related correspondence, as well as any replies that you received.

| | |
|---|---|
| **Verification:**<br>The individual completing this proof of claim must sign and date it. If the claim is filed electronically, the Bankruptcy Code authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration.<br><br>• Print the name and title, if any, of the customer or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. Criminal penalties apply for making a false statement on a proof of claim. | **Credits:**<br>An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the customer gave the Debtor credit for any obligations of the customer to the Debtor. |
| **ADDITIONAL INFORMATION** | |
| **Acknowledgment of Receipt of Claim**<br><br>[Instructions for acknowledgment of filing] | **Offers to Purchase a Claim**<br>Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact you and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the Debtor. These entities do not represent the Bankruptcy Court or the Debtor. A customer has no obligation to sell its claim. However, if a customer decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. 101 *et seq.*), and any applicable orders of the Bankruptcy Court. |

BILLING CODE 6351–01–C

## Appendix B to Part 190—Special Bankruptcy Distributions

### Framework 1—Special Distribution of Customer Funds When the Cross-Margining Account Is a Futures Account

(a) This distributional rule applies when a debtor futures commission merchant has participated in a cross-margining (''XM'') program for futures and securities under which the cross-margined positions of its futures customers (as defined in § 1.3 of this chapter) and the property received to margin, secure or guarantee such positions are held in one or more accounts pursuant to a Commission order that requires such positions and property to be segregated, pursuant to section 4d(a) of the Act, from the positions and property of—

(1) The futures commission merchant,

(2) If applicable, any affiliate carrying the securities positions as a participant in the XM program (''Affiliate''), and

(3) Other futures customers of the futures commission merchant (such segregated accounts, the ''XM accounts'').

(b) The futures commission merchant may, and any Affiliate that holds the securities positions in an XM account that it directly carries will, be registered as a broker-dealer under the Exchange Act. The Commission order approving the XM program may limit participating customers to market professionals and will require a participating customer to sign an agreement, in a form approved by the Commission, that refers to this distributional rule.

(c) A futures commission merchant is deemed to receive securities held in an XM account, including securities and other property held by an Affiliate in an XM account, as ''futures customer funds'' (as defined in § 1.3 of this chapter) that margin, guarantee or secure commodity contracts in the XM account (or paired XM accounts at the futures commission merchant and an Affiliate). Under the agreement signed by the customer, in the event that the futures commission merchant (or Affiliate) is the subject of a SIPA proceeding, the customer agrees that securities in an XM account are excluded from the securities estate for purposes of SIPA, and that its claim for return of the securities will not be treated as a customer claim under SIPA. These restrictions apply to the customer only, and should not be read to limit any action that the trustee may take to seek recovery of property in an XM account carried by an Affiliate as part of the customer estate of the futures commission merchant.

(d) XM accounts, and other futures accounts that are subject to segregation under section 4d(a) of the Act (pursuant to the Commission's regulations thereunder) (''non-XM accounts''), are treated as two subclasses

of futures account with two separate pools of segregated futures customer property, an XM pool and a non-XM pool, each of which constitutes a segregated pool under section 4d(a) of the Act. If the futures commission merchant has participated in multiple XM programs, the XM accounts in the different programs are combined and treated as part of the same XM subclass of futures accounts. A futures customer could hold both non-XM and XM accounts.

(e) Customer claims under Part 190 arising out of the XM subclass of accounts are subordinated to customer claims arising out of the non-XM subclass of accounts in certain circumstances in which the futures commission merchant does not meet its segregation requirements. The segregation requirement is the amount of futures customer funds that the futures commission merchant is required by the Act and Commission regulations or orders to hold on deposit in segregated accounts on behalf of its futures customers (exclusive of its targeted residual amount obligations pursuant to § 1.3 of this chapter).

(f) If there is a shortfall in the non-XM pool and no shortfall in the XM pool, all customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and paid pro rata out of the combined XM and non-XM pools of futures customer property. If there is a shortfall in the XM pool and no shortfall in the non-XM pool, customer net equity claims arising from the XM subclass of accounts must be satisfied first from the XM pool, and customer net equity claims arising from the non-XM subclass of accounts must be satisfied first from the non-XM pool. If there is a shortfall in both the non-XM and XM pools:

(1) If the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement for the XM pool, all customer net equity claims will be paid pro rata out of the combined XM and non-XM pools of futures customer property; and

(2) If the XM shortfall as a percentage of the segregation requirement for the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool, non-XM customer net equity claims will be paid pro rata out of the available non-XM pool, and XM customer net equity claims will be paid pro rata out of the available XM pool. In this way, non-XM customers will never be adversely affected by an XM shortfall.

(g) The following examples illustrate the operation of this rule. The examples assume that the FCM has two futures customers, one with exclusively XM accounts and one with exclusively non-XM accounts.

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1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 150 | 150 | 300 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 0 | 0 | |
| Shortfall (percent) | 0 | 0 | |
| Distribution | 150 | 150 | 300 |

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 150 | 250 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 0 | |
| Shortfall (percent) | 50/150=33.3 | 0 | |
| Pro rata (percent) | 150/300=50 | 150/300=50 | |
| Pro rata (dollars) | 125 | 125 | |
| Distribution | 125 | 125 | 250 |

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the $250 available, or $125.

3. Shortfall in XM Only:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 150 | 100 | 250 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 0 | 50 | |
| Shortfall (percent) | 0 | 50/150=33.3 | |
| Pro rata (percent) | 150/300=50 | 150/300=50 | |
| Pro rata (dollars) | 125 | 125 | |
| Distribution | 150 | 100 | 250 |

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving $150 while the XM customer will receive the remaining $100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 125 | 100 | 225 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 25 | 50 | |
| Shortfall (percent) | 25/150=16.7 | 50/150=33.3 | |
| Pro rata (percent) | 150/300=50 | 150/300=50 | |
| Pro rata (dollars) | 112.50 | 112.50 | |
| Distribution | 125 | 100 | 225 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM

customer will receive the $125 available with respect to non-XM claims while the XM customer will receive the $100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 125 | 225 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 25 | |
| Shortfall (percent) | 50/150=33.3 | 25/150=16.7 | |
| Pro rata (percent) | 150/300=50 | 150/300=50 | |
| Pro rata (dollars) | 112.50 | 112.50 | |
| Distribution | 112.50 | 112.50 | 225 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the $225 available, or $112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

| | Non-XM | XM | Total |
|---|---|---|---|
| Funds in 4d(a) segregation | 100 | 100 | 200 |
| 4d(a) Segregation requirement | 150 | 150 | 300 |
| Shortfall (dollars) | 50 | 50 | |
| Shortfall (percent) | 50/150=33.3 | 50/150=33.3 | |
| Pro rata (percent) | 150/300=50 | 150/300=50 | |
| Pro rata (dollars) | 100 | 100 | |
| Distribution | 100 | 100 | 200 |

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the $200 available, or $100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

**Framework 2 Special Allocation of Shortfall to Customer Claims When Customer Funds for Futures Contracts and Cleared Swaps Customer Collateral Are Held in a Depository Outside of the United States or in a Foreign Currency**

The Commission has established the following allocation convention with respect to futures customer funds (as § 1.3 of this chapter defines such term) and Cleared Swaps Customer Collateral (as § 22.1 of this chapter defines such term) (both of which are customer funds (as § 1.3 of this chapter defines such term) that are segregated pursuant to the Act and Commission rules thereunder), which applies in certain circumstances when futures customer funds or Cleared Swaps Customer Collateral are held by a futures commission merchant in a depository outside the United States (''U.S.'') or in a foreign currency. If a futures commission merchant enters into bankruptcy and maintains futures customer funds or Cleared Swaps Customer Collateral in a depository outside the U.S. or in a depository located in the U.S. in a currency other than U.S. dollars, the trustee shall use the following allocation procedures to calculate the claim of each public customer in the futures account class or each public customer in the cleared swaps account class, as applicable, when sovereign action of a foreign government or court has occurred that results in losses to the futures customer funds or Cleared Swaps Customer Collateral. Applying the allocation convention will result in reduction of certain customer claims for such futures customer funds or Cleared Swaps Collateral. For purposes of this bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or enforcement of statutes, rules, regulations, interpretations, advisories, decisions, or orders, formal or informal, by a federal, state, or provincial executive, legislature, judiciary, or government agency. The trustee should perform the allocation procedures separately with respect to each public customer in the futures account class or cleared swaps account class.

## I. Reduction in Claims for General Shortfall

A. Determination of losses not attributable to sovereign action

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in §190.01(s) (the "Exchange Rate").

2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, include customer funds for futures contracts and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.

3. Convert the amount of customer funds for futures contracts and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.

4. Determine the Shortfall Percentage that is not attributable to sovereign action, as follows:

$$\textit{Shortfall}\ \text{Percentage} = \left(1 - \left[\frac{\textit{Total}\ \text{Customer Assets}}{\textit{Total}\ \text{Customer Claims}}\right]\right)$$

B. Allocation of Losses Not Attributable to Sovereign Action

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Shortfall Percentage.

## II. Reduction in Claims for Sovereign Loss

A. Determination of Losses Attributable to Sovereign Action ("Sovereign Loss")

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.

2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:

a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:

a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one location and:

a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.

5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:

a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

B. Calculation of Sovereign Loss

1. The total Sovereign Loss for each location is the difference between:

a. The total customer funds for futures contracts or Cleared Swaps Customer Collateral deposited in depositories in that location and

b. The amount of customer funds for futures contracts or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.

2. The total Sovereign Loss for each currency is the difference between:

a. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and

b. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the Final Net Equity Determination Date.

C. Allocation of Sovereign Loss

1. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\textit{All}\ \text{portions of customer claims exposed to loss in that location}}$$

2. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that currency}}{\textit{All}\ \text{portions of customer claims exposed to loss in that currency}}$$

3. A portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more customer funds for futures contracts or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of customer funds for futures contracts or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) ("Total Excess Sovereign Loss") will be divided among all futures customers or Cleared Swaps Customer who have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer claim reduced by the following amount:

$$\textit{Total}\ \text{Excess Sovereign Loss} \times \left[\frac{\left(\begin{array}{c}\text{This customer's total claim} - \text{The portion of this Customer's claim} \\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}\right)}{\begin{array}{c}\textit{Total}\ \text{customer claims} - \text{Total of all customer claims} \\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}}\right]$$

The following examples illustrate the operation of this convention.

Example 1. No shortfall in any location.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany |
| D | £300 | U.K. |

| Location | Actual asset balance |
|---|---|
| U.S. | $50 |
| U.K. | £300 |
| U.K. | €50 |
| Germany | €50 |

Note: Conversion Rates: £1 = $1; £1=$1.5.

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in U.S. dollars |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | £300 | 1.5 | 450 |
| Total | | | $600.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $50 | 1.0 | $50 | | | $50 |
| U.K. | £300 | 1.5 | 450 | | | 450 |
| U.K. | €50 | 1.0 | 50 | | | 50 |
| Germany | €50 | 1.0 | 50 | | | 50 |
| Total | | | $600.00 | | 0 | $600.00 |

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction of futures customer or Cleared Swaps Customer claims.

**Claims**:

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $50 | $0 | $50 |
| B | 50 | 0 | 50 |
| C | 50 | 0 | 50 |
| D | 450 | 0 | 450 |
| Total | 600.00 | 0.00 | 600.00 |

Example 2. Shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $100 | U.S. |
| B | €50 | U.K. |
| C | €100 | U.K., Germany, or Japan |

| Location | Actual asset balance |
|---|---|
| U.S. | $50 |
| U.K. | €100 |
| Germany | €50 |

Note: Conversion Rates: €1=$1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

There is a shortfall in the funds held in the U.S. such that only1/2 of the funds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $100 | 1.0 | $100 |
| B | €50 | 1.0 | 50 |
| C | €100 | 1.0 | 100 |
| Total | | | 250.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $50 | 1.0 | $50.00 | | | $50 |
| U.K. | €100 | 1.0 | 100 | | | 100 |
| Germany | €50 | 1.0 | 50 | | | $50 |
| Total | | | 200.00 | | | 200.00 |

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−(200/250)) = (1−80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $100 | $20.00 | $80.00 |
| B | 50 | 10.00 | 40.00 |
| C | 100 | 20.00 | 80.00 |
| Total | 250.00 | 50.00 | 200.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the futures customer or Cleared Swaps Customer claims will not be further reduced.

CLAIMS AFTER REDUCTIONS

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $80 | | $80.00 |
| B | 40 | | 40.00 |
| C | 80 | | 80.00 |
| Total | 200.00 | 0 | 200.00 |

Example 3. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $150 | U.S. |
| B | €100 | U.K. |
| C | €50 | Germany |
| D | $100 | U.S. |
| D | €100 | U.K. or Germany |

| Location | Actual asset balance |
|---|---|
| U.S. | $250 |
| U.K. | €50 |
| Germany | €100 |

Note: Conversion Rates: €1=$1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $150 | 1.0 | $150 |
| B | €100 | 1.0 | 100 |
| C | €50 | 1.0 | 50 |
| D | $100 | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| Total | | | 500.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $250 | 1.0 | $250 | | | $250 |
| U.K. | €50 | 1.0 | 50 | | | 50 |
| Germany | €100 | 1.0 | 100 | | | 100 |
| Total | | | 400.00 | | 0 | 400.00 |

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−400/500) = (1−80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $150 | $30.00 | 120.00 |
| B | 100 | 20.00 | 80.00 |
| C | 50 | 10.00 | 40.00 |
| D | 200 | 40.00 | 160.00 |
| Total | 500.00 | 100.00 | 400.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the claims will not be further reduced.

CLAIMS AFTER REDUCTIONS

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action | Claim after all reductions |
|---|---|---|---|
| A | $120.00 | | $120 |
| B | 80.00 | | 80 |
| C | 40.00 | | 40 |
| D | 160.00 | 0 | 160 |
| Total | 400.00 | 0 | 400 |

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

| Customer | Claim | Location(s) where customer has consented to have funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany |
| D | $100. | U.S. |
| D | €100 | U.K. or Germany |

| Location | Actual asset balance |
|---|---|
| U.S. | $150 |
| U.K. | 100 |
| Germany | 100 |

Notice: Conversion Rates: €1 = $1; ¥1= $0.01, £1= $1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | $100 | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| Total | | | 350.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $150 | 1.0 | $150 | | | $150 |
| U.K. | €100 | 1.0 | 100 | | | 100 |
| Germany | €100 | 1.0 | 100 | 50% | 50 | 50 |
| Total | | | 350.00 | | 50.00 | 300.00 |

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−350/350) = (1−100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | 0 | $50.00 |
| B | 50 | 0 | 50.00 |
| C | 50 | 0 | 50.00 |
| D | 200 | 0 | 200.00 |
| Total | 350.00 | 0.00 | 350.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, only1/2of the funds in Germany are available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $50 | | |
| B | | $50 | |
| C | | | $50 |
| D | 100 | | 100 |
| Total | 150.00 | 50.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$150 | 33.3% of $50 | $16.67 |
| D | $100/$150 | 66.7% of $50 | 33.33 |
| Total | | | 50.00 |

CLAIMS AFTER REDUCTIONS:

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Claim after all reductions |
|---|---|---|---|
| A | $50 | | $50 |
| B | 50 | | 50 |
| C | 50 | $16.67 | 33.33 |
| D | 200 | 33.33 | 166.67 |
| Total | 350.00 | 50.00 | 300.00 |

Example 5. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $100 | U.S. |
| B | €50 | U.K. |
| C | €150 | Germany |
| D | $100 | U.S. |
| D | £300 | U.K. |
| D | €150 | U.K. or Germany |

| Location | Actual asset balance |
|---|---|
| U.S. | $100 |
| U.K. | £300 |
| U.K. | €200 |
| Germany | €150 |

Conversion Rates: €1=$1; £1=$1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $100 | 1.0 | $100 |
| B | €50 | 1.0 | 50 |
| C | €150 | 1.0 | 150 |
| D | $100 | 1.0 | 100 |
| D | £300 | 1.5 | 450 |
| D | €150 | 1.0 | 150 |
| Total | | | 1000.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $100 | 1.0 | $100 | | | $100 |
| U.K. | £300 | 1.5 | 450 | | | 450 |
| U.K. | €200 | 1.0 | 200 | | | 200 |
| Germany | €150 | 1.0 | 150 | 100% | $150 | 0 |
| Total | | | 900.00 | | 150.00 | 750.00 |

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1 − 900 / 1000) = (1 − 90%) = 10%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $100 | $10.00 | $90.00 |
| B | 50 | 5.00 | 45.00 |
| C | 150 | 15.00 | 135.00 |
| D | 700 | 70.00 | 63.00 |
| Total | 1000.00 | 100.00 | 900.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $100 | | |
| B | | $50 | |
| C | | | $150 |
| D | 100 | 450 | 150 |
| Total | 200.00 | 500.00 | 300.00 |

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

| Customer | Allocation share | Allocation Share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $150/$300 | 50% of $150 | $75 |
| D | 150/$300 | 50% of $150 | 75 |
| Total | | | 150.00 |

CLAIMS AFTER REDUCTIONS

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Claim after all reductions |
|---|---|---|---|
| A | $90 | | $90 |
| B | 45 | | 45 |
| C | 135 | $75 | 60 |
| D | 630 | 75 | 555 |
| Total | 900.00 | 150.00 | 750.00 |

Example 6. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | €50 | U.K. |
| C | $20 | U.S. |
| C | €50 | Germany |
| D | $100. | U.S. |
| D | £300 | U.K. |
| D | €100 | U.K., Germany, or Japan |
| E | $80 | U.S. |
| E | ¥10,000 | Japan |

| Location | Actual asset balance |
|---|---|
| U.S. | $200 |
| U.K. | £200 |
| U.K. | €100 |
| Germany | €50 |
| Japan | ¥10,000 |

Conversion Rates: £1 = $1; ¥1=$0.01, £1=$1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | €50 | 1.0 | 50 |
| C | $20 | 1.0 | 20 |
| C | €50 | 1.0 | 50 |
| D | $100. | 1.0 | 100 |
| D | €300 | 1.5 | 450 |
| D | £100 | 1.0 | 100 |
| E | $80 | 1.0 | 80 |
| E | ¥10,000 | 0.01 | 100 |
| Total | | | 1000.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $200 | 1.0 | $200 | | | $200 |
| U.K. | £200 | 1.5 | 300 | | | 300 |
| U.K. | €100 | 1.0 | 100 | | | 100 |
| Germany | €50 | 1.0 | 50 | 100% | $50 | 0 |
| Japan | ¥10,000 | 0.01 | 100 | 50% | 50 | 50 |
| Total | | | 750 | | 100.00 | 650.00 |

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1–750/1000) = (1–75%) = 25%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in U.S.$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | $12.50 | $37.50 |
| B | 50 | 12.50 | 37.50 |
| C | 70 | 17.50 | 52.50 |
| D | 650 | 162.50 | 487.50 |
| E | 180 | 45.00 | 135.00 |
| Total | 1000.00 | 250.00 | 750.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only1/2of the funds in Japan are available.

| Customer | Presumed location of funds | | | |
|---|---|---|---|---|
| | U.S. | U.K. | Germany | Japan |
| A | $50 | | | |
| B | | $50 | | |
| C | 20 | | $50 | |
| D | 100 | 450 | 50 | $50 |
| E | 80 | | | 100 |
| Total | 250.00 | 500.00 | 100.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

| Customer allocation | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$100 | 50% of $50 | $25 |
| D | 50/100 | 50% of 50 | 25 |
| Total | | | 50 |

Japan ($50 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| D | $50/$150 | 33.3% of $50 | $16.67 |
| E | 100/150 | 66.6% of 50 | 33.33 |
| Total | | | 50.00 |

CLAIMS AFTER REDUCTIONS

| Customer | Claim in US dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action from Germany | Allocation of shortfall due to sovereign action from Japan | Claim after all reductions |
|---|---|---|---|---|
| A | $37.50 | | | 37.50 |
| B | 37.50 | | | 37.50 |
| C | 52.50 | $25 | | 27.50 |
| D | 487.50 | 25 | 16.67 | 445.83 |
| E | 135.00 | | 33.33 | 101.67 |
| Total | 750.00 | 50.00 | 50.00 | 650.00 |

Example 7. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, where the FCM kept more funds than permitted in such location or currency.

| Customer | Claim | Location(s) customer has consented to having funds held |
|---|---|---|
| A | $50 | U.S. |
| B | 50 | U.S. |
| B | €50 | U.K. |
| C | €50 | Germany. |
| D | 100. | U.S. |
| D | €100 | U.K. or Germany. |
| E | 50 | U.S. |
| E | €50 | U.K. |

| Location | Actual asset balance |
|---|---|
| U.S. | $250 |
| U.K. | €50 |
| Germany | €200 |

Conversion Rates: 1 = $1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

| Customer | Claim | Conversion rate | Claim in US$ |
|---|---|---|---|
| A | $50 | 1.0 | $50 |
| B | 50 | 1.0 | 50 |
| B | €50 | 1.0 | 50 |
| C | €50 | 1.0 | 50 |
| D | €100. | 1.0 | 100 |
| D | €100 | 1.0 | 100 |
| E | 50 | 1.0 | 50 |
| E | €50 | 1.0 | 50 |
| Total | | | 500.00 |

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

| Location | Assets | Conversion rate | Assets in U.S. dollars | Shortfall due to sovereign action percentage | Actual shortfall due to sovereign action | Amount actually available |
|---|---|---|---|---|---|---|
| U.S. | $250 | 1.0 | $250 | | | $250 |
| U.K. | €50 | 1.0 | 50 | | | 50 |
| Germany | €200 | 1.0 | 200 | 100% | 200 | 0 |
| Total | | | 500.00 | | 200 | 300.00 |

Determine the percentage of shortfall that is not attributable to sovereign

Shortfall Percentage = (1–500/500) = (1–100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

| Customer | Claim in US$ | Allocated shortfall (non-sovereign) | Claim in U.S. dollars after allocated shortfall |
|---|---|---|---|
| A | $50 | $0 | $50.00 |
| B | 100 | 0 | 100.00 |
| C | 50 | 0 | 50.00 |
| D | 200 | 0 | 200.00 |
| E | 100 | 0 | 100.00 |
| Total | 500.00 | 0.00 | 500.00 |

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

| Customer | Presumed location of funds | | |
|---|---|---|---|
| | U.S. | U.K. | Germany |
| A | $50 | | |
| B | 50 | 50 | |
| C | | | 50 |
| D | 100 | | 100 |
| E | 50 | 50 | |
| Total | 250.00 | 100.00 | 150.00 |

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

| Customer | Allocation share | Allocation share of actual shortfall | Actual shortfall allocated |
|---|---|---|---|
| C | $50/$150 | 33.3% of $200 | $66.67 |
| D | $100/$150 | 66.7% of $200 | $133.33 |
| Total | | | $200.000 |

This would result in the claims of customers C and D being reduced below zero.

Accordingly, the claims of customer C and D will only be reduced to zero, or $50 for C and $100 for D. This results in a Total Excess Shortfall of $50.

| Actual shortfall | Allocation of shortfall for customer C | Allocation of shortfall for customer D | Total excess shortfall |
|---|---|---|---|
| $200 | $50 | $100 | $50 |

This shortfall will be divided among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

| Customer | Total claims of customers permitting funds to be held outside the U.S. | Portion of claim required to be in the U.S. | Allocation share (column B-C/column B Total—all customer claims in U.S.) | Allocation share of actual total excess shortfall | Actual total excess shortfall allocated |
|---|---|---|---|---|---|
| B | $100 | $50 | $50/$200 | 25% of $50 | $12.50 |
| C | 50 | 0 | [1] | | 0 |
| D | 200 | 100 | $100/200 | 50% of $50 | 25 |
| E | 100 | 50 | 50/100 | 25% of $50 | 12.50 |
| Total | 450.00 | | | | 50.00 |

[1]Claim already reduced to $0.

CLAIMS AFTER REDUCTIONS

| Customer | Claim in U.S. dollars after allocated non-sovereign shortfall | Allocation of shortfall due to sovereign action Germany | Allocation of total excess shortfall | Claim after all reductions |
|---|---|---|---|---|
| A | $50 | | | $50.00 |
| B | 100 | | 12.50 | 87.50 |
| C | 50 | 50 | | 0 |
| D | 200 | 100 | 25 | 75.00 |
| E | 100 | | 12.50 | 87.50 |
| Total | 500.00 | 150.00 | 50.00 | 300.00 |

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Issued in Washington, DC, on April 16, 2020, by the Commission.

**Christopher Kirkpatrick,**

*Secretary of the Commission.*

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

**Appendices to Bankruptcy Regulations—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements**

**Appendix 1—Commission Voting Summary**

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

**Appendix 2—Statement of Support of Chairman Heath P. Tarbert**

In his 1926 novel *The Sun Also Rises,* Ernest Hemingway offers what is perhaps the best chronicle of the anatomy of a typical bankruptcy. In the novel, the character Mike

Campbell is asked how he went bankrupt. He answers: ''two ways . . . gradually and then suddenly.''

As Hemingway's dialogue succinctly describes, bankruptcies often come on unexpectedly. A business's relatively minor financial or operational troubles may be exacerbated by a sudden crisis—whether a firm-level issue, or a national or even global event. Many catalysts for insolvency are entirely unpredictable, and we must be prepared with a bankruptcy regime that fosters a swift and equitable resolution.

**Background on the CFTC's Bankruptcy Regime**

Part 190 of the CFTC's rules, addressing commodity broker [1] bankruptcies, was enacted in 1983. Since that time, the commodity broker bankruptcy process and the state of the industry have gradually changed. Yet in the nearly four decades since, Part 190 has never been revised to keep up. This regime is intended to protect customer funds, but having antiquated rules does not help achieve that goal.

CFTC staff has therefore embarked on a process of updating Part 190 over the last several years, while a healthy economy made bankruptcies relatively unlikely. Today's proposal is a product of that hard work and engagement with external stakeholders and subject matter experts, including the American Bar Association.

To be clear, U.S. derivatives markets have weathered the recent volatility associated with the coronavirus pandemic admirably. The decision to issue this proposal was made long before COVID–19 emerged as a concern, and I hope and anticipate that it will not be necessary to use this updated bankruptcy regime to address fallout from current market conditions. But as I just noted, we cannot know for certain what the future holds—for bankruptcy often comes ''gradually and then suddenly.'' We must therefore be prepared for all contingencies.

Accordingly, I am pleased to support today's proposal to update Part 190 for the 21st century. The proposal promotes the CFTC's core values in a number of ways, particularly the values of *clarity* and *forward thinking.* The proposal also furthers the agency's strategic goal of regulating our derivatives markets to promote the interests of all Americans.[2]

**Clarity for Customers and Creditors**

The proposed rule serves our core value of clarity by incorporating key principles and actual practice as they have evolved in commodity broker bankruptcies and related judicial decisions in the years since 1983.

A new introductory section of the rule would enumerate certain ''core concepts'' of commodity broker bankruptcies. This section is intended to offer a readily understandable primer on relevant law, policy, and practical considerations in this area, thereby providing a common mental framework for brokers, customers, bankruptcy trustees, courts, and the public. Among other things, this section provides an overview of the various classes of customer segregated accounts held by a commodity broker; the priority of public customers over non-public customers; the requirement of *pro rata* distribution; and the preference to transfer rather than liquidate open positions.

The proposal would further codify a number of approaches and practices that have proven necessary or desirable in commodity broker bankruptcies in the intervening years since 1983. For example, the proposed rule would authorize a bankruptcy trustee to treat a broker's customers in the aggregate for certain purposes, rather than handling each customer's account on a bespoke basis. This aggregate treatment has in practice proven unavoidable in more recent commodity broker bankruptcies, which have required disposition of hundreds of thousands of derivatives contracts—on behalf of thousands or tens of thousands of customers—within days or even hours. By making clear that such aggregate disposition of accounts is permissible and may even be likely to occur than the alternative, the proposal would provide greater clarity on potential outcomes for trustees, brokers, and customers.

Thus, for example, the proposed rule would expressly permit the trustee, following consultation with CFTC staff, to determine whether to treat open positions of public customers in a designated hedging account as specifically identifiable property (requiring the trustee to solicit and comply with individual customer instructions), or instead transfer or ''port'' all such positions to a solvent commodity broker where possible. This provision recognizes that requiring the trustee to identify hedging accounts and provide account holders the opportunity to give individual instructions is often a resource-intensive endeavor, which could interfere with the trustee's ability to act in a timely and effective manner to protect all the broker's customers.[3]

The proposal also includes explicit rules governing the bankruptcy of a clearinghouse, otherwise known as a derivatives clearing organization or DCO. Since its inception, Part 190 has contemplated only a ''case-by-case'' approach with no corresponding rules to spell out what would happen. While a DCO bankruptcy is extremely unlikely, it is important to provide *ex ante* clarity to DCO members and customers as to how a resolution would be handled. The proposed rule would favor following the DCO's existing default management and recovery and wind-down rules and procedures. This would allow the bankruptcy trustee to take advantage of an established ''playbook,'' rather than being forced to form a resolution plan in a matter of hours during the onset of a crisis. The proposed rule would also give legal certainty to DCO actions taken in accordance with a recovery and wind-down plan filed with the CFTC by precluding the trustee from voiding any such action.

I support codifying these and other practices within our rules in order to provide greater transparency and predictability to brokers, customers, and other key stakeholders regarding permissible and expected procedures in a bankruptcy scenario.

**Forward Thinking on Future Insolvencies**

The proposed rule would update a number of provisions to reflect changes in financial technology since Part 190 was enacted 37 years ago. The enhanced discretion discussed above would in many cases help the trustee to account for the many-fold increase in transaction execution and processing speed, as well as the potential for large and unpredictable market moves given the rise of global trading and the 24-hour news cycle. In addition, the proposal would acknowledge digital assets as a physically deliverable asset class, in light of the listing of a number of physically delivered ''virtual currency'' derivatives contracts.

The proposed changes also reflect advances in communications technology. For example, under the proposed rule, notice of a bankruptcy filing and related filed documents would be provided to the CFTC by electronic rather than paper means. Furthermore, required customer notice procedures would no longer include publication in a ''newspaper of general circulation'' in light of the downward trend in newspaper readership. The proposal would similarly recognize changes from paper-based to electronic recording of documents of title.

**Promoting the Interests of All Americans**

Protection of customer funds is the lynchpin of the commodity broker bankruptcy regime of Part 190. The proposed rule includes a number of measures to enhance those protections, including by buttressing provisions already in place under existing law and regulation. In doing so, the proposal seeks to ensure that the CFTC's bankruptcy regime works for the derivatives market participants it was meant to serve—particularly public brokerage customers, with a special emphasis on customers using derivatives to hedge their commercial risks.

For example, the proposal reinforces the bankruptcy priority of public broker customers over ''non-public'' customers (*e.g.,* the broker's proprietary and affiliate accounts). It also strengthens the CFTC's longstanding position that shortfalls in segregated customer assets should be made up from the broker's general estate. As a result, our proposal makes clear that the CFTC's bankruptcy regime is complementary to relatively recently-enacted customer protection rules for day-to-day broker operations.[4]

The proposal would also further the preference—consistent with Subchapter IV of

[1] The term ''commodity broker'' may refer either to a futures commission merchant (''FCM'') or a derivatives clearing organization (''DCO''). 11 U.S.C. 101(6).

[2] *See* Remarks of CFTC Chairman Heath P. Tarbert to the 35th Annual FIA Expo 2019 (Oct. 30, 2019), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/opatarbert2* (outlining the CFTC's strategic goals).

[3] The proposal would also grant the trustee needed discretion in other respects—for example, by allowing the trustee to modify the customer proof of claim form as appropriate for a particular bankruptcy.

[4] 17 CFR 1.23 (enacted in 2013 and revised in 2014) (requiring an FCM to contribute its own funds as ''residual interest'' to top up shortfalls in customer segregated accounts in the ordinary course of business).

the Bankruptcy Code [5]—for transferring or ''porting'' customer positions to a solvent broker, rather than liquidating those positions. Porting of positions protects the utility of customer hedges by avoiding the risk of market moves between liquidation and re-establishment of the customer's hedging position. It also mitigates the risk that liquidation itself will cause such market moves. Among other measures, the grant of trustee discretion as to whether to treat hedging positions as specifically identifiable property will serve these objectives by facilitating porting of such positions *en masse,* promptly and efficiently, along with other customer property.

**Conclusion**

While updates to the CFTC's bankruptcy rules have been years in the making, I believe today's proposal was well worth the wait. The commodity broker resolution regime of Part 190 is respected throughout the world for its effectiveness and efficiency. In addition, Part 190 is important to the continued global competitiveness of American exchanges, clearinghouses, and market intermediaries. The proposed rule further enhances these features of our regime. Through its focus on promoting customer protection, clarity, and forward thinking, I believe the proposed rule would, if finalized, position us well for this decade and beyond.

## Appendix 3—Statement of Support of Commissioner Brian D. Quintenz

I am pleased to support today's proposal to amend the Commission's regulations governing the bankruptcy proceedings of commodity brokers.[1] This proposal makes the first comprehensive change to these regulations since they were first issued in 1983. It marks another important step in Chairman Tarbert's agenda to update and make more efficient several critical areas of the Commission's regulations. I note that today's proposal was not hastily prepared in response to the market events surrounding the COVID–19 pandemic. Commission staff has been considering these amendments since 2017, when a subcommittee of the American Bar Association (ABA) requested that the Commission update the part 190 bankruptcy regulations.[2] The ABA provided its proposal in response to the CFTC's Project KISS initiative, which generally requested input from the public on how the Commission's regulations could be simplified to reduce compliance burdens.[3] I commend former Chairman Giancarlo for launching Project KISS because it is important for agencies periodically to review their regulations, some of which may not have been amended for many years, to ensure they are as targeted, rational, and transparent as possible, in light of new developments in the markets they affect. I am pleased that the Commission's rulemaking work continues despite the new challenges the agency is facing in light of the pandemic.

I would like to highlight a few aspects of today's proposal. First of all, the proposal reaffirms the special treatment the U.S. Bankruptcy Code affords to the customer account of an insolvent commodity broker, so that customers' positions can promptly be transferred.[4] The Commission is proposing new rules for an insolvent DCO, which are similar to the rules applicable to an FCM. These rules take into account Title II of the Dodd-Frank Act, and I am pleased that the FDIC was consulted. Next, taking advantage of the Commission's experience with a few insolvent FCMs over the past decades, the proposal would provide increased deference to the trustee that a U.S. Bankruptcy Court appoints to oversee the proceedings of an insolvent commodity broker. This increased deference is intended to expedite the transfer of customer funds. In light of the Commission's experience from the bankruptcy of MF Global in 2011, proposed amendments would treat letters of credit equivalently to other collateral posted by customers, so that the *pro rata* distribution of customer property in the event of a shortfall in the customer account would apply equally to all collateral. The proposal also reflects experience from MF Global by dividing the delivery account into ''physical delivery'' and ''cash delivery'' account classes. Property other than cash is generally easier to trace, so it should have the benefit of a separate account class. Finally, the proposal's revised treatment of the ''delivery account,'' applicable in the context of physically-settled futures and cleared swaps, would apply not only to tangible commodities, as is currently the case, but also to digital assets. This amendment will provide important legal certainty to the growing exchange-traded market for cleared, physically-settled, digital asset derivatives.

I look forward to reviewing the comments to this proposal, not only from FCMs and DCOs, but also from their diverse customer base, including asset managers, the agricultural community, energy firms, and other derivatives end-users.

## Appendix 4—Concurring Statement of Commissioner Rostin Behnam

I respectfully support the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') issuance of a proposed rule (the ''Proposal'') to amend Part 190 of its regulations, which govern bankruptcy proceedings of commodity brokers. First and foremost, I want to thank Commission staff for all of their hard work on this Proposal. If finalized, it will be the first major update of the CFTC's existing Part 190 since 1983, when it was originally implemented by the Commission.[1]

The Proposal is not a response to current market conditions, nor is it a proposal that has only recently been considered; it is the product of years of staff analysis and engagement with market participants, including the Part 190 Subcommittee of the Business Law Section of the American Bar Association, which submitted detailed suggested model Part 190 rules in response to a prior Commission request for information.[2] Several agency Chairs going back many years deserve recognition and thanks for pushing to update Part 190 and starting this process. Customer protections are at the heart of the Commodity Exchange Act, and it is imperative that the Commission have clear rules that direct how proceedings occur during a commodity broker bankruptcy. The Commission, market participants, customers, and the public will benefit greatly from this Proposal, and I am proud to have contributed to this effort.

The revision is designed to recognize the many changes in our industry over the past 37 years. The Commission finalized the existing part 190 the same year that the movie Trading Places debuted—when futures trading, so distinctly depicted in the film, occurred exclusively in oval trading pits, and markets were less global, less complex, and less sophisticated. To paraphrase former CFTC Chairman Giancarlo, Part 190 is an analog regulation applying to what has since become a digital world.[3]

More personally, I was a lead advisor during the U.S. Senate's investigation of the 2011 MF Global bankruptcy, the eighth largest corporate bankruptcy in American history.[4] During the Senate investigation, I learned the intricate contours of Part 190, its relationship to the Bankruptcy Code, and how the larger puzzle of creditors, customers, and equity holders, among others, fits together. It was during those frenzied days that I truly appreciated the regulatory principle that *customer margin is sacrosanct property.* As a Commissioner since 2017, I have made customer protections an absolute priority in part because of my experience during those few months. Having spoken with many market participants throughout the bankruptcy proceedings, including those whose money disappeared in the days immediately following, customer protection is my most pressing responsibility.

The strengths and weaknesses of the Commission's bankruptcy regime were further laid bare just a few months later in early 2012 following the bankruptcy of Peregrine Financial Group (''PFG'')—a second blow in short order. Important lessons have been learned, both in terms of

[5] Statutory authority for part 190 includes Subchapter IV of Chapter 7 of the Bankruptcy Code.

[1] Part 190 of the Commission's regulations (17 CFR 190).

[2] Proposal by the Part 190 Subcommittee of the Business Law Section of the Amer. Bar Assoc., dated Sept. 29, 2017, available at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText* and *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61331&SearchText.*

[3] CFTC Requests Public Input on Simplifying Rules, *https://www.cftc.gov/PressRoom/PressReleases/pr7555–17.*

[4] 11 U.S.C. 761 *et seq.*

[1] *Bankruptcy,* 48 FR 8716 (March 1, 1983).

[2] 82 FR 23765 (May 3, 2017). The ABA Submission can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61331&SearchText*; the accompanying cover note (''ABA Cover Note'') can be found at: *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText*

[3] *See* Address of CFTC Commissioner J. Christopher Giancarlo to the American Enterprise Institute: 21st Century Markets Need 21st Century Regulation (Sep. 21, 2016), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-17.*

[4] John Gapper and Isabella Kaminska, *Downfall of MF Global,* Financial Times, Nov. 4, 2011, *available at https://www.ft.com/content/2882d766-06fb-11e1-90de-00144feabdc0.*

what works and what does not, and I believe today's Proposal is a positive step to addressing both.

There are a number of changes in today's proposal that are intended to further support provisions of Part 190 that have worked in prior bankruptcies. One of the themes of this refresh is clarity. The goal is to be as clear as possible about the Commission's intentions regarding Part 190 in order to enhance the understanding of Designated Clearing Organizations (''DCOs''), Futures Commission Merchants (''FCMs''), their customers, trustees, and the public at large. Changes in this proposal would foster the longstanding and continuing policy preference for transferring (as opposed to liquidating) the positions of public customers—an important customer protection. Other changes further support existing requirements including that short falls in segregated property should be shored up from the FCM's general assets, and that *public customers are favored over non-public customers.* The proposal also grants trustees enhanced discretion based upon prior positive experience, and codifies practice adopted in past bankruptcies by requiring FCMs to notify the Commission of their intent to file for voluntary bankruptcy.

Other changes address what has not worked or become outdated. In light of lessons learned from MF Global, the Commission is proposing changes to the treatment of letters of credit as collateral, both during business as usual and during bankruptcy, in order to ensure that customers who post letters of credit as collateral have the same proportional loss as customers who post other types of collateral.

The Proposal also addresses a number of changes that have naturally occurred in our markets since the original Part 190 finalization in 1983. The Commission is proposing a new subpart C to part 190, specifically governing the bankruptcy of a clearing organization. As DCOs have grown in importance over time, including being deemed systemically important by the Financial Stability Oversight Council following the financial crisis,[5] the Commission believes that it is imperative to have a clear plan in place for exactly how a DCO bankruptcy would be resolved. The Proposal also addresses changes in technology over the past 37 years, and the movement from paper-based to electronic-based means of communication—a stark reminder from the PFG bankruptcy.

I am hopeful that the 90 day comment period will allow sufficient time for the public to digest this extensive Proposal and provide fulsome comments. There can be no higher demand of market participants and the general public than to assist and guide the Commission in its duty, especially for one as important as this Proposal; it is absolutely critical.

If needed, I encourage market participants to request an extension of the comment period. As we all continue to endure the challenges of new realities at home and in the workplace as a result of the Covid-19 pandemic, I firmly believe the Commission needs to be as flexible as necessary to accommodate market participants and the general public in their efforts to provide us with the best comments to rulemakings. I have made my position clear on what and how the Commission should be allocating its resources during these unprecedented times.[6]

As we propose bankruptcy rules that would provide important customer protections, I note with approval that today we are also finalizing another rule related to customer protection. Rule 160.30 re-establishes longstanding detailed requirements for Commission registrants to adopt policies and procedures to address administrative, technical and physical safeguards for the protection of customer records and information.

I would like to close by again thanking staff for all of their hard work in producing this refresh of the Commission's part 190 rules to provide important customer protections, and look forward to considering comments from the public as the Commission considers this critically important rule.

## Appendix 5—Statement of Commissioner Dan M. Berkovitz

### Introduction

I support the proposed comprehensive amendments to the Commission's bankruptcy regulations. These regulations specifically address the disposition of assets, particularly customer property, of a bankrupt futures commission merchant (FCM) or derivatives clearing organization (DCO). The amendments provide a needed update to regulations that the Commission originally adopted in 1983 to account for significant changes in the size, complexity, and structure of our derivatives markets and market participants over the past 37 years. They also incorporate ''lessons learned'' from FCM bankruptcies during that period. FCM bankruptcies are rare, and a registered DCO has never gone bankrupt in the history of the CFTC. It is nonetheless important to make the bankruptcy process as effective and efficient as possible to protect, preserve, and return customer assets quickly.

The overarching purposes of the provisions in the U.S. Bankruptcy Code relating to the liquidation of commodity brokers are to protect the customers of such brokers and to mitigate systemic risks that could arise from a commodity broker bankruptcy.[1] The Bankruptcy Code provides certain special protections for positions and property of customers of an FCM debtor so that the customers and current or future counterparties (and the clearing house) can be assured that those positions and property will not be treated as part of the FCM debtor's property and can be transferred to another FCM. In this way, a single FCM's bankruptcy will not cascade through derivatives markets by impacting customer positions and the counterparties to those positions.[2]

In section 20(a) of the Commodity Exchange Act (''CEA'') Congress gave the Commission broad authority to establish regulations regarding commodity broker debtors, including identifying which property shall be considered customer property (or commodity broker member property), the method for conducting the business of a commodity broker after the filing of a bankruptcy petition, and how net equity of customers is determined.[3] Pursuant to CEA section 20, the Commission first adopted regulations to address these issues in 1983.

### Need for Comprehensive Amendments

Since 1983, trading volumes and speeds have increased significantly. There are fewer FCMs, and much of the FCM business is concentrated in a few large firms, particularly with respect to swaps. Swap trading and clearing were added to the CFTC's jurisdiction following the 2008 financial crisis, and FCMs and clearing organizations trade and clear large volumes of swaps that were not considered when the Commission first adopted its bankruptcy regulations. The volume of cleared derivatives trades has also grown, and the amount of customer property held by FCMs and clearing organizations has correspondingly increased to tens of billions of dollars. This increase in the amount of customer property holdings and concentration of activity in fewer commodity brokers increases the complexity and risks posed by a commodity broker bankruptcy.

These changes in the derivatives industry since the Commission originally adopted its bankruptcy regulations warrant updating those regulations. In addition, the several FCM bankruptcies that have occurred during this period have provided valuable lessons regarding how the current regulations have operated in practice. It is appropriate to incorporate into the Commission's regulations these lessons to improve the timely and equitable distribution of customer assets. The preamble to the Proposal provides a good summary of the foundational principles underlying the Proposal and describes the large number of rule

[5] *https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.*

[6] Statement of Commissioner Rostin Behnam Regarding COVID–19 and CFTC Digital Assets Rulemaking (March 24, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement032420*; Statement of Commissioner Rostin Behnam Regarding CFTC's Extension of Currently Open Comment Periods in Response to the COVID–19 Epidemic (April 10, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement041020.*

[1] *See* 11 U.S.C., Chapter 7, Subchapter IV—Commodity Broker Liquidation. ''Commodity Broker'' is defined to mean a futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, for which there is a ''customer,'' as defined in the bankruptcy code. *See* 11 U.S.C. 101(6).

[2] The bankruptcy trustee is directed to ''return promptly to a customer any specifically identifiable security, property, or commodity contract to which such customer is entitled, or shall transfer, on such customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor'' subject to CFTC regulations. 11 U.S.C. 766(c). Section 764(a) of the Bankruptcy Code provides that ''any transfer by the debtor of property that, but for such transfer, would have been customer property, may be avoided by the [bankruptcy] trustee . . . .'' 11 U.S.C. 764(a).

[3] *See* CEA section 20(a), 7 U.S.C. 24(a).

amendments to implement those principles. I will mention here a few aspects of the Proposal that I encourage commenters to address.

The Proposal is consistent with the bankruptcy code generally, while also recognizing the particular nature and uses of derivatives and their unique status under the code. The Proposal incorporates pro rata distribution among ''public customers'' [4] as a class, with public customers having a priority interest in property held by a debtor FCM. This approach is appropriate because public customers are not participants in the business decisions of the FCM debtor, and pro rata distribution among public customers would put smaller customers on an equal footing with larger customers. The Proposal also grants greater discretion to the trustee that manages the bankruptcy process, in recognition of the complexity of modern commodity brokers, the speed of trading and price discovery, and the stated goal of prompt distribution of customer property.

Emphasizing *prompt* distribution of customer property over exacting *precision* in certain aspects of the bankruptcy proceedings is also a guiding concept in the Proposal. One of the lessons the Commission has learned from prior FCM bankruptcies is that many public customers rely on expected cash flows from commercial activities, including associated hedges, to fund ongoing operations. A failure to promptly distribute funds in a bankruptcy proceeding could therefore not only disrupt the cash flow and normal business operations of the debtor's customers, but also set in motion a chain of payment delays or failures in commercial markets.

While I believe the Proposal largely achieves an appropriate balance of equitable and prompt resolution of a bankrupt commodity broker, I look forward to receiving comments from stakeholders on these issues. In particular, I look forward to hearing from smaller commercial market participants who may not have the resources to actively defend their own interests in an FCM bankruptcy proceeding. Does the Proposal provide sufficient protections? Are the likely outcomes from the customer property distribution choices made in the Proposal expected to provide an equitable and timely result? I look forward to comments.

**Comment Period**

Speaking of comments, in light of the coronavirus emergency this country and the world are currently dealing with, 90 days is not sufficient time to review and comment on this nearly 400-page document. The Proposal amends almost every section in the existing bankruptcy regulations and adds several new provisions. A 90-day comment period would barely be long enough in normal times. Many stakeholders with an interest in these regulations are struggling day-by-day, hour-by-hour, just to maintain operations, generate cash flow, and pay employees. It is incongruous to ask the public to digest in 90 days a lengthy and complex rulemaking that took the Commission three years to develop. There is no statutory deadline or commercial imperative that compels a comment period of 90 days. There is no need to rush commenters or the rulemaking process in the midst of a pandemic in an area as complex and as important as bankruptcy.

**Conclusion**

I commend the hard work of the Commission staff who have spent years working on this Proposal. The Proposal's deliberative, pragmatic choices reflect time spent learning from past bankruptcies and engaging with a number of interested parties (particularly the American Bar Association) on these issues. My office received a number of briefings on the Proposal and staff worked diligently to incorporate our comments throughout the process.

The Proposal is a comprehensive and complex effort to modernize the Commission's existing bankruptcy regulations. While FCM bankruptcies are rare and clearing organization bankruptcies have not occurred to date, such events can be highly disruptive to market participants. In some cases, they could impact the continued operation of markets altogether. It is critical for the Commission to update its bankruptcy rules to reduce the probability and extent of potential disruptions should an unfortunate event of bankruptcy occur.

I look forward to comments on the Proposal and working to finalize this rule in a thoughtful and deliberative manner.

[FR Doc. 2020–08482 Filed 6–11–20; 8:45 am]

BILLING CODE 6351–01–P

[4] Generally, public customers are customers whose accounts must be segregated from the proprietary accounts of an FCM or of the members of a clearing organization. *See* Definition of ''public customer'' in regulation 190.01.


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Part III

## The President

Notice of June 11, 2020—Continuation of the National Emergency With Respect to the Actions and Policies of Certain Members of the Government of Belarus and Other Persons To Undermine Democratic Processes or Institutions of Belarus

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# Presidential Documents

**Title 3—**

## The President

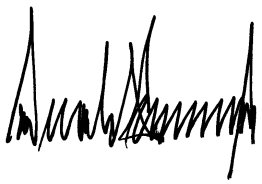
**Notice of June 11, 2020**

## Continuation of the National Emergency With Respect to the Actions and Policies of Certain Members of the Government of Belarus and Other Persons To Undermine Democratic Processes or Institutions of Belarus

On June 16, 2006, by Executive Order 13405, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of certain members of the Government of Belarus and other persons to undermine Belarus's democratic processes or institutions, manifested in the fundamentally undemocratic March 2006 elections; to commit human rights abuses related to political repression, including detentions and disappearances; and to engage in public corruption, including by diverting or misusing Belarusian public assets or by misusing public authority.

The actions and policies of certain members of the Government of Belarus and other persons continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on June 16, 2006, and the measures adopted on that date to deal with that emergency, must continue in effect beyond June 16, 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 13405.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
*June 11, 2020.*

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## CUSTOMER SERVICE AND INFORMATION



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**Last List June 9, 2020**

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